

**This volume was donated to LLMC
to enrich its on-line offerings and
for purposes of long-term preservation by**

Northwestern University School of Law

THE
FEDERAL REPORTER.

VOLUME 130.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

JULY—SEPTEMBER, 1904.

ST. PAUL:
WEST PUBLISHING CO.
1904.

COPYRIGHT, 1904,
BY
WEST PUBLISHING COMPANY.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

FIRST CIRCUIT.

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
Hon. LE BARON B. COLT, Circuit Judge.....Bristol, R. I.
Hon. WILLIAM L. PUTNAM, Circuit Judge.....Portland, Me.
Hon. CLARENCE HALE, District Judge, MainePortland, Me.
Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. FRANCIS C. LOWELL, District Judge, Massachusetts.....Boston, Mass.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

SECOND CIRCUIT.

Hon. RUFUS W. PECKHAM, Circuit Justice.....Washington, D. C.
Hon. WILLIAM J. WALLACE, Circuit Judge.....Albany, N. Y.
Hon. E. HENRY LACOMBE, Circuit Judge.....New York, N. Y.
Hon. WILLIAM K. TOWNSEND, Circuit Judge.....New Haven, Conn.
Hon. ALFRED C. COXE, Circuit JudgeUtica, N. Y.
Hon. GEORGE C. HOLT, District Judge, S. D. New YorkNew York, N. Y.
Hon. JAMES P. PLATT, District Judge, Connecticut.Hartford, Conn.
Hon. GEORGE W. RAY, District Judge, N. D. New YorkNorwich, N. Y.
Hon. GEORGE B. ADAMS, District Judge, S. D. New YorkNew York, N. Y.
Hon. EDWARD B. THOMAS, District Judge, E. D. New York....29 Liberty St., New York.
Hon. HOYT H. WHEELER, District Judge, Vermont.....Brattleboro, Vt.
Hon. JOHN R. HAZEL, District Judge, W. D. New YorkBuffalo, N. Y.

THIRD CIRCUIT.

Hon. HENRY B. BROWN, Circuit JusticeWashington, D. C.
Hon. MARCUS W. ACHESON, Circuit Judge.....Pittsburgh, Pa.
Hon. GEORGE M. DALLAS, Circuit Judge.....Philadelphia, Pa.
Hon. GEORGE GRAY, Circuit JudgeWilmington, Del.
Hon. EDWARD G. BRADFORD, District Judge, Delaware.....Wilmington, Del.
Hon. ANDREW KIRKPATRICK, District Judge, New Jersey¹.....Newark, N. J.
Hon. WILLIAM M. LANNING, District Judge, New Jersey².....Trenton, N. J.

¹ Died May 3, 1904.

² Appointed June 1, 1904, to succeed Kirkpatrick, District Judge.

Hon. JOHN B. McPHERSON, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
 Hon. J. B. HOLLAND, District Judge, E. D. Pennsylvania².....Philadelphia, Pa.
 Hon. ROBERT WODROW ARCHBALD, District Judge, M. D. Pennsylvania.....Scranton, Pa.
 Hon. JOSEPH BUFFINGTON, District Judge, W. D. Pennsylvania.....Pittsburgh, Pa.

FOURTH CIRCUIT.

Hon. MELVILLE W. FULLER, Circuit Justice.....Washington, D. C.
 Hon. NATHAN GOFF, Circuit Judge.....Clarksburg, W. Va.
 Hon. CHARLES H. SIMONTON, Circuit Judge⁴.....Charleston, S. C.
 Hon. JETER C. PRITCHARD, Circuit Judge⁵.....Asheville, N. C.
 Hon. THOMAS J. MORRIS, District Judge, Maryland.....Baltimore, Md.
 Hon. THOMAS R. PURNELL, District Judge, E. D. North Carolina.....Raleigh, N. C.
 Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
 Hon. WILLIAM H. BRAWLEY, District Judge, E. and W. D. South Car.....Charleston, S. C.
 Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.....Richmond, Va.
 Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....Lynchburg, Va.
 Hon. JOHN J. JACKSON, District Judge, N. D. West Virginia.....Parkersburg, W. Va.
 Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia.....Branwell, W. Va.

FIFTH CIRCUIT.

Hon. EDWARD D. WHITE, Circuit Justice.....Washington, D. C.
 Hon. DON A. PARDEE, Circuit Judge.....Atlanta, Ga.
 Hon. A. P. McCORMICK, Circuit Judge.....Dallas, Tex.
 Hon. DAVID D. SHELBY, Circuit Judge.....Huntsville, Ala.
 Hon. THOMAS GOODE JONES, District Judge, M. and N. D. Alabama.....Montgomery, Ala.
 Hon. HARRY T. TOULMIN, District Judge, S. D. Alabama.....Mobile, Ala.
 Hon. CHARLES SWAYNE, District Judge, N. D. Florida.....Pensacola, Fla.
 Hon. JAMES W. LOCKE, District Judge, S. D. Florida.....Jacksonville, Fla.
 Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.....Atlanta, Ga.
 Hon. EMORY SPEER, District Judge, S. D. Georgia.....Macon, Ga.
 Hon. CHARLES PARLANGE, District Judge, E. D. Louisiana.....New Orleans, La.
 Hon. ALECK BOARMAN, District Judge, W. D. Louisiana.....Shreveport, La.
 Hon. HENRY C. NILES, District Judge, N. and S. D. Mississippi.....Kosciusko, Miss.
 Hon. DAVID E. BRYANT, District Judge, E. D. Texas.....Sherman, Tex.
 Hon. EDWARD R. MEEK, District Judge, N. D. Texas.....Ft. Worth, Tex.
 Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.....Austin, Tex.
 Hon. WALLER T. BURNS, District Judge, S. D. Texas.....Houston, Tex.

SIXTH CIRCUIT.

Hon. JOHN M. HARLAN, Circuit Justice.....Washington, D. C.
 Hon. HENRY F. SEVERENS, Circuit Judge.....Kalamazoo, Mich.
 Hon. HORACE H. LURTON, Circuit Judge.....Nashville, Tenn.
 Hon. JOHN K. RICHARDS, Circuit Judge.....Ironton, Ohio.
 Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky.....Covington, Ky.
 Hon. WALTER EVANS, District Judge, W. D. Kentucky.....Louisville, Ky.
 Hon. HENRY H. SWAN, District Judge, E. D. Michigan.....Detroit, Mich.
 Hon. GEORGE P. WANTY, District Judge, W. D. Michigan.....Grand Rapids, Mich.
 Hon. AUGUSTUS J. RICKS, District Judge, N. D. Ohio.....Cleveland, Ohio.
 Hon. FRANCIS J. WING, District Judge, N. D. Ohio.....Cleveland, Ohio.
 Hon. ALBERT C. THOMPSON, District Judge, S. D. Ohio.....Cincinnati, Ohio.
 Hon. CHARLES D. CLARK, District Judge, E. and M. D. Tennessee.....Chattanooga, Tenn.
 Hon. ELI S. HAMMOND, District Judge, W. D. Tennessee.....Memphis, Tenn.

² Appointed in accordance with an act of Congress providing for an additional District Judge for this District.

⁴ Died April 25, 1904.

⁵ Appointed April 27, 1904, to succeed Simonton, Circuit Judge.

SEVENTH CIRCUIT.

| | |
|---|--------------------|
| Hon. WILLIAM R. DAY, Circuit Justice..... | Washington, D. C. |
| Hon. JAMES G. JENKINS, Circuit Judge..... | Milwaukee, Wis. |
| Hon. PETER S. GROSSCUP, Circuit Judge | Chicago, Ill. |
| Hon. FRANCIS E. BAKER, Circuit Judge | Indianapolis, Ind. |
| Hon. CHRISTIAN C. KOHLSAAT, District Judge, N. D. Illinois..... | Chicago, Ill. |
| Hon. ALBERT B. ANDERSON, District Judge, Indiana..... | Indianapolis, Ind. |
| Hon. J. OTIS HUMPHREY, District Judge, S. D. Illinois..... | Springfield, Ill. |
| Hon. WILLIAM H. SEAMAN, District Judge, E. D. Wisconsin..... | Sheboygan, Wis. |
| Hon. ROMANZO BUNN, District Judge, W. D. Wisconsin..... | Madison, Wis. |

EIGHTH CIRCUIT.

| | |
|--|-----------------------|
| Hon. DAVID J. BREWER, Circuit Justice..... | Washington, D. C. |
| Hon. WALTER H. SANBORN, Circuit Judge..... | St. Paul, Minn. |
| Hon. AMOS M. THAYER, Circuit Judge..... | St. Louis, Mo. |
| Hon. WILLIS VAN DEVANTER, Circuit Judge | Cheyenne, Wyo. |
| Hon. WILLIAM C. HOOK, Circuit Judge | Leavenworth, Kan. |
| Hon. JACOB TRIEBER, District Judge, E. D. Arkansas..... | Little Rock, Ark. |
| Hon. JOHN H. ROGERS, District Judge, W. D. Arkansas..... | Ft. Smith, Ark. |
| Hon. MOSES HALLETT, District Judge, Colorado..... | Denver, Colo. |
| Hon. SMITH McPHERSON, District Judge, S. D. Iowa..... | Red Oak, Iowa. |
| Hon. HENRY THOMAS REED, District Judge, N. D. Iowa..... | Cresco, Iowa. |
| Hon. JOHN C. POLLOCK, District Judge, Kansas..... | Topeka, Kan. |
| Hon. WM. LOCHREN, District Judge, Minnesota..... | Minneapolis, Minn. |
| Hon. PAGE MORRIS, District Judge, Minnesota..... | Duluth, Minn. |
| Hon. ELMER B. ADAMS, District Judge, E. D. Missouri..... | St. Louis, Mo. |
| Hon. JOHN F. PHILLIPS, District Judge, W. D. Missouri..... | Kansas City, Mo. |
| Hon. W. H. MUNGER, District Judge, Nebraska..... | Omaha, Neb. |
| Hon. CHARLES F. AMIDON, District Judge, North Dakota..... | Fargo, N. D. |
| Hon. JOHN E. CARLAND, District Judge, South Dakota..... | Sioux Falls, S. D. |
| Hon. JOHN A. MARSHALL, District Judge, Utah..... | Salt Lake City, Utah. |
| Hon. JOHN A. RINER, District Judge, Wyoming..... | Cheyenne, Wyo. |

NINTH CIRCUIT.

| | |
|--|---------------------|
| Hon. JOSEPH McKENNA, Circuit Justice..... | Washington, D. C. |
| Hon. WM. W. MORROW, Circuit Judge..... | San Francisco, Cal. |
| Hon. WILLIAM B. GILBERT, Circuit Judge..... | Portland, Or. |
| Hon. ERSKINE M. ROSS, Circuit Judge..... | Los Angeles, Cal. |
| Hon. JOHN J. DE HAVEN, District Judge, N. D. California..... | San Francisco, Cal. |
| Hon. OLIN WELLBORN, District Judge, S. D. California..... | Los Angeles, Cal. |
| Hon. WILLIAM H. HUNT, District Judge, Montana..... | Helena, Mont. |
| Hon. CORNELIUS H. HANFORD, District Judge, Washington..... | Seattle, Wash. |
| Hon. THOMAS P. HAWLEY, District Judge, Nevada..... | Carson City, Nev. |
| Hon. CHARLES B. BELLINGER, District Judge, Oregon..... | Portland, Or. |
| Hon. JAMES H. BEATTY, District Judge, Idaho..... | Boise City, Idaho. |

* Appointed April 19, 1904, to succeed Knowles, District Judge.

CASES REPORTED.

| | Page | | Page |
|--|------|---|------|
| Actiesselskabet Albis v. Munson (D. C.) | 32 | Berger v. Wild (C. C. A.) | 882 |
| Adams, In re (D. C.) | 381 | Berks, The (D. C.) | 989 |
| Adams, In re (D. C.) | 788 | Besse, Burlee Dry Dock Co. v. (C. C. A.) | 444 |
| Adams, Shirk v. (C. C. A.) | 441 | Best v. Kessler (C. C. A.) | 24 |
| Adler-Weinberger S. S. Co., Rothschild v. (C. C. A.) | 866 | Bevis v. Markland (C. C.) | 226 |
| Ah Chung, United States v. (C. C. A.) | 885 | Bidwell, Mosle v. (C. C. A.) | 334 |
| Alaska Packers' Ass'n v. Letson (C. C. A.) | 129 | Blair, Mutual Life Ins. Co. of New York v. (C. C.) | 971 |
| Alaska & P. S. S. Co., Guffey v. (C. C. A.) | 271 | Blevins, Southern R. Co. v. (C. C. A.) | 688 |
| Allen v. Field (C. C. A.) | 641 | Board of Trade of City of Chicago v. L. A. Kinsey Co. (C. C. A.) | 507 |
| American Bonding Co. of Baltimore v. Spokane Building & Loan Soc. (C. C. A.) | 737 | Bomberger, Chicago Terminal Transfer R. Co. v. (C. C. A.) | 884 |
| American Bridge Co. v. Hunt (C. C. A.) | 302 | Bonanno v. Tweedie Trading Co. (C. C. A.) | 448 |
| American Can Co., Vulcan Detinning Co. v. (C. C.) | 635 | Bookkeeper Pub. Co., Seal v. (C. C. A.) | 449 |
| American Cement & Oil Co., G. W. Cole Co. v. (C. C. A.) | 703 | Boorman, Independent Baking Powder Co. v. (C. C.) | 726 |
| American Exch. Cigar Co., E. Regensberg & Sons v. (C. C.) | 549 | Boston & M. R. Co., Gokey v. (C. C.) | 992 |
| American Lawbook Co., Edward Thompson Co. v. (C. C.) | 639 | Boston & M. R. Co., Gokey v. (C. C.) | 994 |
| American Newspaper Ass'n, Encyclopædia Britannica Co. v. (C. C.) | 460 | Bothe, Pratt v. (C. C. A.) | 670 |
| American Newspaper Ass'n, Encyclopædia Britannica Co. v. (C. C.) | 493 | Bradley, Diamond Stone Sawing Mach. Co. v. (C. C.) | 896 |
| American Soda Fountain Co. v. Sample (C. C. A.) | 145 | Brett, In re (D. C.) | 981 |
| American Transformer Co., Westinghouse Electric & Mfg. Co. v. (C. C.) | 550 | Bridgewater Roller Mills Co. v. Receivers of Baltimore Building & Loan Ass'n (C. C. A.) | 1021 |
| Andrews, In re (D. C.) | 383 | British & Foreign Marine Ins. Co., Portland Flouring Mills Co. v. (C. C. A.) | 860 |
| Andrews, Chicago & N. W. R. Co. v. (C. C. A.) | 65 | Brown v. McDonald (C. C.) | 964 |
| Armour Packing Co. v. Metropolitan Water Co. (C. C. A.) | 851 | Brown, Diamond Stone Sawing Mach. Co. v. (C. C.) | 896 |
| Arter v. Northwestern Mut. Life Ins. Co. (C. C. A.) | 768 | Brown, Schweer v. (C. C. A.) | 328 |
| Art Metal Works, Royal Metal Mfg. Co. v. (C. C. A.) | 778 | Brunswick & Birmingham R. Co., Quillan v. (D. C.) | 216 |
| Atkinson, Whitman v. (C. C. A.) | 759 | Bryan v. Dupoyster (C. C. A.) | 83 |
| Atlantic City, Third Nat. Bank v. (C. C. A.) | 751 | Buffalo Hump Min. Co., Olson v. (C. C.) | 1017 |
| Baer v. Fidelity & Deposit Co. of Maryland (C. C. A.) | 94 | Bunker Hill & S. Mining & Concentrating Co. v. Jones (C. C. A.) | 813 |
| Baer v. United States (C. C.) | 391 | Burlee Dry Dock Co. v. Besse (C. C. A.) | 444 |
| Baker & Co. v. Slack (C. C. A.) | 514 | Burleigh v. Foreman (C. C. A.) | 13 |
| Baltimore & L. R. Co., Steel Rail Supply Co. v. (C. C. A.) | 433 | Burr, Pennsylvania R. Co. v. (C. C. A.) | 847 |
| Barcus v. Gates (C. C.) | 364 | Burrill v. Crossman (C. C. A.) | 763 |
| Barret & Jordan, Butler v. (C. C.) | 944 | Bush Co. v. Central R. Co. of New Jersey (D. C.) | 222 |
| Battin v. Northwestern Mut. Life Ins. Co. (C. C. A.) | 874 | Butler v. Barret & Jordan (C. C.) | 944 |
| Bay State Gas Co. of Delaware, Edwards v. (C. C.) | 242 | Cahill, The Winfield S. (D. C.) | 989 |
| Beckwith & Co., In re (D. C.) | 475 | Callison, In re (D. C.) | 987 |
| Beifeld, Spencer Elevator Safety Guard Co. v. (C. C. A.) | 888 | Campbell v. Equitable Life Assur. Soc. (C. C.) | 786 |
| Belasco, Hubges v. (C. C.) | 388 | Campbell v. National Broadway Bank (C. C. A.) | 699 |
| Benson, In re (C. C.) | 486 | Campbell v. Wetherill (D. C.) | 213 |
| | | Carlsen's Petition, In re (D. C.) | 379 |
| | | Carr Realty Co., Socrates Quicksilver Mines v. (C. C. A.) | 293 |
| | | Carstens, Frye & Bruhn v. (C. C. A.) | 766 |

| | Page | | Page |
|---|------|---|------|
| Central R. Co. of New Jersey v. Bush Co. (D. C.) | 222 | Diamond Drill & Machine Co. v. Kelley Bros. & Spielman (C. C.) | 893 |
| C. F. Beckwith & Co., In re (D. C.) | 475 | Diamond Stone Sawing Mach. Co. v. Bradley (C. C.) | 896 |
| Champagne Lumber Co. v. Nyback (C. C. A.) | 1021 | Diamond Stone Sawing Mach. Co. v. Brown (C. C.) | 896 |
| Champagne Lumber Co., Nyback v. (C. C.) | 784 | Diamond Stone Sawing Mach. Co. v. Morrison (C. C.) | 896 |
| Chauncey M. Depew, The (D. C.) | 59 | Dimes, Jones v. (D. C.) | 638 |
| Chautaugua Assembly, McKee v. (C. C. A.) | 536 | Dodd v. Louisville Bridge Co. (C. C.) | 186 |
| Chelsea Sav. Bank v. Ironwood (C. C. A.) | 410 | Dodge & Olcott v. United States, two cases (C. C.) | 624 |
| Chicago-Coulterville Coal Co. v. Fidelity & Casualty Co. of New York (C. C.) | 957 | Downing v. United States (C. C.) | 393 |
| Chicago, M. & St. P. R. Co., Gunnison v. (C. C. A.) | 259 | Downington Mfg. Co., New Haven Pulp & Board Co. v. (C. C.) | 605 |
| Chicago, R. I. & T. R. Co., J. Rosenbaum Grain Co. v. (C. C.) | 46 | Dowse v. Hammond (C. C. A.) | 103 |
| Chicago Terminal Transfer R. Co. v. Bomberger (C. C. A.) | 884 | Doyle, London Guarantee & Accident Co. v. (C. C.) | 719 |
| Chicago, Treat v. (C. C. A.) | 443 | Du Bois, Lazier Gas Engine Co. v. (C. C. A.) | 834 |
| Chicago & N. W. R. Co. v. Andrews (C. C. A.) | 65 | Dupoyster, Bryan v. (C. C. A.) | 83 |
| Christensen Engineering Co., Westinghouse Air Brake Co. v. (C. C. A.) | 144 | Earle v. Enos (C. C.) | 467 |
| Christensen Engineering Co., Westinghouse Air Brake Co. v. (C. C.) | 735 | Eaton & Prince Co. v. Wadsworth (C. C. A.) | 702 |
| City of New York v. New York & E. R. Ferry Co. (D. C.) | 397 | Edelman, In re (C. C. A.) | 700 |
| City of New York v. Shortland Bros. Co. (C. C. A.) | 1021 | Edwards v. Bay State Gas Co. of Delaware (C. C.) | 242 |
| Clark v. Langenbach (C. C. A.) | 755 | Edward Thompson Co. v. American Law Book Co. (C. C.) | 639 |
| Clarke, Eureka County Bank v. (C. C. A.) | 325 | Eldred v. Kirkland (C. C. A.) | 342 |
| Clipper Mfg. Co., Young v. (C. C. A.) | 150 | Eliza Strong, The (C. C. A.) | 99 |
| C. Moench & Sons Co., In re (C. C. A.) | 685 | Encyclopædia Britannica Co. v. American Newspaper Ass'n (C. C.) | 460 |
| Coffey, The Michael J. (D. C.) | 221 | Encyclopædia Britannica Co. v. American Newspaper Ass'n (C. C.) | 493 |
| Coffin, Stanton v. (C. C.) | 1022 | Enos, Earle v. (C. C.) | 467 |
| Cole, United States v. (C. C.) | 614 | Equitable Life Assur. Soc., Campbell v. (C. C.) | 786 |
| Cole, United States v. (C. C.) | 620 | E. Regensberg & Sons v. American Exch. Cigar Co. (C. C.) | 549 |
| Cole Co. v. American Cement & Oil Co. (C. C. A.) | 703 | Eric P. Swenson & Sons v. Colvin (C. C.) | 626 |
| Col. John F. Gaynor, The (C. C. A.) | 856 | Eureka County Bank v. Clarke (C. C. A.) | 325 |
| Columbia Ave. Savings Fund, Safe Deposit, Title & Trust Co. v. Dawson (C. C.) | 152 | Eustus Mfg. Co., Silver & Co. v. (C. C.) | 348 |
| Columbus Waterworks Co., Mercantile Trust & Deposit Co. of Baltimore v. (C. C.) | 180 | Fachant, Hopkins v. (C. C. A.) | 839 |
| Colvin, Eric P. Swenson & Sons v. (C. C.) | 626 | Fidelity & Casualty Co. of New York, Chicago-Coulterville Coal Co. v. (C. C.) | 957 |
| Conner v. Manchester Assur. Co. of Manchester, England (C. C. A.) | 743 | Fidelity & Deposit Co. of Maryland, Baer v. (C. C. A.) | 94 |
| Connors v. United States (C. C.) | 609 | Field, Allen v. (C. C. A.) | 641 |
| Consolidated Retail Booksellers v. Ward (C. C.) | 389 | First Nat. Bank v. National Surety Co. (C. C. A.) | 401 |
| Consolidated Rubber Tire Co., Munford Rubber Tire Co. v. (C. C.) | 496 | First Nat. Bank, Sowles v. (C. C.) | 1009 |
| Cornell Steamboat Co. v. United States (D. C.) | 480 | Fisheries Co. v. Lennen (C. C. A.) | 533 |
| Crawford v. Illinois Cent. R. Co. (C. C.) | 395 | Flint, The Wallace B. (C. C. A.) | 338 |
| Crossman, Burrill v. (C. C. A.) | 763 | Florence Mach. Co., Ex parte (C. C. A.) | 103 |
| Curley v. United States (C. C. A.) | 1 | Folsom v. Greenwood County (C. C.) | 730 |
| | | Foreman, Burleigh v. (C. C. A.) | 13 |
| Daix, Supreme Council A. L. H. v. (C. C. A.) | 101 | Fox Copper & Bronze Co., Sneeth v. (C. C. A.) | 455 |
| Daniels, In re (D. C.) | 597 | Frank v. Union Cent. Life Ins. Co. (C. C.) | 224 |
| Dauchy, In re (C. C. A.) | 532 | Frederick L. Grant Shoe Co., In re (C. C. A.) | 881 |
| Dawson, Columbia Ave. Savings Fund, Safe Deposit, Title & Trust Co. v. (C. C.) | 152 | Frye & Bruhn v. Carstens (C. C. A.) | 766 |
| Debro v. James Lee's Sons Co. (C. C.) | 385 | | |
| Delaware, L. & W. R. Co., Paul v. (C. C.) | 951 | Gale v. Southern Building & Loan Ass'n (C. C. A.) | 1021 |
| D. E. Loewe & Co. v. Lawlor (C. C.) | 633 | Ganoga, The (D. C.) | 399 |
| Depew, The Chauncey M. (D. C.) | 59 | Gaskill, In re (D. C.) | 235 |
| Detroit Steel & Spring Co., Thornton N. Motley Co. v. (C. C.) | 396 | | |

| | Page | | Page |
|--|------|---|------|
| Gates, Barcus v. (C. C.) | 364 | I. M. Parr & Son, Manchester S. S. Co. | 999 |
| Gaynor, The Col. John F. (C. C. A.) | 856 | v. (D. C.) | 999 |
| General Electric Co. v. Wagner Electric | | Inca, The (D. C.) | 36 |
| Mfg. Co. (C. C. A.) | 772 | Independent Baking Powder Co. v. Boor- | |
| George M. Hill Co., In re (C. C. A.) | 315 | man (C. C.) | 726 |
| George Watkinson & Co., In re (D. C.) | 218 | Ingraham v. National Salt Co. (C. C. A.) | 676 |
| Gift, In re (D. C.) | 230 | International Tooth Crown Co., Hanks | |
| Ginsburg, In re (D. C.) | 627 | Dental Ass'n v. (C. C. A.) | 1022 |
| Globe Newspaper Co., Walker v. (C. C.) | 593 | Ironwood, Chelsea Sav. Bank v. (C. C. | |
| Gokey v. Boston & M. R. Co. (C. C.) | 992 | A.) | 410 |
| Gokey v. Boston & M. R. Co. (C. C.) | 994 | Israel v. Israel (C. C.) | 237 |
| Goldenberg Bros. & Co. v. United States | | | |
| (C. C. A.) | 108 | Jackson, The Virginia (D. C.) | 221 |
| Golden Gate Mfg. Co. v. Newark Faucet | | Jacobs v. Mexican Sugar Co. (C. C.) | 589 |
| Co. (C. C. A.) | 112 | James v. Supreme Council of Royal Ar- | |
| Goodhile, In re (D. C.) | 471 | canum (C. C.) | 1014 |
| Goodhile, In re (D. C.) | 782 | James Hill Mfg. Co., Kasadarian v. (C. C.) | 62 |
| Grand Trunk R. Co. of Canada, McMil- | | James Lee's Sons Co., Debro v. (C. C.) | 385 |
| lan v. (C. C. A.) | 827 | James P. Smith & Co. v. United States | |
| Grant Shoe Co., In re (C. C. A.) | 881 | (C. C. A.) | 104 |
| Greenleaf v. National Ass'n of Ry. Postal | | Jamison v. Wimbish (D. C.) | 351 |
| Clerks (C. C.) | 209 | John F. Gaynor, The Col. (C. C. A.) | 856 |
| Greenwood County, Folsom v. (C. C.) | 730 | Johnson v. Lehigh Valley Traction Co. (C. | |
| Guaranty Trust Co. of New York v. North | | C.) | 932 |
| Chicago St. R. Co. (C. C. A.) | 801 | Johnson, Herold v. (C. C. A.) | 109 |
| Guffey v. Alaska & P. S. S. Co. (C. C. A.) | 271 | Johnson, Rutan v. (C. C. A.) | 109 |
| Guild v. Pringle (C. C. A.) | 419 | Johnston v. Turnbull (C. C. A.) | 769 |
| Gunnison v. Chicago, M. & St. P. R. Co. | | Jones v. Dimes (D. C.) | 638 |
| (C. C. A.) | 259 | Jones, Bunker Hill & S. Mining & Con- | |
| G. W. Cole Co. v. American Cement & Oil | | centrating Co. v. (C. C. A.) | 813 |
| Co. (C. C. A.) | 703 | Joseph Peene, The (D. C.) | 489 |
| | | J. P. Eustis Mfg. Co., Silver & Co. v. (C. | |
| H. A. Meldrum Co., Lowrie v. (C. C. A.) | 886 | C.) | 348 |
| Hammond, Dowse v. (C. C. A.) | 103 | J. Rosenbaum Grain Co. v. Chicago, R. I. | |
| Hanks Dental Ass'n v. International Tooth | | & T. R. Co. (C. C.) | 46 |
| Crown Co. (C. C. A.) | 1022 | J. Rosenbaum Grain Co., Railroad Commis- | |
| Harris, Levy v. (C. C. A.) | 711 | sion of Texas v. (C. C. A.) | 110 |
| Hatfield, King v. (C. C.) | 564 | Judd & Root v. New York & T. S. S. Co. | |
| Hayes-Young Tie Plate Co. v. St. Louis | | (C. C.) | 991 |
| Transit Co. (C. C.) | 900 | Julius Wile Bro. & Co., United States v. | |
| Hayner, Russell v. (C. C. A.) | 90 | (C. C. A.) | 331 |
| Hayward, In re (D. C.) | 720 | | |
| H. C. Judd & Root v. New York & T. S. S. | | Kahn, In re (D. C.) | 1023 |
| Co. (C. C.) | 991 | Kasadarian v. James Hill Mfg. Co. (C. C.) | 62 |
| Henderson, In re (D. C.) | 385 | Kelley Bros. & Spielman, Diamond Drill & | |
| Henry McShane Mfg. Co., Lowenstein v. | | Machine Co. v. (C. C. A.) | 893 |
| (D. C.) | 1007 | Kennedy, Yocum v. (C. C.) | 722 |
| Herod, Rankin v. (C. C.) | 390 | Kerr v. Union Marine Ins. Co. (C. C. A.) | 415 |
| Herold v. Johnson (C. C. A.) | 109 | Kessler, Best v. (C. C. A.) | 24 |
| Hill Co., In re (C. C. A.) | 315 | King v. Hatfield (C. C.) | 564 |
| Hill Mfg. Co., Kasadarian v. (C. C.) | 62 | King Philip Mills, Kip-Armstrong v. (C. | |
| Hoffman v. Wilson (C. C. A.) | 694 | C.) | 28 |
| Hooton Cocoa & Chocolate Co., Van Hout- | | Kinsey Co., Board of Trade of City of Chi- | |
| ten v. (C. C.) | 600 | cago v. (C. C. A.) | 507 |
| Hopkins v. Fachant (C. C. A.) | 839 | Kip-Armstrong Co. v. King Philip Mills | |
| Howard, In re (D. C.) | 1004 | (C. C.) | 28 |
| Hubert v. New Orleans (G. C. A.) | 21 | Kirk v. United States (C. C. A.) | 112 |
| Hubges v. Belasco (C. C.) | 388 | Kirkland, Eldred v. (C. C. A.) | 342 |
| Hughes Specialty Well Drilling Co., Rome | | Knott, Louisville Trust Co. v. (C. C. A.) | 820 |
| Petroleum & Iron Co. v. (C. C.) | 585 | Kohn v. North Chicago St. R. Co. (C. C. | |
| Humphrey, San Fernando Copper Mining | | A.) | 801 |
| & Reduction Co. v. (C. C. A.) | 298 | Kraut v. United States (C. C.) | 392 |
| Hung Chang, United States v. (C. C. A.) | 439 | | |
| Hunt, American Bridge Co. v. (C. C. A.) | 302 | Laden v. Meck (C. C. A.) | 877 |
| Huntington Dry Pulverizer Co. v. Virginia- | | L. A. Kinsey Co., Board of Trade of City | |
| Carolina Chemical Co. (C. C.) | 558 | of Chicago v. (C. C. A.) | 507 |
| Hymes Buggy & Implement Co., In re | | Langenbach, Clark v. (C. C. A.) | 755 |
| (D. C.) | 977 | Lawlor, D. E. Loewe & Co. v. (C. C.) | 633 |
| | | Lazier Gas Engine Co. v. Du Bois (C. C. A.) | 834 |
| Illinois Cent. R. Co., Crawford v. (C. C.) | 395 | Leaycraft & Co. v. United States (C. C. | |
| | | A.) | 106 |

| | Page | | Page |
|---|------|---|------|
| Leerbuerger v. United States (C. C.)..... | 1022 | Michigan Cent. R. Co., Von Voight v. (C. C.)..... | 398 |
| Lee's Sons Co., Debro v. (C. C.)..... | 385 | Michigan Cent. R. Co., Wright v. (C. C. A.)..... | 843 |
| Lehigh Valley R. Co., Long v. (C. C. A.).. | 870 | Miller v. Schwarner (C. C.)..... | 561 |
| Lehigh Valley Traction Co., Johnson v. (C. C.)..... | 932 | Miller, Rankin v. (C. C.)..... | 229 |
| Lenhart, Lourie Implement Co. v. (C. C. A.)..... | 122 | Mineral Development Co., Scott v. (C. C. A.)..... | 497 |
| Lennen, Fisheries Co. v. (C. C. A.)..... | 533 | Minneapolis, The (C. C. A.)..... | 111 |
| Leonhard v. Provident Sav. Life Assur. Soc. (C. C. A.)..... | 287 | Moench & Sons Co., In re (C. C. A.)..... | 685 |
| Letson v. Alaska Packers' Ass'n (C. C. A.).. | 129 | Montauk, The (D. C.)..... | 996 |
| Levy v. Harris (C. C. A.)..... | 711 | Morrison, Diamond Stone Sawing Mach. Co. v. (C. C.)..... | 896 |
| Lippincott v. Supreme Council A. L. H. (C. C.)..... | 483 | Mosle v. Bidwell (C. C. A.)..... | 334 |
| Livingstone, The (C. C. A.)..... | 746 | Motley Co. v. Detroit Steel & Spring Co. (C. C.)..... | 396 |
| Loewe & Co. v. Lawlor (C. C.)..... | 633 | Munford Rubber Tire Co. v. Consolidated Rubber Tire Co. (C. C.)..... | 496 |
| London Guarantee & Accident Co. v. Doyle (C. C.)..... | 719 | Munson, Actiesselskabet Albis v. (D. C.).. | 32 |
| Long v. Lehigh Valley R. Co. (C. C. A.).. | 870 | Murray v. Pannaci (C. C. A.)..... | 529 |
| Lonsby, McRae v. (C. C. A.)..... | 17 | Mutual Life Ins. Co. of New York v. Blair (C. C.)..... | 971 |
| Louisville Bridge Co., Dodd y. (C. C.)..... | 186 | National Ass'n of Ry. Postal Clerks, Greenleaf v. (C. C.)..... | 209 |
| Louisville Trust Co. v. Knott (C. C. A.).. | 820 | National Broadway Bank, Campbell v. (C. C. A.)..... | 699 |
| Louisville Water Co. v. Wiemer (C. C. A.).. | 257 | National Salt Co., Ingraham v. (C. C. A.).. | 676 |
| Louisville Water Co., Wiemer v. (C. C.).. | 244 | National Surety Co., First Nat. Bank v. (C. C. A.)..... | 401 |
| Louisville Water Co., Wiemer v. (C. C.).. | 246 | Nax v. Travelers' Ins. Co. (C. C.)..... | 985 |
| Louisville Water Co., Wiemer v. (C. C.).. | 251 | Nellie, The (D. C.)..... | 213 |
| Lourie Implement Co. v. Lenhart (C. C. A.)..... | 122 | Newark Faucet Co., Golden Gate Mfg. Co. v. (C. C. A.)..... | 112 |
| Lowenstein v. Henry McShane Mfg. Co. (D. C.)..... | 1007 | Newburgh, The (C. C. A.)..... | 321 |
| Lowrie v. H. A. Meldrum Co. (C. C. A.).. | 886 | New Haven Pulp & Board Co. v. Downingtown Mfg. Co. (C. C.)..... | 605 |
| Lucas v. New York, N. H. & H. R. Co. (C. C. A.)..... | 436 | New Orleans, Hubert v. (C. C. A.)..... | 21 |
| Lueders v. United States (C. C.)..... | 624 | New Trinidad Lake Asphalt Co., Martin v. (C. C.)..... | 394 |
| Luyties, United States v. (C. C. A.)..... | 333 | New York, Shortland Bros. Co. v. (C. C. A.)..... | 1022 |
| McClure, Thiel Detective Service Co. v. (C. C.)..... | 55 | New York Cent. Coal Co., United States v. (C. C. A.)..... | 312 |
| McDonald, Brown v. (C. C.)..... | 964 | New York, N. H. & H. R. Co., Lucas v. (C. C. A.)..... | 436 |
| McKee v. Chautauqua Assembly (C. C. A.).. | 536 | New York Telephone Co. v. Treat (C. C. A.)..... | 340 |
| McKnight v. United States (C. C. A.)..... | 659 | New York & E. R. Ferry Co., City of New York v. (D. C.)..... | 397 |
| McMillan v. Grand Trunk R. Co. of Canada (C. C. A.)..... | 827 | New York & T. S. S. Co., H. C. Judd & Root v. (C. C.)..... | 991 |
| McNulty v. Wiesen (D. C.)..... | 1012 | North Chicago St. R. Co., Guaranty Trust Co. of New York v. (C. C. A.)..... | 801 |
| McRae v. Lonsby (C. C. A.)..... | 17 | North Chicago St. R. Co., Kohn v. (C. C. A.)..... | 801 |
| McShane Mfg. Co., Lowenstein v. (D. C.).. | 1007 | North Electric Co., Western Electric Co. v. (C. C. A.)..... | 457 |
| Madisonville Traction Co. v. St. Bernard Min. Co. (C. C.)..... | 789 | Northwestern Mut. Life Ins. Co., Arter v. (C. C. A.)..... | 768 |
| Madisonville Traction Co., St. Bernard Min. Co. v. (C. C.)..... | 794 | Northwestern Mut. Life Ins. Co., Battin v. (C. C. A.)..... | 874 |
| Manchester Assur. Co. of Manchester, England, Conner v. (C. C. A.)..... | 743 | Nyback v. Champagne Lumber Co. (C. C.).. | 784 |
| Manchester S. S. Co. v. I. M. Parr & Son (D. C.)..... | 999 | Nyback, Champagne Lumber Co. v. (C. C. A.)..... | 1021 |
| Marine Const. & Dry Dock Co., In re (C. C. A.)..... | 446 | O'Callahan, Whitehead & Hoag Co. v. (C. C.)..... | 243 |
| Markland, Bevis v. (C. C.)..... | 226 | Ohio Brass Co., Thomson-Houston Electric Co. v. (C. C.)..... | 542 |
| Martin v. New Trinidad Lake Asphalt Co. (C. C.)..... | 394 | Olson v. Buffalo Hump Min. Co. (C. C.)... | 1017 |
| Maurice, The (D. C.)..... | 634 | | |
| Meck, Laden v. (C. C. A.)..... | 877 | | |
| Meldrum Co., Lowrie v. (C. C. A.)..... | 886 | | |
| Mercantile Trust Co. v. United States Shipbuilding Co. (C. C.)..... | 725 | | |
| Mercantile Trust & Deposit Co. of Baltimore v. Columbus Waterworks Co. (C. C.)..... | 180 | | |
| Metropolitan Water Co., Armour Packing Co. v. (C. C. A.)..... | 851 | | |
| Mexican Sugar Co., Jacobs v. (C. C.)..... | 589 | | |
| Michael J. Coffey, The (D. C.)..... | 221 | | |

| | Page | | Page |
|--|------|---|------|
| One Dark Bay Horse, United States v. (D. C.) | 240 | Sawyer, In re (D. C.) | 384 |
| O'Neil v. Pittsburg, C., C. & St. L. R. Co. (C. C.) | 204 | Scherzer, In re (D. C.) | 631 |
| Owens v. United States (C. C. A.) | 279 | Schinotti v. Whitney (C. C.) | 780 |
| Pacific Mail S. S. Co., In re (C. C. A.) | 76 | Schwarner, Miller v. (C. C.) | 561 |
| Pannaci, Murray v. (C. C. A.) | 529 | Schweer v. Brown (C. C. A.) | 328 |
| Parker, Yocum v. (C. C.) | 722 | Scott v. Mineral Development Co. (C. C. A.) | 497 |
| Parker, Yocum v. (C. C. A.) | 770 | Scott v. United States (C. C. A.) | 429 |
| Parr & Son, Manchester S. S. Co. v. (D. C.) | 999 | Scribner v. Straus (C. C.) | 389 |
| Parsons, United States v. (C. C. A.) | 681 | Seal v. Bookkeeper Pub. Co. (C. C. A.) | 449 |
| Paul v. Delaware, L. & W. R. Co. (C. C.) | 951 | Shinkle v. Vickery (C. C. A.) | 424 |
| Peene, The Joseph (D. C.) | 489 | Shirk v. Adams (C. C. A.) | 441 |
| Pennsylvania R. Co. v. Burr (C. C. A.) | 847 | Shortland Bros. Co. v. New York (C. C. A.) | 1022 |
| Philadelphia Pneumatic Tool Co., Timolat v. (C. C.) | 903 | Shortland Bros. Co., City of New York v. (C. C. A.) | 1021 |
| Pittsburg, C., C. & St. L. R. Co., O'Neil v. (C. C.) | 204 | Silver & Co. v. J. P. Eustis Mfg. Co. (C. C.) | 348 |
| Portland Flouring Mills Co. v. British & Foreign Marine Ins. Co. (C. C. A.) | 860 | Simpson Mfg. Co., In re (C. C. A.) | 367 |
| Pratt v. Bothe (C. C. A.) | 670 | Slack, Walter Baker & Co. v. (C. C. A.) | 514 |
| Pringle, Guild v. (C. C. A.) | 419 | Smeeth v. Fox Copper & Bronze Co. (C. C. A.) | 455 |
| Provident Sav. Life Assur. Soc., Leonard v. (C. C. A.) | 287 | Smith & Co. v. United States (C. C. A.) | 104 |
| Quigley, The Thomas (C. C. A.) | 336 | Socrates Quicksilver Mines v. Carr Realty Co. (C. C. A.) | 293 |
| Quillan v. Brunswick & Birmingham R. Co. (D. C.) | 216 | Southern Building & Loan Ass'n, Gale v. (C. C. A.) | 1021 |
| Railroad Commission of Texas v. J. Rosenbaum Grain Co. (C. C. A.) | 110 | Southern R. Co. v. Blevins (C. C. A.) | 688 |
| Ramsey, Standard Elevator Interlock Co. v. (C. C.) | 151 | Southern Trust & Safe Deposit Co. v. Yeatman (C. C.) | 798 |
| Rankin v. Herod (C. C.) | 390 | Sowles v. First Nat. Bank (C. C.) | 1009 |
| Rankin v. Miller (C. C.) | 229 | Spencer Elevator Safety Guard Co. v. Beifeld (C. C. A.) | 888 |
| Receivers of Baltimore Building & Loan Ass'n, Bridgewater Roller Mills Co. v. (C. C. A.) | 1021 | Spitzer, In re (C. C. A.) | 879 |
| Regensberg & Sons v. American Exch. Cigar Co. (C. C.) | 549 | Spokane Building & Loan Soc., American Bonding Co. of Baltimore v. (C. C. A.) | 737 |
| Richard, Ridgely v. (C. C.) | 387 | Standard Elevator Interlock Co. v. Ramsey (C. C.) | 151 |
| Ridgely v. Richard (C. C.) | 387 | Standard Oil Co., Riggs v., two cases (C. C.) | 199 |
| Riggs v. Standard Oil Co., two cases (C. C.) | 199 | Stanton v. Coffin (C. C.) | 1022 |
| Riggs Restaurant Co., In re (C. C. A.) | 691 | Steel Rail Supply Co. v. Baltimore & L. R. Co. (C. C. A.) | 433 |
| Rome Petroleum & Iron Co. v. Hughes Specialty Well Drilling Co. (C. C.) | 585 | Stein, In re (D. C.) | 377 |
| Rosenbaum Grain Co. v. Chicago, R. I. & T. R. Co. (C. C.) | 46 | Stein, In re (D. C.) | 629 |
| Rosenbaum Grain Co., Railroad Commission of Texas v. (C. C. A.) | 110 | Stephenson v. Supreme Council A. L. H. (C. C.) | 491 |
| Rothschild v. Adler-Weinberger S. S. Co. (C. C. A.) | 866 | Stevens, Weston Electrical Instrument Co. v. (C. C.) | 152 |
| Royal Metal Mfg. Co. v. Art Metal Works (C. C. A.) | 778 | Stewart, Wright v. (C. C.) | 905 |
| Russell v. Hayner (C. C. A.) | 90 | Straus, Scribner v. (C. C.) | 389 |
| Rutan v. Johnson (C. C. A.) | 109 | Strong, The Eliza (C. C. A.) | 99 |
| St. Bernard Min. Co. v. Madisonville Traction Co. (C. C.) | 794 | Supreme Council A. L. H. v. Daix (C. C. A.) | 101 |
| St. Bernard Min. Co., Madisonville Traction Co. v. (C. C.) | 789 | Supreme Council A. L. H., Lippincott v. (C. C.) | 483 |
| St. Louis Transit Co., Hayes-Young Tie Plate Co. v. (C. C.) | 900 | Supreme Council A. L. H., Stephenson v. (C. C.) | 491 |
| Sample, American Soda Fountain Co. v. (C. C. A.) | 145 | Supreme Council of Royal Arcanum, James v. (C. C.) | 1014 |
| Sanbo v. Union Pac. Coal Co. (C. C.) | 52 | Sweetser, In re (C. C. A.) | 103 |
| San Fernando Copper Mining & Reduction Co. v. Humphrey (C. C. A.) | 298 | Swenson & Sons v. Colvin (C. C.) | 626 |
| | | Swift, In re (C. C. A.) | 13 |
| | | Thiel Detective Service Co. v. McClure (C. C.) | 55 |
| | | Third Nat. Bank v. Atlantic City (C. C. A.) | 751 |
| | | Thomas Quigley, The (C. C. A.) | 336 |
| | | Thompson Co. v. American Law Book Co. (C. C.) | 639 |
| | | Thompson v. Winslow (D. C.) | 1001 |

| | Page | | Page |
|---|------|---|------|
| Thomson-Houston Electric Co. v. Ohio Brass Co. (C. C.)..... | 542 | Virginia-Carolina Chemical Co., Huntington Dry Pulverizer Co. v. (C. C.)..... | 558 |
| Thomson-Houston Electric Co. v. Wagner Electric Mfg. Co. (C. C.)..... | 902 | Virginia Jackson, The (D. C.)..... | 221 |
| Thornton N. Motley Co. v. Detroit Steel & Spring Co. (C. C.)..... | 396 | Von Voigt v. Michigan Cent. R. Co. (C. C.)..... | 398 |
| Thorp, In re (D. C.)..... | 371 | Vulcan Detinning Co. v. American Can Co. (C. C.)..... | 635 |
| Timolat v. Philadelphia Pneumatic Tool Co. (C. C.)..... | 903 | Wadsworth, Eaton & Prince Co. v. (C. C. A.)..... | 702 |
| Transfer No. 11, The (C. C.)..... | 1019 | Wagner Electric Mfg. Co., General Electric Co. v. (C. C. A.)..... | 772 |
| Transit, The (D. C.)..... | 996 | Wagner Electric Mfg. Co., Thomson-Houston Electric Co. v. (C. C.)..... | 902 |
| Travelers' Ins. Co., Nax v. (C. C.)..... | 985 | Walker v. Globe Newspaper Co. (C. C.).. | 593 |
| Treat v. Chicago (C. C. A.)..... | 443 | Wallace B. Flint, The (C. C. A.)..... | 338 |
| Treat, New York Telephone Co. v. (C. C. A.)..... | 340 | Walter Baker & Co. v. Slack (C. C. A.).... | 514 |
| Troy Wagon Works v. Vastbinder (D. C.).. | 232 | Ward, Consolidated Retail Booksellers v. (C. C.)..... | 389 |
| Turnbull, Johnston v. (C. C. A.)..... | 769 | Watkinson & Co., In re (D. C.)..... | 218 |
| Tweedie Trading Co., Bonanno v. (C. C. A.)..... | 448 | Western Electric Co. v. North Electric Co. (C. C. A.)..... | 457 |
| Union Cent. Life Ins. Co., Frank v. (C. C.) | 224 | Westinghouse Air Brake Co. v. Christensen Engineering Co. (C. C. A.)..... | 144 |
| Union Marine Ins. Co., Kerr v. (C. C. A.) | 415 | Westinghouse Air Brake Co. v. Christensen Engineering Co. (C. C.)..... | 735 |
| Union Pac. Coal Co., Sanbo v. (C. C.).... | 52 | Westinghouse Electric & Mfg. Co. v. American Transformer Co. (C. C.)..... | 550 |
| United States v. Ah Chung (C. C. A.).... | 885 | Weston Electrical Instrument Co. v. Stevens (C. C.)..... | 152 |
| United States v. Cole (C. C.)..... | 614 | Wetherill, Campbell v. (D. C.)..... | 213 |
| United States v. Cole (C. C.)..... | 620 | Whitehead & Hoag Co. v. O'Callahan (C. C.)..... | 243 |
| United States v. Hung Chang (C. C. A.).. | 439 | Whitman v. Atkinson (C. C. A.)..... | 759 |
| United States v. Julius Wile Bro. & Co. (C. C. A.)..... | 331 | Whitney, Schinotti v. (C. C.)..... | 780 |
| United States v. Luyties (C. C. A.)..... | 333 | Wiemer v. Louisville Water Co. (C. C.).... | 244 |
| United States v. New York Cent. Coal Co. (C. C. A.)..... | 312 | Wiemer v. Louisville Water Co. (C. C.).... | 246 |
| United States v. One Dark Bay Horse (D. C.)..... | 240 | Wiemer v. Louisville Water Co. (C. C.).... | 251 |
| United States v. Parsons (C. C. A.)..... | 681 | Wiemer, Louisville Water Co. v. (C. C. A.) | 257 |
| United States v. Withers (C. C. A.)..... | 696 | Wiesen, McNulty v. (D. C.)..... | 1012 |
| United States, Baer v. (C. C.)..... | 391 | Wild, Berger v. (C. C. A.)..... | 882 |
| United States, Connors v. (C. C.)..... | 609 | Wildcroft, The (C. C. A.)..... | 521 |
| United States, Cornell Steamboat Co. v. (D. C.)..... | 480 | Wile, Bro. & Co., United States v. (C. C. A.)..... | 331 |
| United States, Curley v. (C. C. A.)..... | 1 | Wilkesbarre Furniture Mfg. Co., In re (D. C.)..... | 796 |
| United States, Dodge & Olcott v., two cases (C. C.)..... | 624 | Wilson, Hoffman v. (C. C. A.)..... | 694 |
| United States, Downing v. (C. C.)..... | 393 | Wimbish, Jamison v. (D. C.)..... | 351 |
| United States, Goldenberg Bros. & Co. v. (C. C. A.)..... | 108 | Winfield S. Cahill, The (D. C.)..... | 989 |
| United States, James P. Smith & Co. v. (C. C. A.)..... | 104 | Winslow, Thompson v. (D. C.)..... | 1001 |
| United States, Kirk v. (C. C. A.)..... | 112 | Withers, United States v. (C. C. A.).... | 696 |
| United States, Kraut v. (C. C.)..... | 392 | Wolfe, Young v. (C. C. A.)..... | 891 |
| United States, Leaycraft & Co. v. (C. C. A.) | 106 | Worth, In re (D. C.)..... | 927 |
| United States, Leerburger v. (C. C.)..... | 1022 | Wright v. Michigan Cent. R. Co. (C. C. A.) | 843 |
| United States, Lueders v. (C. C.)..... | 624 | Wright v. Stewart (C. C.)..... | 905 |
| United States, McKnight v. (C. C. A.).... | 659 | Yeatman, Southern Trust & Safe Deposit Co. v. (C. C.)..... | 798 |
| United States, Owens v. (C. C. A.)..... | 279 | Yocum v. Kennedy (C. C.)..... | 722 |
| United States, Scott v. (C. C. A.)..... | 429 | Yocum v. Parker (C. C.)..... | 722 |
| United States Shipbuilding Co., Mercantile Trust Co. v. (C. C.)..... | 725 | Yocum v. Parker (C. C. A.)..... | 770 |
| Van Houten v. Hooton Cocoa & Chocolate Co. (C. C.)..... | 600 | Young v. Clipper Mfg. Co. (C. C. A.)..... | 150 |
| Vastbinder, Troy Wagon Works v. (D. C.) | 232 | Young v. Wolfe (C. C. A.)..... | 891 |
| Vickery, Shinkle v. (C. C. A.)..... | 424 | | |

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

CURLEY et al. v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. March 1, 1904.)

No. 506.

1. CONSPIRACY TO DEFRAUD THE UNITED STATES—STATUTES—CONSTRUCTION.

Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], providing that if two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all shall be subject to imprisonment, etc., should be construed as declaring not only against conspiracies to commit offenses, but also to conspiracies to defraud the United States, and to punish such conspiracies when supplemented by an overt act, though the wrong has not become effectual in its purpose.

2. SAME—SUBSEQUENT RIGHTS—CREATION.

Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], prohibiting and providing for the punishment of conspiracies to defraud the United States, applies with equal force to rights of the United States created subsequent to its passage, as well as those previously existing.

3. SAME—CONSPIRACY TO DEFRAUD.

The term "defraud," as used in Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], prohibiting and providing for the punishment of conspiracies to defraud the United States in any manner whatsoever on the doing of any act, by any of the conspirators, intended to effect the object of the conspiracy, should not be construed as limited only to frauds respecting property rights, but to include the deprivation of a right by deception or artifice.

4. SAME.

Defendant H., desiring to procure appointment as a letter carrier, a position in the classified civil service of the United States, unlawfully agreed with defendant C. that the latter should falsely impersonate H. at a civil service examination, and do all acts required by the examiners, and sign H.'s name to the examination papers to be delivered to C. for examination while he should impersonate H. C., in pursuance of such conspiracy, gained entrance to the examination, and falsely signed H.'s name to a declaration sheet which was required to be in the handwriting and on the honor of the applicant. *Held*, that such facts constituted a conspiracy to defraud the United States, prohibited by Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676].

In Error to the District Court of the United States for the District of Massachusetts.

For opinion below, see 122 Fed. 738.

Heman W. Chaplin and Henry W. Dunn, for plaintiffs in error.

Henry P. Moulton, U. S. Atty., and William H. Lewis, Asst. U. S. Atty.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. This case, novel in its character and aspects, has been argued with marked ability and clearness on both sides. The statement of the case appearing in the record sufficiently presents the general situation to enable us to consider the questions involved under the assignment of errors. It is as follows:

"The indictment is for conspiracy against the United States, and sets forth that Hughes, desiring to procure an appointment as letter carrier, a position in the classified civil service of the United States, and for the purpose of procuring the placing of his name on the list of persons eligible to appointment as letter carriers, and for the purpose of defrauding the United States, unlawfully agreed with Curley that the defendant Curley should falsely impersonate Hughes at a civil service examination, and do all acts required by the board of examiners, and sign the name of Hughes to such examination papers as should be delivered to Curley for examination while he should personate said Hughes; that Curley, in pursuance of said conspiracy, did falsely and unlawfully gain entrance to an examination, and, for the purpose of defrauding the United States, did falsely make a certain writing known as a 'Declaration Sheet.' There are also allegations of presenting false papers to an officer of the United States.

"The indictment contains three counts: The first, a conspiracy to defraud the United States, under section 5440, Rev. St. [U. S. Comp. St. 1901, p. 3676]; the second, a conspiracy to commit an offense against the United States, to wit, an offense set out in section 5418, Rev. St. [U. S. Comp. St. 1901, p. 3666], to falsely make a writing for the purpose of defrauding the United States; the third, a conspiracy to commit an offense against the United States, the offense being under section 5418, Rev. St., to wit, to present a false writing to an officer of the United States."

The various counts of the indictment set out with particularity the object of the conspiracy, the means employed, and the acts done in furtherance thereof. The first count also sets out verbatim the application for examination, the regulation vouchers, three in number, the answers of which are required to be in the handwriting of the voucher, all of which purport to be signed by Hughes; and the second and third counts set out what is called the 'Declaration Sheet,' which purports in its phraseology and signature to be in the handwriting and upon the honor of Hughes, such examination papers being originally supplied, as is understood, by the government, and show some of the precautionary regulations of the civil service department of the government, designed for the purpose of ascertaining the qualifications of applicants for official position in the Post Office Department.

The case first came up for consideration before Judge Brown in the District Court upon general demurrer, wherein the point was taken that neither count of the indictment set forth an offense against the laws of the United States. The demurrer was overruled, and the defendants excepted. The case was subsequently tried before Judge

Lowell and a jury, the defendants were convicted, and after sentence the case was brought to this court by writ of error.

The assignments of error are based upon exceptions duly taken, and are against alleged error in overruling the demurrer to the various counts, and to alleged error upon the subsequent trial in refusing to grant the request for a ruling to the jury that there was no evidence to warrant a verdict of guilty, for the reason that the facts alleged and in evidence set forth and constitute no crime against the United States, and alleged error in refusing to rule that neither count of the indictment charged an indictable offense, for the reason that the facts alleged and in evidence set forth and constitute no crime against the United States.

No point was taken at the trial that the proofs did not sustain the allegations of the indictment, or that the elements of the wrong complained of were not described with sufficient certainty and particularity to bring the indictment within the rule (*United States v. Cruikshank et al.*, 92 U. S. 542, 558, 23 L. Ed. 588) which requires, where statutes use generic terms in declaring an offense, that the indictment must descend to particulars and describe the wrong. The sole or principal contention in that court was that the facts alleged did not constitute an offense within the meaning of the statute. And the principal contention of the defendants here is that the word "defraud," in its ordinary common-law acceptation, has reference to property and property rights, and the case largely, and perhaps wholly, depends upon the sense in which the word "defraud" was used in the statute under consideration. Was it intended to limit the scope of the statute to frauds upon property and property rights of the government, or was it intended to use the word in a broader sense, and for the protection of intangible rights, privileges, and functions of the government?

Speaking generally, the wrongs, whatever they are, contemplated by the second part of section 5440 [page 3676], under which the first count of the indictment was drawn, must relate to a purpose to defraud the government, and the false papers contemplated by section 5418 [page 3666] must have reference to a like purpose, and counts 2 and 3 are drawn upon that theory. This being so, the question of construction, raised under one section, in effect relates to the other, and the same is true as to the various counts, so far as we can see, and this is so because the purpose to defraud is an essential element of section 5418 and the second part of section 5440, as well as an essential feature of the various counts of the indictment.

Some stress has been laid upon the position, though it is not the main contention, that section 5440 of the statute should not be construed broadly in either of its aspects, but strictly. In support of this position it is suggested that, if construed broadly, it will include offenses with penalties different from those of the statute in question. The answer to that particular argument, quite likely, is that, while the purpose of statutory laws describing particular offenses in respect to the various ramifications of the government deal with completed wrongs, the purpose of the statutes in question was to deal with wrong in its incipient stages. The case *In re Coy*, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274, involved a count based upon the first part of section 5440, and alleged a conspiracy to commit an offense against the United States,

which related to the federal election laws—an offense which was punishable by law—and the indictment was sustained. The case of *United States v. Sacia* (D. C.) 2 Fed. 754, involved an allegation of a conspiracy to defraud the government of its rights under a will, and while the expression in that case, that the statute in question doubtless intended to meet the party to the fraud against the government on the very threshold of the perpetration of the crime, may be too broad, we do not doubt the soundness of the general reasoning that the statute intended to make it an offense for two or more persons to conspire for an unlawful purpose, and, the purpose existing and some act being done in furtherance of the object, that the penalty attaches before a consummation of the conspiracy.

Upon this general aspect we accept the statutes in question as having a comprehensive purpose, that of declaring against conspiracy to commit offenses as well as all kinds of conspiracies to defraud the United States, and to punish such conspiracies when supplemented by “any act to effect the object of the conspiracy,” though the wrong has not become effectual in its purpose.

Although the statute is accepted broadly as general and comprehensive in its terms, it being a penal statute, when questions are raised as to its applicability to a particular situation, such questions must be determined under the rules of strict construction. It does not necessarily follow, however, that rules of strict construction would operate to limit the general terms or the general purposes of statutes of this character, but, under a particular description of an offense, the wrong complained of must be found to embrace the elements of a wrong clearly within the meaning of the general terms and the general purposes of the statutes.

Another point urged against the government is that, as the statute upon which the indictment was founded is older than the statute which creates the right in respect to which the government claims to have been defrauded, the particular kind of wrong charged could not have been contemplated by Congress, or intended as within the terms of the statute. This, to our minds, is the most weighty argument advanced by the defense. The answer to it, however, is that Congress intended to protect the government in its rights, privileges, operations, and functions against all fraudulent operations,—impositions upon its rights as well as properties, and to this end employed the most general terms and the broadest possible phraseology and declared that “if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy,” they shall be liable, etc. The statute thus clearly and expressly carries its provisions beyond wrongs which had been expressly declared to be offenses against the United States, and extends its provisions so as to embrace fraud in any manner for any purpose, and it would thus seem apparent that it was intended by Congress to carry the meaning of the statute beyond frauds in respect to property and property rights by declaring against fraud for any purpose, and in so doing it must have been intended not only to meet present wants and conditions of the law in respect to statutory offenses

and wrongs and frauds in relation to then existing conditions of administration, but to provide for future statutory offenses and frauds and wrongs growing out of new conditions of the future.

Such being the intention, it becomes a question whether the statute legally operates upon conditions or upon rights in respect to the administration of government subsequently created. It is said in *Wheeler v. Philadelphia*, 77 Pa. 338, 349, "legislation is intended not only to meet the wants of the present, but to provide for the future. It deals not with the past, but, in theory at least, anticipates needs of a state, healthy with a vigorous development." At least the argument that the offense was not within the terms of the statute would not hold good in respect to property, upon the ground that the property or property right about which the government or an individual was defrauded through conspiracy was acquired subsequent to a statute declaring it to be an offense to defraud the government or an individual of its property through a conspiracy for such purpose.

If this be true as to property and property rights, which we assume, and if the statute in question is broad enough under fair and reasonable construction to include rights, privileges, and functions in respect to governmental operations, it is difficult to see why, on the same principle, the statute does not apply itself to rights and privileges subsequently acquired or created in the course of legislative development in the interests of good government and improved service to the public. To illustrate, section 5451 of the same chapter of the federal statutes [U. S. Comp. St. 1901, p. 3680] makes it an offense to bribe any officer of the United States, or any person acting for or on behalf of the United States in any official function. It is probably not to be doubted that a statute of this kind would operate upon an offender who should bribe the incumbent of a federal office created subsequent to the time when section 5451 became a law, and, in conclusion upon this point, it must be said that no difference can be seen in principle between such a situation and the one under consideration.

As a general proposition, it is no objection to a statute that it is general in its terms. It may be sufficiently comprehensive to include a whole subject, or it may limit itself to a class of wrongs relating to a subject, or to a single phase of a given subject. Where a statute is general, the wrong complained of must be particularly described, so that it can be determined whether it is within the meaning of the statute. The point is taken, however, that, as the great body of wrongs and offenses against individuals and communities under our system of governments is left to be dealt with by the state governments, a federal statute drawn in general terms, if so general as to include offenses cognizable and punishable exclusively under the state governments, will not be operative, and that to be effective it must specify the particular class of acts upon which the federal statute is intended to operate, in order that it may be seen that they are within the scope or domain of federal legislation.

Assuming that such is the rule, in our view there is nothing in the sections of the statute under consideration which, under any reasonable construction, could include matters within the exclusive control of state governments. On the contrary, the sections in question only assume

to deal with wrongs against the federal government, and expressly describe conspiracies to commit offenses against the United States and conspiracies to defraud the United States, thus limiting the subject-matter of the legislation to matters concerning the federal government alone; and, while the language is general as to persons and conspiracies, the subject with which the statute assumes to deal limits its scope to conspiracies to commit offenses against the United States and conspiracies to defraud the United States. Criminal statutes of a state are general in the sense that they operate upon all members of the public and for the protection of all. The statute in question is general in the sense that it operates upon all in respect to subjects which concern the federal government alone, and for the protection of a single entity alone, that of the government. In speaking of the limited and special powers and purposes of the federal government, it was said by the Supreme Court in *United States v. Cruikshank et al.*, 92 U. S. 542, 550, 23 L. Ed. 588, that "the government thus established and defined is to some extent a government of the states in their political capacity. It is also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. * * * It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view." And in furtherance of the idea of its own protection and preservation, and to the end that it might administer itself for the purposes for which it was created, its courts were invested with exclusive jurisdiction "of all crimes and offences cognizable under the authority of the United States." Rev. St. § 711 [U. S. Comp. St. 1901, p. 577].

It is clearly enough within the power of the federal government to protect itself by proper legislation from crimes against its operations as well as from crimes against its existence.

We now come to the main contention of the defense, which is that the conspiracy to deceive, and the acts in furtherance thereof, related to a regulation or a requirement of a department of the government, and not to the property or the money of the government and, therefore, that the conspiracy to defraud or deceive is not of a kind contemplated by the sections of the statute under which the indictment was drawn, and thus it will be seen that the question, under the defendant's main contention, is whether the allegations of the indictment, supported by the facts, constitute an offense, and justify conviction, and that question depends largely upon the sense in which the word "defraud" was used in the sections of the statute under consideration. Speaking generally, when a word which was used in the old English statutes and in the common law, and which has been accepted as having a particular meaning in the common law, is used in a modern statute, it is ordinarily presumed that the word was used in its common-law sense, but this meaning may be enlarged or limited by its setting in a particular statute. Quite likely the word "defraud," as ordinarily used in the common law, and as used in English statutes and in the statutes of our states, enacted with the object of protecting property and property rights of communities and individuals, as well as of municipal governments, which exist largely for the purpose of

administering local financial affairs, has reference to frauds relating to money and property. If this is so, it is because the word is used in that sense, but it may well enough have a broader sense, and be used for a broader purpose.

The words "defraud" and "deceive," as defined by lexicographers, are nearly synonymous. "Defraud—to deprive of right, either by procuring something by deception or artifice, or by appropriating something wrongfully; to defeat or frustrate wrongfully." "Deceive—to mislead by false appearance or statement; to frustrate or disappoint."

It is a familiar rule that, when there is doubt about the purpose or the meaning of a statute, reference may always be had to the object which promoted legislation upon the subject; and though, under the view of the English courts, the title of an act is ordinarily not considered even under conditions of doubt, in this country the courts will look to the title where the meaning is doubtful, because, under the Constitution and the laws, the title is required to be expressed, and it is, therefore, thought not unwarrantable, under certain circumstances, to look to the title in determining the general purpose involved in the legislative intent. In respect to these particular statutes, however, the question cannot be influenced very substantially by the title, because section 5440 [page 3676], in the form in which it was originally enacted, was a part of an act entitled "An act to amend existing laws relating to internal revenue, and for other purposes," and what is now section 5418 [page 3666], in some substantial respects changed, though the general purpose is the same as originally enacted in 1866, was entitled "An act more effectually to provide for the punishment of certain crimes against the United States." In later revisions and compilations, however, these sections both became a part of chapter 5, tit. 70, under the title of "Crimes against the Operations of the Government." Still, quite aside from the title, in view of the history of the sections in question, we have no doubt of the general purpose of Congress to deal with offenses and wrongs which interfere with the operations of the government.

Under the rule which permits reference to the object of legislation, we may consider what was to be guarded against and who was to be protected, whether a private right, the public at large, the law, a government, or, in the English sense, the Crown, is the subject to be affected. Therefore the meaning of the word "defraud," when used in the common law or in a statute, is largely influenced by the sense in which it is used and by the subject to which it relates. A statute which, in general terms, has for its object the protection of the individual property rights of the members of the civic body, is one thing; a statute which has for its object the protection and welfare of the government alone, which exists for the purpose of administering itself in the interests of the public, might be quite another thing. The purpose might be broadly different in the two cases.

The personal rights and interests of individual members of society needing protection are one thing; the rights and interests of a government needing protection are quite another thing. This results from the fact that the rights and interests of individuals and governments are different. The individual rights relate to life, liberty, and the

pursuit of happiness, and the right to acquire and hold property. Governments are instituted for the purpose of protecting such individual rights, and they may protect themselves for that purpose and safeguard their own existence. Therefore the word "defraud" may have a different meaning in a statute for the protection of the government and its administration than when used in a statute designed for the protection of personal rights.

Manifestly, section 5440, in its general terms, contemplates wrongs other and beyond conspiracies to commit distinct statutory offenses against the United States, for, after declaring that if two or more persons conspire to commit any offense against the United States, it broadens the scope of the statute by saying, "or to defraud the United States in any manner or for any purpose," thus covering frauds and deceptions which are not distinct offenses under federal laws.

It is, perhaps, not going too far to say that this section is generic in terms, generic in the sense of including in the first part of the section all conspiracies to commit offenses against the United States—therefore all of a class; and then, under an enlarged scope, embracing all conspiracies to defraud the United States in any manner or for any purpose. It is generic in the sense of including all conspiracies to defraud, thus covering the whole subject of fraudulent conspiracies against the government; conspiracies to wrong the government through fraud and deception not constituting an offense, as well as conspiracies to commit offenses against the government. But whether the statute, accurately speaking, is generic or not, it is manifest that the words "if two or more persons conspire * * * to defraud the United States in any manner or for any purpose" have a broader scope and a different sense than the words "if two or more persons conspire * * * to commit any offense against the United States," and, in considering whether a broader scope was intended under the second part of the section than under the first part thereof, the use of the word "either" should be noticed—conspiring "either" to commit any offense or to defraud in any manner or for any purpose.

In considering a statute enacted for the protection of the government, an entity which, in its right to render service to the people under wise and beneficent laws, holds property only as an incident of governing, and which declares it a penal offense to conspire to defraud the government for any purpose, we need not necessarily, we think, approach the question of the interpretation of the word "defraud" from the same standpoint from which the question would be considered if the word "defraud" were used in a state statute enacted for the protection of ordinary property rights of individuals constituting a state; and this is so for the reason that in the one instance the statute in its ordinary acceptance has reference to property and property rights alone, while in the other it has reference to a broader purpose, that of protecting the government in its administration under the law, as well as protecting the property of the government which it holds as an incident to the fundamental purpose for which the government was instituted.

A government does not exist in a personal sense, or as an entity in any primary sense, for the purpose of acquiring, protecting, and enjoying property. It exists primarily for the protection of the people

in their individual rights, and it holds property not primarily for the enjoyment of property accumulations, but as an incident to the purpose for which it exists—that of serving the people and protecting them in their rights. For instance, the property right in a post-office building is acquired and held as an incident to the service which the government is expected to perform and which it has a right to perform.

The limited sense in which the word “defraud” was sometimes used in the older statutes had reference to the protection of personal and individual property rights, as, for instance, “if any person shall defraud another,” etc. That kind of legislation results, of course, from the purpose of the local government to protect the individual in his natural and fundamental right to enjoy liberty and acquire property. The fundamental idea of government is not to acquire and enjoy property, but to establish instrumentalities for protecting the people, not only in their individual and property rights, but in the enjoyment of the right and privilege of proper service in all departments of the government. The fundamental and chief function of the government is to administer protection and service to a body of people within its territorial limits. Its property is simply an incident of such administration.

The language of the statute in question is very broad—“if two persons shall conspire to defraud,” etc. Now, it is, we think, not only reasonable, but the duty is upon us, in considering this statute, to have in mind the object of government in respect to a statute of this kind, as we would have in mind the object of a statute directing itself against wrongs destructive of individual property rights. The chief aim of government being that of protection and service, it may safeguard itself against conspiracies or combinations, or acts intended to impair its proper administration, or conspiracies to impair any of the functions of the government. It may declare it unlawful to combine for the purpose of doing any act which obstructs or interferes with the operations of government or any of its departments. The government may unquestionably safeguard itself against being defrauded out of its right to administer an intelligent and honest service in the interests of the people.

As a moral offense, defrauding the government of its right and its facilities for rendering a proper service to the people, that being the prime object for which it exists, cuts deeper than defrauding the government of a wheelbarrow, and it is unquestionably within the power of the government to protect itself against that kind of a fraud. The question here, therefore, is whether this statute was intended to accomplish that result, and upon that question we should take into consideration the purpose for which government exists. Under such an aspect it does not necessarily follow, as we have said, because the word “defraud” used in statutes for the protection of individual rights will be construed as having reference to property interests, that the word “defraud” as used in a statute intended for the protection of a government and its wholesome administration of its affairs in the interests of the great body of the people has reference solely to property and pecuniary interests.

The federal government has the right to require that the mail service shall be performed by honest and otherwise competent agents.

It has the right to devise and declare its own regulations and means for ascertaining who possess the requisite integrity and other reasonable qualifications. It has the right to protect itself against imposition in this respect. The government had the right to have its blanks used by the person who purported to use and sign them, and to have the answers made by the persons who purported to make them, and, under the circumstances disclosed by the indictment, the defendants conspired and combined to defraud and cheat the government in respect to such right, for the purpose of securing for a person who did not conform to the government regulations a position to which he was not entitled under a law which the government had created and which it was the duty and the right of the government to enforce.

It is an inherent and unquestionable right of the government to administer itself according to law, and, while all citizens have the right and are at liberty to become an instrument of the government under the rules and regulations established by law, they are not at liberty and have not the right to subvert the lawful purposes of the government through a conspiracy to attain government power and emolument by means of fraudulent acts calculated and intended to defraud and deceive the government in respect to its right to administer the mail service according to law. This results from the fundamental rule that the rights and liberties of a people may be regulated by law.

A government must administer itself through its agents or servants. It must be represented as to matters in the various departments by its agents. There is no single particular entity which can be said to be the government, to the exclusion of all other instrumentalities employed to effect the purposes for which the government exists. The government, in respect to its purposes, its rights, and its service, exists in a representative capacity, and in turn its agents, created to administer its purposes, its rights, and its service, are representatives of the government. Therefore conspiracy to practice a fraud, or a deception which amounts to a fraud, upon an agent or agents of the government, and doing acts in furtherance of such purpose in respect to property or rights that belong to the government, whereby the property or the rights of the government may be destroyed or impaired, is a fraudulent conspiracy within the meaning of the statute in question.

The general purpose of the legislation, as well as the general intent of the statute, was to protect the government from impositions through conspiracies to defraud or cheat. The purpose was broad enough, therefore, to include fraudulent conspiracies to injure the government in respect to its rights and privileges, as well as in respect to its property. State statutes for the protection of communities against wrong may be general in their terms, and may operate penally upon an offender, provided the facts alleged and proved constitute a wrong upon an individual member of the community which can fairly be said to be within the class or kind of wrongs against which it was intended to safeguard and protect the public. If this is true, as a general principle of criminal law applicable to state statutes enacted for the protection of individual members of a community in their property and rights, it is equally true of statutes for the protection of a government in respect to its rights, functions, and properties. Of course, this rule is

subject to the limitation that the wrong alleged must possess all the elements of the different kinds of wrongs against which a given statute was directed, as, for instance, if the statute declares against fraud, the offense alleged must have the element of fraud; if against polluting food and drink, the offense must relate to that; and, if a statute declares against a conspiracy to overthrow the government, the conspiracy and the act must relate to such purpose.

As has been said, the defendants in this case combined to cheat or deceive the agents of the government in respect to a service which it was the duty of the government to perform, and which it had the right to perform according to law. The regulations which were violated and subverted were requirements founded upon a law of Congress which authorized the civil service commissioners, under rules made by the President, to prescribe regulations for the admission of persons into the civil service of the United States. The regulations and the requirements, therefore, having reference in this particular case to the mail service, were founded upon law, and were such as the government had the right to enforce in connection with that department of the government. It is not our province to question the wisdom of the civil service law. Courts are bound to accept legislation, regularly enacted in the course of governmental development and authorized executive action thereunder, as based upon grounds of sound and wholesome public policy.

We have spoken of the popular acceptance of the word "defraud," and now as to its legal meaning. In *Burdick v. Post*, 12 Barb. 168, 186, it is said to "defraud" is to withhold from another that which is justly due him, or deprive him of a right by deception or artifice, and Bouvier adopts this definition. Thus the word in legal acceptance refers to rights, as well as to property and money. Moreover, when the word "defraud" is used in connection with the government and the law itself, it naturally and necessarily has a broader and a different meaning than when used in connection with personal rights or in connection with individual rights of property. To illustrate, it is said in *The William King*, 2 Wheat. 148, 153, 4 L. Ed. 206, that "whatever is done in fraud of a law is done in violation of it" and in that case a vessel, intending to go to a foreign port, complying with the requisition necessary to obtain a clearance for a voyage coastwise, was treated as employing a device in fraud of the law, by which she eluded the force that would have otherwise prevented her departure from port. Again, in *Lee v. Lee*, 8 Pet. 44, 8 L. Ed. 860, which involved a question of jurisdiction in a slave case, where the question of jurisdiction depended upon place of citizenship, and as to that there was a question whether there had been an attempt to evade the law, after referring approvingly to the expression of the court in *The William King*, to which we have referred, and in speaking of the alleged device and intent, it is said: "Suppose the hiring had been for one week or one day, would any one doubt that it would have been done with a view to take the case out of the law of 1796, and would have been a fraud upon the law?" In *United States v. Fox*, 95 U. S. 670, 672, 24 L. Ed. 538, it is said that "any act committed with a view of evading the legislation of Congress passed in the execution of any of its powers, or of fraud-

ulently securing the benefit of such legislation, may properly be made an offense against the United States." These cases are not cited as having a direct bearing upon the construction of the statute in question but as showing that the word "defraud" has a different meaning when used in connection with the government and the law than when used with reference to fraudulent interference with individual property rights, and that the law, and its administration through the instrumentalities of the government, may be defrauded.

United States v. Bunting (D. C.) 82 Fed. 883, and Palmer v. Colladay, 18 App. D. C. 426, are cases which discuss the meaning of the word "defraud" as used in section 5440, and we are unable to see any defect in the reasoning of those cases.

The case of United States v. Hirsch, 100 U. S. 33, 35, 25 L. Ed. 539, is urged by the defendants as one in which the statute was limited, through construction, to cases of cheating the government in respect to property and money. We do not take that view of that case, for it must be seen that the court was not there considering the specific kind of fraud before us; and while the court, in illustrating the case before it, and in speaking of the frauds against the United States mentioned in the statute, said, "It may be against the coin, or consist in cheating the government of its land or other property," it was also said, in the course of the opinion, that "the fraud mentioned is any fraud against them," and the section is referred to as one which "enacts in the most general terms a law against conspiracies"; and the view, therefore, that the court intended to limit the statute to frauds in respect to the moneys or property of the government, cannot be accepted as sound.

The case of United States v. Thompson (C. C.) 29 Fed. 26, is also urged as having the same limitation, but it will be seen in that case that, while the court was not dealing with the question presented here, it referred to the statute as including "every conceivable case or conspiracy to defraud the United States; that is, to deprive or divest it of any property, money or 'thing,' otherwise than a law requires or allows," thus carrying its meaning beyond property and money.

Cross v. North Carolina, 132 U. S. 131, 10 Sup. Ct. 47, 33 L. Ed. 287, is another case relied upon by the defense, but it does not seem to be in point, for the reason that it turned upon the idea that the contemplated fraud was upon a bank, and that the act complained of could not be said to have been done for the purpose of defrauding the United States; that, while it might be a fraud upon a bank or upon its stockholders, it was not in itself, within the meaning of section 5418, a fraud upon the United States.

Moreover, and in respect to the other phase of the case, if it were to be assumed, contrary to our view of the meaning of the sections in question, that the word "defraud" was used therein in the limited sense in which it has, under certain circumstances, been accepted in the common law, the English statutes, and the statutes of the states, as having reference to property and property rights, it is still difficult to see why the object sought to be attained in the wrong complained of in this case does not come within such acceptance. The purpose of the conspiracy here was not to secure an opportunity for a qualified person to discharge gratuitously the duties of an office under the federal govern-

ment, but through fraud and deception to avoid the requirements of the law in respect to qualifications, and to secure, without such examination as the law and governmental regulations require, the privileges, immunities, and emoluments of an office for the duties of which the person was not qualified, the chief incentive and leading idea, of course, being to secure the statutory pay intended by the government as compensation for an official answering the requirements and qualifications of the law; and in this sense surely the object of the conspiracy had reference to money and property of the government. It is difficult to see why a conspiracy to wrongfully secure a statutory salary from the government, through fraudulent impersonation, stands differently than a conspiracy to fraudulently procure a pension from the government, like that in *United States v. Adler* (D. C.) 49 Fed. 736.

It is unnecessary to take up the consideration of section 5418, and counts 2 and 3 based thereon, as involving a distinct and different proposition from that involved in the general discussion of section 5440, for the reason, that count 1 being based upon a conspiracy to defraud the government, and upon the idea of certain acts in furtherance thereof, and counts 2 and 3 being founded upon the idea of the preparation and use of certain false papers for the purpose of defrauding the government, the two sections and the various counts present the same question as to the meaning of the word "defraud," and any view applicable to either section or any of the counts in this respect is equally applicable to all.

If these sections of the statutes are impotent to deal with fraud and deception upon the general government like that involved in this case, it is difficult to see upon what principle or upon what interpretation they could deal with fraud and deception in respect to an office of greater power and responsibility, or with fraud and deception upon government rights and regulations more vital to an honest and intelligent administration of its service to the people.

The judgment of the District Court is affirmed.

BURLEIGH et al. v. FOREMAN.

In re SWIFT et al.

(Circuit Court of Appeals, First Circuit. February 26, 1904.)

No. 472.

1. BANKRUPTCY—PERSONAL ASSETS—APPEAL—FINDINGS.

Where there were no express findings of fact either by the referee or the District Court, on an issue as to whether certain property had in fact been transferred by a partner to the firm, which had been adjudged a bankrupt, the Circuit Court of Appeals, on appeal from a decision that such property was a part of the bankrupt's assets, was not aided in its consideration of the case by the weight which ordinarily attaches to the findings of courts of first instance.

¶ 1. Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. A. 9.

2. SAME—EVIDENCE.

In proceedings for the administration of the assets of a bankrupt firm of brokers, evidence reviewed, and *held* insufficient to authorize a finding that one of the members of such firm transferred to it certain seats in different exchanges of which he was a member.

3. SAME.

Where certain assets, belonging to one of the members of a firm of brokers, which subsequently became bankrupt, were not mentioned in the partnership articles, and such partner's testimony that such of the assets as were owned prior to January 1, 1899, were his individual property, and were not transferred to the partnership, was undisputed, a finding that such assets belonged to the firm was error.

Appeal from the District Court of the United States for the District of Massachusetts.

See 125 Fed. 217.

Addison C. Burnham and Albert S. Hutchinson, for appellants.
Bancroft G. Davis, for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. This is an appeal in bankruptcy, and as such raises the whole case. The question here is whether a seat in the Boston Stock Exchange, a seat in the New York Stock Exchange, a seat in the Chicago Board of Trade, and certain Wheelman Company stock and notes, were the property of E. C. Hodges & Co., which company is in bankruptcy. There were other questions below, but we have only to deal with such questions as are raised by the assignment of errors, and they all relate to the single question stated.

The discussions upon the briefs and oral arguments have taken a very broad range, but, after all, the question in the case is a very simple one, and is largely, if not altogether, a question of fact. Williams on Bankruptcy (7th Ed.) p. 158. The argument of the appellee is largely constructed upon certain supposed presumptions and inferences as to relative rights and as to community of interests which result where one partner only contributes property to the capital of the partnership; but such argument is without much force in this case, because the question here is whether the stock exchange seats in controversy were actually contributed to the partnership, and, in a situation like this, that becomes a question of fact. The issue here is not as to the rights of creditors in respect to property, which we are at liberty to assume was contributed by a sole partner to the capital of the partnership. The question whether the property was ever in fact contributed is raised in limine, and therefore the question whether the individual title ever passed to the partnership is first to be determined.

The question of contribution once established, various presumptions as to ownership and rights result, and substantial questions of legal and equitable creditor rights may then be largely influenced by considerations of estoppel and other considerations having reference to the ostensible ownership; and oftentimes, when individual property is once in, it may be held by creditors, although the contributing or creditor partner, as between himself and the other or debtor partners, would be entitled to restoration of title, or to an accounting with re-

spect to the property. Oftentimes confusion arises by applying to what is here the original question, that of contribution, inferences, and presumptions resulting from confused conditions under reputed and ostensible ownership in the course of the partnership business; but there is nothing in the situation here which entitles the partnership creditors to hold the property in question upon the ground of reputed or ostensible ownership as against the individual ownership, if such individual ownership has never been parted with in fact. This case, so far as we are to consider it, turns upon the question whether the first point is established; that is to say, Is the fact established that Hodges, who, it is conceded, was the individual owner of the property in question, actually contributed it to the partnership enterprise?

The solution of that essential and preliminary question is not aided by any presumption or inference as to community of interests based upon the fact of contribution. In a situation like the one before us, the proposition that the title was transferred must be established like any other proposition of fact.

Upon this fundamental question of fact there is no distinct finding by either the referee in bankruptcy or the District Court. The conclusion of the referee, based upon findings and opinion, was that the property in question formed part of the assets of the joint estate. Just how far this conclusion was influenced by presumptions resulting from ostensible and reputed ownership we cannot know. Neither is there anything in the record which enables us to determine just how far the referee was influenced by statements of customers who dealt with the firm that they had been told that the property in question was joint assets, but there is, however, enough in the certificate of the referee to show that such phase was taken into consideration by him. Neither is it apparent from the record that the District Court made a distinct finding upon the essential and preliminary question of fact. On the contrary, it would seem from the opinion, which is before us, that the learned judge of that court, who did not have the witnesses before him, and who acted upon the record now before us, with expressions of doubt reached his conclusions upon general reasoning in respect to law and fact.

Indeed, the learned District Judge says that "the intentions of both parties, Hodges and Swift, were vague. The original partnership between Hodges and Lowry was of an uncertain character." Again, "When the new partnership was formed, consisting of Hodges, Swift, and Lowry, the intention was but a little more definite."

We are aware that, in the absence of circumstances showing the contrary, the presumption is that all facts necessary to a decree were found by the court below; but in this case the circumstances show that the precise question whether Hodges put the seats, in the various stock exchanges, into the firm, intending thereby to contribute their title and their value to the capital of the partnership, was not determined as a distinct question of fact. There being no express findings stated in such a way as to make it clear that they were distinct findings upon questions of fact, we are not aided in our consideration of this case by the weight which ordinarily attaches to findings of courts of first instance.

The stock exchange seats were the individual property of Hodges at the time the partnership was formed. The precise question, as we have said, is whether he parted with his ownership of the seats, and contributed their value to the partnership assets. There is nothing in the articles of copartnership or in the evidence as to the conduct of the parties by way of practical construction of the particular paragraph relating to the stock exchange seats, or in the circumstances of this case, viewing it in all its aspects, of sufficient potency to establish the proposition and justify a finding that Hodges parted with his title by contributing the seats in the various stock exchanges to the partnership capital. The partnership was for the limited period of six months. There is a paragraph in the agreement which provides that the New York and Boston seats standing in the name of Hodges shall draw interest up to the amount of \$50,000, which shall be charged to the general expense account. The Chicago seat was not referred to at all. The seats in the various stock exchanges were of a substantial value, considerably more than \$50,000. It is contended that Swift, as an equivalent, contributed \$50,000 to the partnership capital, but this turns out to be a loan negotiated by him upon the responsibility of the partnership. The seats were never credited to Hodges, nor were they entered upon the books as partnership assets. The fact that Hodges was to be paid interest on the arbitrary sum of \$50,000 is more consistent with the idea that it was in the nature of compensation for the use than with the idea of an outright contribution of his individual property to the partnership capital. There is no occasion, and we have no right, to enter the field of supposed presumption and inference resulting from a community of interests, based upon the fact of contribution to the partnership property.

It is highly improbable that Hodges, without provision for pecuniary return for their value, intended to pass title to these seats to a partnership with these young men without capital, formed with reference to the profits of the business for a term of six months. We look upon the provision in the copartnership articles as to interest on \$50,000 as an expression adopted by the parties for fixing the value of the use of the seats in the stock exchanges to the partnership business.

We do not get much aid in the solution of a question like the one with which we are now confronted from reported decisions. Each case must necessarily stand upon its own merits. In *Grecean v. Bell* (C. C.) 115 Fed. 553, where it was determined that the individual title to a trade-mark owned by one of the partners, used in the partnership business, did not pass without an express agreement, the question is reasoned as though it were to be governed by a rule or by a doctrine, and a quotation from *Brown on Trade-Marks*, where it is said that what the partnership takes over as its own depends entirely upon the terms of the partnership agreement, is referred to as a doctrine stated by the textbook writer. In our view, the determination of such a question is not controlled by a rule of law, but is in each case to be determined as a question of fact, and that fact must be ascertained upon the evidence which describes and illustrates the situation of that particular case. Of course, how a question of fact will be determined depends largely upon the character of the question, and rules of law have to do with

the kind and measure of proofs, and, under all conditions, the proofs must be sufficiently definite and of sufficient substance to fairly and reasonably establish the proposition asserted.

We reach the conclusion that there is nothing in the record to justify a finding of fact that the stock exchange and board of trade seats which were the individual property of Hodges were contributed to the joint assets of the partnership.

The Wheelman assets were not mentioned in the articles of agreement, so far as we have discovered were only referred to in the evidence of Hodges, and his undisputed statements must be received as establishing the fact that such as were prior to January 1, 1899, were his individual property, and were not transferred to the partnership. These assets, therefore, so far as they existed prior to January 1, 1899, stand the same as the Boston and New York Stock Exchange seats and the Chicago Board of Trade seat, and the general observations with reference to that phase of the case apply with equal force to such as existed prior to the time to which we have referred.

The Wheelman transactions, subsequent to the formation of the partnership, stand differently; and while the proofs as to the status of such assets existing subsequent to January 1, 1899, are very meager and unsatisfactory, we think it is established as a fact that such as were acquired subsequent to January 1, 1899, were based upon partnership transactions and related to partnership business, and should therefore be treated as partnership assets.

The decree of the District Court is reversed so far as it relates to the seat in the Boston Stock Exchange, the seat in the New York Stock Exchange, and the seat in the Chicago Board of Trade, and the decree is modified so far as it relates to the Wheelman assets so as to exclude from partnership assets such as existed prior to January 1, 1899; the case is remanded to the District Court for further proceedings not inconsistent with this opinion; and the appellants recover costs in this court.

M'RAE v. LONSBY et al.

(Circuit Court of Appeals, Sixth Circuit. May 14, 1904.)

No. 1,271.

1. FRAUDULENT REPRESENTATIONS—QUESTIONS FOR JURY.

Where, in an action on a note given for the machinery and the sunken hull of a vessel, defendants by special plea alleged that the note was given by reason of false representations as to the condition of the hull, on which defendants relied, and there was evidence that when defendants attempted to ascertain the condition of the hull the water over and about it was so disturbed and roily that the hull could not be seen, and that defendants relied on the representations, which were warranted to be true, it was proper for the court to submit to the jury whether the facts could have been readily ascertained by inspection, and whether defendants in fact relied on the truth of such representations.

2. SAME — CONTRACTS — RESCISSION — FALSE REPRESENTATIONS — WARRANTY — BREACH.

Where defendants claimed the right to rescind a contract by reason of the falsity of representations made by plaintiff concerning the property

purchased, it was immaterial whether defendants relied on the representations per se, or on an express warranty of their truth.

3. SAME—SPECIAL DEFENSE—STATE PRACTICE—NOTICE.

Under the law of Michigan that a notice of special defense to be attached to a plea of the general issue is sufficient if it informs the plaintiff of the substance of the matter proposed to be shown under it, a notice of special defense to an action on a note given for the price of the machinery and sunken hull of a vessel, alleging that at the time of the purchase the hull was submerged, and that plaintiff induced defendants to make the purchase by representations detailed with regard to the condition of the hull, its value, etc., as of his own knowledge, and warranted such representations to be true, but that the same were false, and that it was thereafter discovered that the hull was worthless, whereupon defendants demanded their note and their expenses incurred in endeavoring to raise the hull, for which judgment was demanded in favor of defendants with the cancellation of the note, was sufficient to raise the issue of defendants' right to a cancellation of the note for fraud.

4. SAME—DAMAGES.

Where defendants were induced to enter into a contract for the purchase of the machinery and sunken hull of a vessel by reason of plaintiff's false representations, and on attempting to raise the hull it was found to be worthless, defendants, in addition to a rescission of the contract, were entitled to recover the reasonable expense incurred by them in endeavoring to raise the hull before its true condition was discovered.

5. SAME—EVIDENCE.

Where a contract for the sale of the machinery and the sunken hull of a vessel was in writing, the hull and machinery being both sold for a lump sum, and the seller claimed that the hull was not included in fixing the price, but was thrown in as a gift, expert evidence was admissible to show that the machinery without the hull was of much less value than the purchase price named in the contract.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Tarsney & Fitzpatrick, for plaintiff in error.

Martin Crocker, for defendants in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge, delivered the opinion of the court.

This is an action brought to recover the contents of a promissory note given by the defendants, Lonsby, to McRae, November 8, 1899, for \$3,300, with interest. The defendants pleaded the general issue, and added a notice of a special defense in the form prescribed by a statute of Michigan relating to pleadings in actions at law. The special defense set up was, in substance, this: That the note was given for the purchase price of the parts of the dismantled steamboat called the Byron Trerice, consisting of the hull, the boiler, the engine, and machinery; that at the time of the purchase all except the hull had been removed and was stored on land; that the hull was lying submerged in Lake Erie, near Leamington, Ontario, where she had suffered the loss of her upper parts by fire and was sunk; that the plaintiff induced the defendants to make the purchase by representations, which are detailed at length, in regard to the condition of the hull and its value, as of his own knowledge, and warranted his representations to be true, declaring that if they were not true the defendants need not pay for the articles sold; that the defendants relied upon

these representations, believing them to be true, and made the purchase and gave the note upon the faith of them; that they set about raising the hull, and in doing so found that the representations of the plaintiff above mentioned were false, and that the hull was in fact worthless; that on making this discovery they notified the plaintiff that they would have no more to do with the articles purchased or claim any interest in them, and demanded back their note; and that they expended about \$500 in trying to get the hull afloat, for which they prayed judgment against the plaintiff. It appears that the boiler, engine, and machinery were never taken by the defendants, but remained where the plaintiff had stored them before the sale. The hull fell apart in the attempt to raise it, and was left where it was.

Upon the trial, the parties offered evidence bearing upon the issues made by the pleadings. The jury rendered a verdict in favor of the defendants for \$450. This verdict plainly imports, in the light of the charge of the court, that the jury found that the representations were made as charged, that they were false, that the defendants had on that account repudiated the purchase, and were therefore entitled to have their note surrendered; and, further, that the defendants, in reliance upon the false representations, had expended \$450 in endeavoring to get the hull afloat before they discovered the fraud. The plaintiff took several exceptions to the rulings of the court upon the trial, which we proceed to consider. Most of them may, however, be generalized and considered together. It is contended that, in order to create a liability for representations which are untrue, it must appear that the facts could not readily be known by inspection; and, further, that it must appear that the party complaining relied upon the truth of the representations and acted upon them; and, subordinate to this last proposition, that, if it appears that the party relied upon a warranty that the representations were true, he must depend upon the warranty as a contract of indemnity, and cannot ground his complaint upon the false representations per se. And it is claimed that the facts were open to inspection; that the defendants did not rely upon the representations, but relied solely upon the warranty.

The first two of the propositions above stated may be admitted to be correct. But the facts to which it is proposed to apply them were matters to be determined by the jury. And it is sufficient to say that there was some evidence from which they might have determined them in favor of the defendants. There was evidence that, when the defendants tried to find out the condition of the hull, the water over and about it was so disturbed and roily that the hull could not be seen. There was also evidence tending to show that the defendants relied upon the representations, for the representations were what was warranted. It is useless to argue that the weight of the evidence was the other way. The court was not authorized on that account to take the questions from the jury.

With respect to the other proposition, it is to be observed that the question whether the defendants relied upon the representations which proved to be false, or relied upon a warranty of their truth, was one which concerned the sufficiency of the ground on which the defendants relied as a justification of their rescission of the contract, and the dis-

inction contended for was wholly immaterial. For whether the false representations or a false warranty of their truth were relied upon in either case, on discovery of their falsity the purchaser might rescind. *Thornton v. Wynn*, 12 Wheat. 183, 6 L. Ed. 595; *Rubin v. Sturtevant*, 80 Fed. 930, 26 C. C. A. 259; *Voorhees v. Earl*, 2 Hill, 288, 38 Am. Dec. 588; *Dorr v. Fisher*, 1 Cush. 271. The distinction is for most purposes rather shadowy. It will be understood that when we speak of a false warranty we are referring to a warranty superimposed upon false representations, and not a mere warranty unaccompanied by fraud. In the former case it has long been settled that an action of tort will lie, the law regarding the warranty as being a continuation of the fraudulent representations. In this case the court put the case to the jury in such form as would require the defendants to prove that the representations of the plaintiff were false and fraudulent, and not that a bare warranty would be sufficient. By the law of Michigan, the notice of special matter to be attached to the general issue is not required to conform to the rules of special pleading, and it is enough if it informs the plaintiff of the substance of the matter proposed to be shown under it. Tested by this rule, it cannot be doubted that this notice informed the plaintiff fully of the matters which were upon the trial attempted to be proved. If acute criticism can be turned upon it in respect to its noncompliance with matters of form, it is such criticism that the statute abolishing special pleading and substituting a mere notice was designed to thwart. *Rosenbury v. Angell*, 6 Mich. 508; *McHardy v. Wadsworth*, 8 Mich. 349; *Farmers' Mutual Ins. Co. v. Crampton*, 43 Mich. 421, 5 N. W. 447.

It is objected that the court erred in giving such instructions as would permit the jury to find a verdict in favor of the defendants for the expenses they were put to in trying to get the hull up out of the water. But we think that, if such expenses were reasonable in amount, they might be recovered as damages produced by the plaintiff's fraudulent representations. Whether they were reasonable or not was a question for the jury. It is true that the court told the jury that, if they found that the contract was brought about by the fraud of the plaintiff, they might allow the sum of \$450 to the defendants, there being some evidence that that was the amount of expenses incurred. The plaintiff's exception was "to that part of the charge wherein the court says, if they should find for the defendant on the ground of false representations, that they may allow him what he has expended in the attempt to raise the vessel." This exception seems to be founded on the objection to allowing such a recovery at all, and not to point to any error of the court in submitting the sum of \$450 as the amount which they might find. If the plaintiff desired the question of the reasonableness of an expenditure to that amount to be submitted, he should have drawn the court's attention to that subject. As we have indicated, we think the exception to any recovery for such expenses cannot be sustained. The rescission of the contract by the defendants did not prevent their recovery for the damages they were brought to suffer by relying on the false representations which induced it. Not having got what they bought, they were not obliged to go on and keep and pay for a thing they had not bought and did not want. Nor would the

refunding of the price paid—that is to say, the recovery of the note—restore to them the expense they had incurred by reason of the plaintiff's fraud, a consequence which the plaintiff must have known the defendants would suffer. *Warren v. Cole*, 15 Mich. 265; *Kimball & Austin Mfg. Co. v. Vroman*, 35 Mich. 310, 24 Am. Rep. 558 (a case of false warranty); *Atlanta, etc., R. Co. v. Hodnett*, 29 Ga. 461; 14 A. & E. Encycl. of L. 178. In *Wilson v. New U. S. Cattle Ranch Co.*, 36 U. S. App. 634, 73 Fed. 994, 20 C. C. A. 241, Judge Sanborn stated the rule as follows:

"Upon a rescission of a contract, the measure of damages is the consideration paid, and the moneys naturally expended on account of the purchase before the fraud was discovered."

A witness named Cederstrom was called by defendants as an expert to prove the value of the engine, the object being to repel a contention made by the plaintiff that the hull was not included in the purchase but was thrown in as a gift, by showing that the boiler, engine, and other machinery would not be worth anything like the purchase price. It was objected that the testimony was incompetent because there was no such issue. But the contention of the plaintiff just stated did raise such an issue. However, the testimony on this subject was wholly immaterial, and could have done no harm, for the contract, which was in writing, expressly included the hull as one of the articles sold for the lump sum of \$3,300.

The judgment must be affirmed, with costs.

HUBERT v. CITY OF NEW ORLEANS.

(Circuit Court of Appeals, Fifth Circuit. April 5, 1904.)

No. 1,251.

1. FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP—RECEIVERS—RIGHT TO SUE—SUCCESSORS.

Where, after a foreign receiver, appointed by a state court, had brought suit in the Circuit Court of the United States sitting in Louisiana against a city of that state, his authority to prosecute the suit was annulled by the Supreme Court of the state, the Circuit Court had no jurisdiction to permit the continuance of such suit by a citizen of Louisiana, appointed as such receiver's successor after his death.

2. SAME—AUTHORITY TO SUE.

Where a receiver, appointed by a state court, was authorized to demand and receive any and all sums which may have been or might thereafter be collected or received on account of a certain police board tax for certain years, and thereafter the authority was enlarged so as to include all the assets, claims, and taxes owned and collected by or due to such board prior to 1879, such authority was not sufficient to give the receiver the right to sue to recover such assets or claims.

¶ 1. Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullagham*, 27 C. C. A. 298.

¶ 2. Suits by and against receivers of federal courts, see note to *J. I. Case Plow Works v. Finks*, 26 C. C. A. 49.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

The following is the statement of the case and the opinion below:

On April 3, 1890, R. F. Harrison, a citizen of Mississippi, alleging himself to be receiver of the Board of Metropolitan Police by appointment of the late Third District Court for the parish of Orleans, La., filed suit No. 11,899 in this court, averring that by certain acts of the Legislature of Louisiana creating the board it was made the duty of the city of New Orleans to levy and collect a certain special tax for the support of the officers and members of said board: that the city owes the board a balance of \$118,057.49 and interest because of said taxes. On May 31, 1890, the receiver, by a supplemental petition, increased his demand to \$940,379.66 and interest. On November 17, 1902, Louis A. Hubert, alleging himself to be the duly appointed and qualified receiver, filed his supplemental and amended petition, claiming from the city \$740,106.54 and interest on account of said taxes. It was admitted that Harrison, the original plaintiff, was, when this suit was brought, a citizen of Mississippi; that he died December 30, 1890; that the receivership remained vacant until December 22, 1899, when, on the application of the city of New Orleans, the present plaintiff, Hubert, was appointed receiver by the civil district court for the parish of Orleans, La., and that he duly qualified; that Hubert is a citizen of Louisiana, and the Board of Metropolitan Police was also a citizen of Louisiana. There was evidence showing the receivership proceedings in the state courts. The city filed an exception to the supplemental and amended petition of the receiver, Hubert, which was tried by a jury. The court directed a verdict for the city, and dismissed the suit for the reasons stated in the opinion. Further facts concerning the litigation are stated in *State ex rel. Brittin et al. v. City of New Orleans*, 43 La. Ann. 829, 9 South. 643.

PARLANGE, District Judge. The exception to the supplemental petition of Louis A. Hubert, receiver, is virtually founded on two grounds, viz.: First, that this court has no jurisdiction, because the parties on both sides are citizens of Louisiana; second, that Hubert, the receiver, is not authorized to bring the suit. It was conceded that the parties are citizens of Louisiana, and, there being no conflict of evidence, cross-motions to direct a verdict were made, and the court directed a verdict in favor of the exceptor, the city of New Orleans, and against the plaintiff. In accordance with the verdict, the court has sustained the exceptions, and dismissed the suit without prejudice. I am clearly of opinion that as Hubert, the present receiver, is a citizen of Louisiana, he cannot prosecute the suit against the city of New Orleans, which is also a citizen of Louisiana. Harrison, the deceased receiver, was, it is true, a citizen of Mississippi, but, the appointment under which he claimed the right to prosecute suit No. 11,899 in this court having been annulled by decree of the Supreme Court of this state (*State ex rel. Brittin v. City of New Orleans*, 43 La. Ann. 829, 9 South. 643), and his authorization to prosecute that suit in this court having also been annulled, it is clear to me that Hubert can claim no standing in this case because of the citizenship of Harrison. No benefit can result to Hubert from a suit by Harrison as receiver under an unlawful appointment. That the counsel who brought suit No. 11,899 were convinced that it virtually went out of existence because of the decree of the Supreme Court of this state and the annulment of Harrison's authorization seems to be plainly shown by the fact that for more than 10 years no step was taken in the suit. The Supreme Court of this state virtually said concerning Harrison: "The order enlarging the powers of the receiver in this case was practically a new and distinct appointment." If the conferring of the enlarged powers on Harrison in 1890 constituted "a new and distinct appointment," the same result followed the appointment of Hubert December 22, 1899, under the same enlarged powers. The supplemental petition must be considered as a new suit brought by a receiver who is a citizen of Louisiana, and therefore this court has no jurisdiction in the matter. I believe, as did the Supreme Court of this state, that the enlargement of Harrison's powers constituted a new and distinct appointment. But it should be noticed that, even if that view is incorrect, the result, so far as the matter in hand

is concerned, would be the same; for, even if the order enlarging Harrison's powers did not constitute a new appointment, it was, at all events, his only source of authority for prosecuting suit No. 11,899, and the question then would be whether, Harrison's capacity and authorization to prosecute the suit having been annulled, Hubert can now, many years afterwards, claim a standing in this court because Harrison, at the time he brought the suit, was a citizen of Mississippi. Clearly, he cannot do so. It should be noticed that Harrison brought suit No. 11,899 before the enlargement of his powers.

I have considered carefully the cases cited by the receiver's counsel in support of the jurisdiction. In my opinion, none of them apply to the matter in hand. It may well be, under those authorities, that if Harrison had brought suit No. 11,899 by virtue of a lawful appointment as receiver, and with due authorization from the court which had appointed him, and the appointment and authorization had not been annulled, this court would not be divested of its jurisdiction over the case by the mere fact of his death; and that Hubert, although a citizen of Louisiana, could prosecute the suit. But such a situation would be radically different from the one presented in this matter. The annulment of Harrison's second appointment, and of his authorization to prosecute suit No. 11,899, left nothing of that suit to which Hubert can now lay claim to maintain the jurisdiction. If Harrison were alive, he could not prosecute the suit. The annulment of his appointment and authorization operated virtually the dismissal of the suit, and it may be—though the point need not be decided—that Harrison's second appointment was void ab initio. It is obvious, of course, that Harrison's death could not put Hubert in a better position than Harrison with regard to the litigation instituted by Harrison.

Even if Hubert were a citizen of another state than Louisiana, and the court had jurisdiction, the suit would have to be dismissed, because Hubert has not been authorized to bring the suit. The authorization of Harrison concerning suit No. 11,899 was specially annulled by the state court on January 9, 1891, and, besides, the annulment of Harrison's second appointment put an end to the power and authority to prosecute the suit. Therefore Hubert can claim no authority to sue in this court by transmission from Harrison. The only contention with regard to the question of Hubert's authorization is that his power to sue in this court results from the terms of his appointment. On December 22, 1899, he was appointed by the state court "receiver of the Board of Metropolitan Police, to succeed R. F. Harrison, deceased." On November 20, 1900, his powers were enlarged by the state court "so as to include all of the assets, claims, and taxes owned and controlled by or due to the said Board of Metropolitan Police prior to 1879." Harrison was appointed receiver in 1877, and "authorized to demand and receive from J. C. Denis, Esq., administrator of finance of the city of New Orleans, or from said city, or any other person, any and all sums which may have been or may hereafter be collected or received for or on account of the metropolitan police tax for the years 1874, 1875, and 1876." It is evident to me that Hubert has not been authorized to sue, and it would seem that the learned counsel who represented Harrison did not believe that Harrison could sue under the terms of his appointment, for, before suing in his behalf in the state court, and subsequently in order that he might proceed with suit No. 11,899 in this court, they sought and obtained the authorization of the state court which had appointed Harrison. "A receiver may not bring any suit without first obtaining leave to do so from the court which appointed him. This rule is universal in the absence of statutory provisions changing it. * * * It has become customary, in order to avoid the necessity of frequent applications, for the court to give the receiver general leave to bring suits. If such authority is not given in the order of appointment, it may be confirmed [conferred?] by a subsequent order." *Am. & Eng. Law* (1st Ed.) verbo "Receivers," vol. 20, pages 229 and 230. Also, as to the necessity of general or special authorization, and, incidentally, of averment by a receiver of his authorization, see *Gluck & Becker on Receivers*, § 46, and notes.

The order of the state court appointing Hubert and the subsequent order of the same court enlarging his powers do not refer in terms to the order appointing Harrison in 1877, but, even if they had, Harrison was only authorized "to demand and receive" from any person the taxes of 1874, 1875, and

1876, then collected or afterwards to be collected. This gave him no power to sue, and, as already stated, he was aware of the fact, and sought and obtained the court's authorization with regard to the two suits which he instituted—one in the state court, and suit No. 11,899 in this court. In any event, Harrison's first appointment did not refer to the assessments which are sued for by Hubert. In *Screven v. Clark*, 48 Ga. 41, the order appointing the receiver recited: "He is hereby ordered to collect immediately all of said property together, and hold the same subject to the further order of the court." It was held that this conferred no authority to bring suit. In the same case the court said: "The rule is perhaps an arbitrary one, but is, nevertheless, well settled, that a receiver has no right to sue without express authority from the chancellor. His general authority to collect and keep the assets is not sufficient to justify him in bringing an action. A receiver is at last only an officer of the court, and the foundation of the rule probably is that it is always for the court itself to determine whether it shall be dragged into litigation. At law, the party having the legal right to sue is the proper party, and if one comes suing for the property of another he must show, as part of his right to recover, the authority he has to come into a court of law asserting another's right. We think this failure to show any authority to sue is fatal to the case of the plaintiff below." The only case cited by plaintiff's counsel, which, in my opinion, bears on the question of authorization is *Helme v. Littlejohn*, 12 La. Ann. 298, decided by the Supreme Court of this state. With great respect for the opinions of that high tribunal, it may be said that the case seems to stand singly and alone. It was decided in 1857, at a time when the law of receiverships was almost unknown in Louisiana. It is but recently that legislation on the subject of receiverships has for the first time been enacted in Louisiana. Under the circumstances it seems to me that the case cannot control as against the universal rule that receivers must be authorized to sue, either specially or generally.

Chas. Louque and Rouse & Grant, for plaintiff in error.

Frank B. Thomas, Asst. City Atty., for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A majority of the court is of the opinion that the judgment of the Circuit Court is right, and it is therefore affirmed.

BEST v. KESSLER.

(Circuit Court of Appeals, Seventh Circuit. April 12, 1904.)

No. 1,002.

1. LIBEL—DAMAGES—EVIDENCE ON QUESTION OF REPUTATION.

Where plaintiff in an action for libel took the stand and testified as to his standing and reputation in the community, a cross-examination, which elicited the fact that he had been a gambler for large stakes, and other facts which would tend to affect his reputation, was proper and pertinent to the issue on the question of damages, and the exclusion of such cross-examination from the jury on such issue, while the direct testimony was allowed to stand, was error.

2. APPEAL—ASSIGNMENT OF ERROR—SUFFICIENCY.

The rule of the Circuit Court of Appeals which requires an assignment of error relating to the charge of the court to state distinctly the grounds of objection, does not require the court to refuse to consider an assignment which merely sets out the language objected to, where the objection as clearly appears from such language as it would if the assignment were further elaborated.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

F. C. Winkler, for plaintiff in error.

Nathan Glicksman, for defendant in error.

Before JENKINS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. This is an action for libel for the publication of an article in the Germania, a German newspaper of the city of Milwaukee, on March 30, 1902. The article, as published in the Germania, was a German translation of one which first appeared in the Rider and Driver, a paper published in New York City on March 22, 1902. The article charges fraud and misconduct on the part of the defendant in connection with a matter which had been discussed in the newspapers relating to the alleged fraudulent substitution of a certain French wine exploited by the plaintiff, and known as "White Seal," made by Moët & Chandon, in France, in the place of a German wine known by the name of "Rheingold," on the occasion of the christening in New York Harbor of the German Emperor's yacht Meteor. The article assumes the truth of such fraudulent conduct, and that the defendant had been guilty of causing a bottle of his champagne to be clandestinely substituted for the German bottle which the Kaiser wished to have used at the christening of his yacht under the auspices of his brother, Prince Henry, and designates the plaintiff as a most disgustingly vulgar and objectionable wine exploiter, and accuses him of clandestine and dishonest practice in connection with the transaction.

The defendant's answer justifies the publication of the article on the ground of its being true, but on the trial no proof was given of its truth, and, the publication being conceded to be libelous, the case resolved itself into a mere question of the extent of the injury to the plaintiff's reputation and the amount of damages thereby sustained.

In a libel suit the plaintiff's reputation is in issue, as the injury to that is the principal measure of damages. The defendant may always attack the plaintiff's standing and reputation if he wishes to do so. It is presumed, however, to be good until the contrary is shown. The plaintiff had alleged in his complaint that he was at all times of good name, fame, and credit, and of good reputation. To strengthen the presumption of law in his favor, he introduced on the trial three several depositions by citizens, bank presidents of New York, to prove his good standing. One of the witnesses named among the directors of his bank such notable men as Mr. Alexander, Mr. Coler, Mr. Chauncey M. Depew, Kuhn, Loeb & Co., Mr. Gould, and others. Not content with the testimony of these witnesses, the plaintiff, to further substantiate a character which had not been attacked, himself took the stand to make more clear his standing and good name. He had lived in New York City 32 years. Was president of the George A. Kessler Company, sales agent for the champagne wines of Moët & Chandon, of Epernay, France. The firm business was very extensive throughout Europe and in every city in the United

States, Canada, and in Havana. In 1902 he was a member of the Chamber of Commerce of the city of New York, and still was, and of the New York Board of Trade and Transportation Company, and over half the charitable organizations in New York. Such was the rather enviable and exalted standing which the plaintiff gave to himself in order to enhance the damages. This evidence was all admitted against the defendant's objection. On cross-examination he was asked if he had not gambled a good deal, and he said he had. In the summer of 1901 he had lost a large sum of money in Saratoga in the clubhouse of Richard A. Canfield. "Q. How large a sum? A. \$13,500," which he paid, and had the receipt in his pocket. In answer to the question whether he had gambled for women in gambling houses, he said, "I may have in a friendly way, over a supper or dinner, or something that happens in the summer time—recreation. Q. In the summer of 1898, were you giving a supper at Saratoga to three ladies, and offered to play for them for something, and go out, and after a little return and bring back \$275, or thereabouts? A. I do not recollect the fact. It may have been. Q. Have you been an operator in stocks to a considerable extent? A. To a very large extent, yes. Q. How many deals did you have up to the time of the panic in May, 1901, when the Northern Pacific went up kiting? A. I had a great many. Cannot tell how many. I defaulted on none. I had a dispute with one house that owes me \$750 that I am suing them for. They are suing me for \$180,000, which is coming up next month. Q. That matter has been ventilated in the newspapers a great deal, has it not? A. The case has been cited in the newspapers. Q. You had an acquaintance with Vera Douglas some years ago, did you not? A. I knew the lady. Q. A good deal was published in the newspapers about you and her, was there not? A. No, sir; there was not. There was in one paper some silly article. It was false and ridiculous, like other statements and reports that get in occasionally. Q. You had a little episode with a Spanish actress, Otera, at one time, did you not? A. No, sir; I did not. Q. Didn't you know her? A. I simply met her. I did not know her. Q. You knew a sister of hers? A. Never. That is one of those blackmailing things. I threw a man out of the office because he published that article. It was afterwards retracted under oath by Otera herself before the court. She was arrested for it." This evidence was legitimate cross-examination on the one subject upon which plaintiff's testimony in chief was directed, which was the matter of his reputation and credit, and was given without objection. In giving the case to the jury, this evidence of the plaintiff on cross-examination was all taken from the jury on the question of his standing and reputation. It bore on the very matter at issue, and shaded off the likeness which the plaintiff and his witnesses had made of himself. It was needed to complete the picture. Without the shades as well as the lights, the portrait would be incomplete. This evidence was offered and admitted without objection on the question of the plaintiff's reputation and standing. That was the subject at issue, and the testimony on both direct and cross examination had no other aim or bearing.

The court charged the jury that no testimony had been introduced

which tends to impeach the plaintiff's character so far as it is affected by the issues in this case. That the testimony which the plaintiff has been allowed on cross-examination of inquiries made as to the gambling and stock operations and things of that kind was received and allowed only upon the question of his credibility as a witness in the case, and not as affecting his reputation or character, for which he was entitled to compensation if an injury was occasioned thereto by the libel. Exceptions were taken to this charge, which we think are well sustained, and that the charge was erroneous. How much weight it would have had with the jury cannot be known. That was a question for the jury. But that it was most likely to have some influence on the question of damages is altogether probable. It can hardly be said that a business man who sues for injury to his standing and reputation in the community where he lives, but who confesses himself to be a gambler for large stakes, and who visits gaming places in company with women, should be regarded by the jury as necessarily having a reputation above reproach.

One of plaintiff's witnesses was asked the question whether plaintiff was not regarded in the community as an honorable man. The answer was, "In a business way, yes." But a business man who is a gambler would hardly be trusted in a matter of business with the same faith and credit as one who is not affected by such a vice. The question was altogether one for the jury, and the cross-examination should have gone to the jury with the plaintiff's testimony in chief as a part of the case.

An exception was taken by counsel for defendant in error to the sufficiency of the assignments of error. It is apparent that there has not been a complete and literal compliance with rule 2, which provides, among other things, that when the error relied upon relates to the charge of the court the assignment of error should state distinctly the grounds of the objection to the instruction. The assignments of error relating to the matter in hand are as follows:

"(14) The court erred in charging the jury in the following words: 'And no testimony has been introduced which tends to impeach his character so far as it is affected by the issues in this case.' (15) The court erred in charging the jury in the following words: 'The testimony which the plaintiff has been allowed on cross-examination of inquiries made as to the gambling and stock operations and things of that kind was received and allowed only upon the question of his credibility as a witness in the case, and not as affecting his reputation or character, for which he was entitled to compensation if any injury was occasioned thereto by the libel.'"

The grounds of objection to these instructions are not set out further than they appear upon the face of the assignments—quite as clearly as though the record were incumbered by the injection of an argument into the body of each of the two assignments. It is not possible that either the court or counsel could be misled by these assignments, or have a doubt as to their proper meaning. Besides, the same rule provides that the court, at its option, may notice a plain error not assigned. Although the assignments are not in strict accordance with the rule, we think the court should take notice of the error.

Judgment reversed, and cause remanded for a new trial.

KIP-ARMSTRONG CO. v. KING PHILIP MILLS.

(Circuit Court, D. Massachusetts. April 20, 1904.)

No. 1,476.

1. PATENTS—CONSTRUCTION OF CLAIMS—"ROTARY" PART.

The word "rotary," used in a claim of a patent to describe an element of a combination, does not necessarily imply a continuous rotation of the part, so as to make it necessary to limit the claim by reading into it as an additional element mechanism for such rotation, but is properly descriptive if the part is capable of being rotated by hand or otherwise.

2. SAME—INFRINGEMENT—WARP STOP-MOTION FOR LOOM.

The Baker patent, No. 595,688, for a warp stop-motion for looms, claim 5, construed, and held not anticipated, valid, and infringed.

In Equity. Suit for infringement of letters patent No. 595,688 for a warp stop-motion for looms, granted to William H. Baker, December 21, 1897. On final hearing.

Harold Binney, for complainant.

Charles F. Richardson, for respondent.

HALE, District Judge. This suit in equity involves the construction and alleged infringement of a patent to William H. Baker, No. 595,688, dated December 21, 1897, for a warp stop-motion for looms. The fifth claim of the patent is in issue. It is as follows:

"(5) In an electrical warp stop-motion for looms, the combination with the thread-supported circuit-closers, of a rotary contact-bar for said circuit-closers to engage, a circuit embracing said bar and closers, and electrically-controlled clutch-shipping mechanism."

The specification describes the invention as follows:

"This invention relates to means for automatically stopping a loom upon the breakage of a warp-thread therein; and it has for its object to provide simple and effective electro-mechanical means whereby the clutch which connects the driving-shaft of the loom with a loose driven pulley thereon may be automatically disconnected upon the breakage of a warp-thread."

The mechanism thus brought before the court is for the purpose of automatically stopping the operation of a loom upon the breakage of a warp-thread. Each warp-thread supports a metallic circuit-closer, which, when the warp-thread breaks, drops upon the top of a metallic contact-bar. This fallen circuit-closer and the contact-bar co-operate and complete an electrical circuit, by the operation of which with an electro-magnet a clutch-shipping mechanism is put in motion, which stops the loom. It will be seen that the claim presents upon the face of it four elements: (1) The thread supported circuit-closers; (2) the rotary contact-bar for said circuit-closers to engage; (3) a circuit embracing the contact-bar and closers; (4) an electrically controlled clutch-shipping mechanism. The defenses are that the patent is invalid, that it has been anticipated, and that it has not been infringed. The great force of contention in the case is placed upon the meaning of the second element in the claim, namely, the rotary contact-bar. The learned counsel for the defendant contends that in the words "rotary contact-bar" there is implied the element that it should be continuously

rotated by a belt. To sustain this contention he calls special attention to the following description in the specification:

"The contact-piece which co-operates with the contact-arms and is here indicated, e⁷, is rotated in suitable bearings by means of a belt, e⁸, driven by a shaft, e⁹, which is rotated by the power of the loom. The object of rotating the contact-piece, e⁷, is to prevent interference with an operative electrical contact by particles of lint deposited on the contact-piece, the rotation of the contact-piece causing any lint that may have been deposited thereon to be scraped away by a contact-arm when the latter drops upon the contact-piece."

The defendant urges that, although the claim itself contains no allusion to the belt, or to any means for driving the contact-bar, yet from an examination of the specification and the drawings it is clear that the use of such belt is imperative in order to make the patent valid and effective; that a fifth element should be read into the claim in suit, namely, "(5) means for operating the contact-bar;" that the drawings show these means, namely, a belt and shaft; that the specification, as we have pointed out, describes the belt in terms, and that without the use of such mechanical means, and without reading this fifth element into it, the claim is fatally defective, as it alleges only a result, which is public property, and does not point out means by which the result is achieved; that under the provisions of the statute fixing the requisites of a specification and claim it is the duty of the patentee to make a full, clear, and concise written description of his invention; that this provision has been complied with by the patentee in his description of the operation of the contact-bar by the mechanical means of a belt; but that unless this use of the belt, or, in other words, this fifth element, is read into the claim, such claim is invalid, functional, inoperative, and void. Defendant insists with great force that the claim in suit, when construed to carry out the intention of the patentee as evidenced by the drawings and specification, contains by implication some mechanical means to give the desired round and round movement to the contact-bar; that in the word "rotary" is necessarily involved the idea of continuous rotation; that without such means of effecting the constant rotation the mechanism referred to in the claim in suit could not perform the special function of scraping away the interfering lint in the manner set forth in the specification and drawings; and that any construction of the claim in suit which would exclude such special function is not admissible.

The first and most important question for the court is, must a fifth element, namely, some power-actuating mechanism, be read into the claim at issue, in order to make it effective and valid? In addressing ourselves to this question, it is necessary to inquire what is meant by a "rotary contact-bar." In Webster's Dictionary "rotary" is defined thus: "Turning, as a wheel on its axis." In the Century Dictionary, the following definition appears: "Rotary. Turning round and round, as a wheel on its axis." A rotary tubular steam boiler is defined as a "tubular boiler with a cylindrical shell supported by trunnions to permit revolution." We do not find anything in the primary definition of "rotary" to indicate that necessarily the idea of continuous rotation is involved in the term. The specification indicates that the inventor had in mind a mechanical means of operating the rotary contact-bar.

His specification and drawings clearly indicate this. But in the operation of the machine it was found that, in order to effect the result of removing the lint, it was not necessary to have a continuous rotary action of the bar by means of the driving mechanism; but that the bar could be rotated manually from time to time, and not continuously; and that this manual and occasional rotation would more simply and economically effect the result of scraping away the lint deposit. Although the patentee may have had in mind a belt or power-actuating mechanism for continuously rotating the contact-bar, we cannot come to the conclusion that the patent must be limited to this mechanical means of rotating the bar. The belt and driving wheel are not necessarily parts of the rotary contact-roll. They are distinct elements; and, under the rule of equivalents, if any other means can fairly be found for effecting the rotary motion, such means should be allowed. The primary thought in the mind of the inventor was a rotary contact-bar, such bar to rotate for the purpose of lint elimination. We do not think he should be limited to the mechanical means of such rotation, but that manual rotation should be permitted. We think that the patent should not be restricted by reading into the claim in suit the element contended for by the defendant. If we should so construe the patent as to compel the reading into it of this fifth element, namely, the mechanical means for driving the contact-bar, such forcing of this element into the claim must be done for the purpose of limiting it. In our opinion, the claim should not be so limited. The natural reading of it makes it consist of the four elements which we have enumerated. To force into it the fifth element, for the purpose of limiting it, is not, in our opinion, a thing favored by the patent law. The claim of this patent seems to us clear upon its face, and not to require interpretation. In *Deering v. Winona Harvesting Works*, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153, Mr. Justice Brown, speaking for the Supreme Court, says:

"Admitting that additional elements are necessary to render the device operative, it does not necessarily follow that the omission of these elements invalidates the claim, or that the precise elements described in the patent as rendering it operative must be read into the claim. If Steward were in fact the first to invent the pivotal extension to a butt-adjuster, he is entitled to the patent therefor, though the infringer may make use of other means than those employed by him to operate it."

Lake Shore Co. v. Brake Shoe Co., 110 U. S. 229, 4 Sup. Ct. 33, 28 L. Ed. 129; *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177; *Canda v. Michigan Malleable Iron Co.* (C. C. A.) 124 Fed. 486; *Thomson-Houston Elec. Co. v. Union Ry. Co.* (C. C.) 84 Fed. 890.

In *Westinghouse v. N. Y. Air Brake Co.* (C. C.) 59 Fed. 581, Judge Townsend says the rule that the claim must be limited to the invention does not necessitate reading into the claim something not specified or necessarily implied therein. In allowing the complainant, under the fifth claim of the patent before us, a manual turning of the contact-roll, we are not introducing a new function into the machine, but merely a new use of its described functions. Even though this use was not thought of by the patentee, it is none the less a use which a fair and natural construction of the patent allows, and which an economical opera-

tion of the loom suggested. An inventor need not know or contemplate all the uses to which his subcombinations may be put. He is protected in any and every use. The court is of the opinion that it is its duty, in giving to the patent its natural interpretation, to broaden it, rather than to force a narrow and limited construction upon it. We are persuaded to this belief by the testimony, which shows that the patent is a primary one in the field to which it is confined, in that it is the primary invention in the art which deals with the problem of overcoming lint interference with the warp stop-motion of a loom. We recognize, however, that the distinction between primary and secondary patents is now given less force than formerly by the courts, for every patent may be regarded as primary within its field; and it follows, then, that every patent should have as broad an interpretation as the courts may fairly give it, and as full and fair a use of the doctrine of equivalents as the courts may fairly allow it. The defendant relies upon *Long v. Pope Co.*, 75 Fed. 835, 21 C. C. A. 533, in which Judge Putnam holds that so much of the mere form given in the specification, drawing, and claim must be retained as is necessary to accomplish all the functions expressly enumerated. But in the case at bar we cannot find that the actuating mechanism contended for in the fifth element, suggested by the defendant to be read into the claim at issue, is necessary, within the meaning of the court in *Long v. Pope Co.* Giving the claim a fair construction under its natural reading, and applying fairly the doctrine of equivalents, we think that the manual rotation of the rotary contact-bar may be substituted for the mechanical rotation. We are aided in reaching this result by a study of the conclusions of the Circuit Court of Appeals in this circuit as announced by Judge Putnam in *Long v. Pope Co.*, cited *supra*, and in the *Reece Case*, 61 Fed. 958, 10 C. C. A. 194. The court is, then, of the opinion that the claim at issue must be construed as presenting a complete and operative mechanism, consisting of four elements, which we have named; and that there is no necessity for reading into it the power-actuating mechanism claimed by the defendant as a fifth element.

In the matter of anticipation, the defendant cites and refers to the *Prest*, *Goldschmidt*, and *Crompton* patents. None of these patents had the rotary contact-bar. It does not seem to us that it is necessary to complicate the case with any long discussion of these alleged anticipatory patents. The contact-bars in all of them are not rotary, but stationary, and hence cannot be cited as anticipatory to the patent in suit. The defense also refers to the *Pain* patent. This patent is in the musical art, which we cannot regard as an analogous art. Assuming that the patentee is presumed at law to have known of the *Pain* patent, the transfer of the device to the new use involved in the art which we are now discussing involved invention. This whole question of a new use is fully discussed and settled in *C. & A. Potts & Co. v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275. We have examined this question and discussed it fully in an opinion which has just been sent down by this court in *Thomson-Houston Elec. Co. v. Ohio Brass Co.*, 130 Fed. 542.

Has this patent been infringed? The decision of the question of infringement is involved in the conclusion of the court that the patent

must be construed as a **complete and operative mechanism** consisting of four elements, and that the fifth element should not be read into it. Without limiting the claim at issue by this fifth element, under the broad construction of the claim as consisting of four elements, the defendant clearly infringes. The testimony shows that Coldwell and Gildard, after having information of the complainant's construction, and of its use of a rotary roll without a belt to drive it, designed the stop-motions which were used by the defendant. The defendant justifies under the Coldwell and Gildard patents. But the testimony convinces the court that the machine used by the defendant has a "rotary contact-bar" and all the other elements involved in the construction which we have given to the claim at issue.

It is contended by the complainant that by reason of the willful acts of infringement by the defendant he should be held in triple damages. The court should not award triple damages unless the evidence clearly warrants it. We do not, however, pass upon this question at this point in the case, but leave it until after an accounting before a master. We do, however, find that the patent is valid, has not been anticipated, and that it has been infringed by the defendant.

A decree is to be entered for complainant for an injunction and an accounting.

ACTIESELSKABET ALBIS v. MUNSON.

(District Court, S. D. New York. April 28, 1904.)

1. SHIPPING—CHARTER HIRE UNDER TIME CHARTER—LOSS OF TIME WAITING FOR DOCKING.

A time charter for a steamer which was employed in West Indian waters provided that she should be docked, cleaned, and painted at least once every six months if the charterer thought necessary, hire to be suspended until she was again in proper state for service. By a subsequent amendment it was provided that the docking should be done only in United States ports where there were facilities, to which she should be sent by the charterer on his own account, who should also pay for all time lost in shifting ports. The charterer sent the vessel to Mobile to be docked, and on her arrival there notified the master that she was then off time, which notice the master refused to accept, as she had not docked, and could not for want of facilities, the only dock available being out of repair. After a delay of nearly a month she proceeded to New Orleans, where she was docked. *Held*, that the charterer was liable for charter hire during the delay at Mobile, it being his duty under the contract to determine when she should be docked, and to take her to a port where there were facilities.

2. SAME.

The charterer was not relieved from the payment of hire because, while waiting at Mobile for the dock to be put in condition, the owners utilized the time to make some repairs on the vessel, where she remained in a condition to sail on short notice.

In Admiralty. Suit to recover charter hire.

Convers & Kirlin, for libellant.

Wheeler, Cortis & Haight, for respondent.

ADAMS, District Judge. This action was brought by the Actieselskabet Albis, owner of the steamer Albis, to recover a claimed unpaid

balance of hire, amounting to \$3,093.51, under extensions of a time charter dated November 17, 1897. The charter was originally for six months from the day of delivery, which was January 20, 1898, but was extended by agreements so that it covered a part of the year 1903. The claim relates to four instalments of hire, due in advance on December 5th and 20th, 1902, and January 5th and 20th, 1903.

The charter provided:

"1.—That the owners shall provide and pay for all the provisions and wages and consular shipping and discharging fees of the Captain, Officers, Engineers, Firemen and Crew, shall pay for the insurance of the vessel; also for all deck and engine-room stores, and maintain her in a thoroughly efficient state, in hull and machinery for the service.

2.—That the Charterers shall provide and pay for all the Coals, Fuel, Port Charges, Pilotages, Agencies, Commissions, and all other charges whatsoever, except those before stated, and shall accept and pay for all Coal in the Steamer's Bunkers on delivery, and the owners shall, on expiration of this Charter Party, pay for all coal left in the Bunkers, each at the current market price at the respective Ports when she is delivered to them.

3.—That the Charterers shall pay for the use and hire of the said vessel at the rate of (£575) Five Hundred & Seventy-five pounds Br. Stlg. per calendar month, commencing on the day of delivery and at and after the same rates for any part of a month; hire to continue from the time specified for terminating the Charter until her delivery to Owner (unless lost) at a port in the United States North of Hatteras.

4.—Payment to be made in cash half monthly in advance in New York at the rate of \$4.85 to the £ sterling and in default of such payment or payments as herein specified, the owners shall have the faculty of withdrawing the said steamer from the service of the Charterers, without prejudice to any claim they, the Owners, may otherwise have on the Charterers, in pursuance of this Charter.

5.—That the cargoes shall be laden and/or discharged in any dock, or at any wharf or place that Charterers may direct where she can always safely lie afloat.

6.—That the whole reach, burthen and passenger accommodation of the ship (not being more than she can reasonably stow and carry) shall be at the Charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions & stores.

7.—The Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew, tackle and boats.

8.—That the Captain (although appointed by the Owners) shall be under the orders and direction of the Charterers as regards employment, agency, or other arrangement; and the Charterers hereby agree to indemnify the Owners from all consequences of liabilities that may arise from the Captain signing Bills of Lading, or in otherwise complying with the same.

9.—That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain, Officers, or Engineers, the Owner shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

10.—That the Master shall be furnished from time to time, with all requisite instructions and sailing directions, and shall keep a full and correct Log of the voyage or voyages which are to be patent to Charterers or their agents, and to furnish the Charterers, their Agent or Supercargo, when required, a true daily copy of Log, showing the course of the steamer and distance run, and the consumption of Coal, and to take every advantage of Wind by using the sails, with a view to economize the expenditure of Coal.

11.—That the Charterers shall have the option of sub-letting the steamer, if required by them.

12.—That in the event of loss of time from deficiency of men or stores, breakdown of machinery, stranding or damage preventing the working of the vessel for more than twenty-four running hours, the payment of the hire shall cease until she be again in an efficient state to resume her service and should she

in consequence put into any other Port, other than that to which she is bound, the Port Charges and Pilotages at such Port shall be borne by the Steamer's Owners, but should the vessel be driven into Port, or to anchorage by stress of weather, or from any accident to her cargo, such detention or loss of time shall be at the Charterers' risk and expense.

* * * * *

17.—Steamer to work night and day if required by Charterers, and all steamer winches to be at Charterers' disposal during loading and discharging, and Steamer to provide men to work same both day and night as required, Charterers agreeing to pay for any night work incurred.

18.—Should Steamer be employed in tropical waters during the term of said Charter Party, Steamer to be docked and bottom cleaned and painted, if Charterers think necessary, at least once in every six months, and payment of the hire to be suspended until she is again in a proper state for the service."

Clause 18 providing for the docking of the steamer was amended January 12, 1899, as follows:

"It is further understood that when it is necessary to dock the steamer charterers agree to send the boat North for their own account."

This provision was also continued in force by extensions dated February 1, 1900, April 9, 1901, and July 7, 1902.

In the last extension, it was provided as follows:

"It is further understood that steamer is to dock only in a United States port where there are facilities, and in case steamer is obliged to shift ports in order to dock and paint, charterers to pay for all time lost shifting ports, also coal consumed and all port charges, same not to vitiate clause 12 in any way."

The charterer ordered the steamer from Cienfuegos to Mobile on the 29th day of November, 1902, to dock and clean bottom. She arrived in Mobile on the 5th day of December following at 1 o'clock P. M., and the charterer notified the master that the steamer was then off time. This notice was not accepted by the master, who insisted that she was still on the charterer's time and would remain so until she could get a dock either at Mobile or at some other place where she might be sent, but no other instruction was given the master and the vessel awaited further orders from the charterer. On the 12th of December, an attempt was made at Mobile to haul the steamer out, when some part of the dock machinery broke and it became necessary to lower the vessel into the water again.

There was only one dock in Mobile where a vessel the size of the Albis could be hauled out. This was a marine railway, belonging to a Mr. Middleton. It was out of condition at the time of the steamer's arrival and remained so until the middle of July, 1903. On the 4th of January, 1903, at 7 o'clock in the morning, the steamer left for New Orleans, where she arrived on the 5th of January at 8 o'clock P. M. and went into dock there on the 6th about 3 o'clock P. M. The docking was finished on the 7th about 4 o'clock P. M.

The main question to be determined is, who was responsible for the loss of time at Mobile. The libellant contends that as the steamer had been ordered there by the charterer and had received no further instructions, the hire continued and the vessel was under no duty to move. The charterer contends that he was justified in ordering the vessel to Mobile and was not bound to consider her on his time until after she

had been docked, and further urges that if he is responsible for the condition of affairs at Mobile, it was the owner's duty to mitigate the damages by causing an earlier docking of the vessel than was attained by her removal to New Orleans.

Clause 3 of the contract required the payment of hire from the day of delivery of the steamer to the charterer until her re-delivery to owner according to the terms of the contract. Unless the charterer can excuse himself by reason of some provision contained in it, he remains liable for the entire hire. Carver's Carriage by Sea, § 572. He claims that under clause 18, as modified by the extensions, he was not required to determine upon the necessity of shifting ports, when it was ascertained that the docking facilities at Mobile were insufficient, but it remained with the owner to decide what to do under the circumstances, and that the loss of time in waiting, was, for that reason, to be borne by the owner.

The language of the contract, however, sufficiently answers the contention. It is provided by clause 18, if the charterer thinks necessary, the steamer should be docked and the bottom cleaned at least once in every six months at the owner's expense. By the extension of July 7, 1902, the docking was limited to a United States port "where there are facilities." As a matter of fact, there were no facilities at Mobile and it was incumbent upon the charterer either to lose the hire for the time consumed in waiting or to find another port. Although it was known to the charterer that the railway was not in order, when the steamer was directed to go there from Cienfuegos, it was expected that the required repairs would be trivial and quickly made and that the railway would shortly be in order. Acting on that belief, the charterer ordered the steamer there and when it was found it would be necessary to send her elsewhere, it was incumbent upon him to give the orders. The detention was apparently caused in the first instance, by the charterer's mistake in sending the vessel to Mobile, which was accentuated by the failure to recognize his liability.

It is contended that the amount of hire should be reduced because it was the duty of the owner to make repairs and some time was consumed at Mobile for that purpose. No doubt the waiting time was, to some extent, devoted to repairs but that fact does not relieve the charterer of his liability for hire. As the steamer was evidently going to be idle, the owner can not properly be charged with the time because the idle days were utilized. It does not appear that the time was necessarily used by the owner. The steamer was all the time in a condition to sail, or could have been made so on a few hours' notice. The condition was not such as to constitute a breakdown, such as would bring clause 12 into operation.

The dispute between the parties seemed, at first, incapable of adjustment, but finally the owner ordered the vessel to New Orleans. It was apparently acting in the interest of the party who should be found liable for the delay, and the charterer was satisfied with its course. In this respect, the owner may be deemed the agent of the charterer.

Decree for the libellant for \$3,093.51, with interest.

THE INCA.

(District Court, S. D. Georgia, E. D. March 14, 1904.)

1. TOWAGE—CARE REQUIRED OF TUG.

A tug, undertaking a towage service, is bound to the exercise of ordinary care and maritime skill, and the master is bound to know the channel, and its usual currents and dangers, which are known generally to men experienced in its navigation, and to exercise such skill and knowledge for the protection of his tow.

2. SAME—LOSS OF TOW—LIABILITY OF TUG.

A tug undertook to tow a bark laden with lumber down the Satilla river, in Georgia, where she had often towed vessels during a number of years. The tug proceeded near the left-hand side of the channel, a short distance outside of which, some half a mile from the starting point, at a bend in the river, there were a number of piles of stone, where vessels had unloaded ballast, and on one of which the bark grounded, striking toward the stern, which was deepest in the water. The tide was rising, and she would have floated in a short time; but the master of the tug, after several attempts, pulled her off, but in doing so she was injured, so that she sank almost immediately. The obstructions had been there for many years, and were known to pilots and navigators of the river, but were not known to the master of the bark, who was wholly unacquainted with the river or its channel. At the place of the accident the channel was 200 feet wide, and the river some 375 feet. The master of the tug testified that he was watching the bark, and that a short time before the grounding a new hand took the wheel, after which she was badly steered and did not follow the tug. *Held*, that the tug was liable for the loss, on the ground that the master was presumed to know the existence of the obstructions, and that it was his duty to warn the bark of the danger, if she was not properly steered; also, because he failed to exercise proper care and skill in releasing her after the grounding.

In Admiralty. Suit against tug for loss of tow.

Walter G. Charlton, for libelants.

William Garrard, for respondent.

SPEER, District Judge. John Swan and others, citizens of the states of New York, Maine, Pennsylvania, and Massachusetts, who were owners and proprietors of the bark Justine H. Ingersoll, have brought this libel against the steam tug Inca.

The libelants aver that on the 8th day of February, 1903, the bark, with a cargo of 373,000 feet of pine lumber, was lying at the Hilton-Dodge lumber mills on the Satilla river, in this state, and was ready to start on her voyage, via said river and St. Andrews Sound, to her destination, the city of New York. The bark was in first-class condition and was properly manned and equipped. The Satilla is a fresh-water stream, and a navigable river at the point where the bark was lying, having an ebb and flow of tide, with a rise of about 6 feet, and with sufficient draft to float such a vessel as the Ingersoll in safety. It empties into the St. Andrews Sound on the coast of Georgia, about 30 miles below the point where the bark lay ready for her voyage. When loaded the Ingersoll drew 17 feet 3 inches aft and 16 feet 6 inches forward, and, whilst the master had been advised by "outsiders" that he had best start on a two-thirds flood, he had no knowledge of the river, its depths, or its channel. It was, therefore, essential for him to employ the assist-

ance of a tug, and to rely on the judgment and direction of the master of the tug, in order to get his vessel out of the river. To obtain this assistance he telegraphed to the agents of the tug that he desired its services to take the bark to sea, and in response to this request the Inca came, and arrived where the Ingersoll was lying at 11 o'clock in the forenoon. The tug was employed. At the hour of her arrival the tide was still running down, and in the judgment of the master of the tug it was not expedient to take the bark down on that stage of the tide. At 1 o'clock in the afternoon, the tide having turned about noon, the master of the tug announced to the master of the bark that he was ready to start, whereupon the master of the bark remonstrated, stating that he had been informed that it was not safe to take a vessel of her draft down the river on a young flood, but that the voyage should be delayed until the tide was two-thirds flood. Whereupon the master of the tug said that his informant was a fool and knew nothing about it, that he himself knew his business, and that it was entirely safe for the bark to be towed down the river at that stage of the tide. The master of the bark, having no personal knowledge of the conditions, and relying upon the assertion of the master of the tug, permitted the bark to be taken in tow, and began the voyage at 1 o'clock in the afternoon of that date. It is further alleged that, in towing the bark, the tug was about 200 feet ahead; there was a man at the wheel of the bark, steering as nearly as possible in the wake of the tug; and all went well until a point between half a mile and a mile from the place of starting was reached, when the bark, in thus following the tug and being thus drawn by her, was run upon sunken rocks, of which the master and crew of the bark had no knowledge, and of which the master of the tug either knew or ought to have known. The bark struck her bottom near the foot of the mizzenmast, and stuck on the rock. Whereupon the master of the tug, failing in the effort to pull the bark ahead off the rock, let her swing with the tide, and attempted to twist her off, during which process her rudder sprung up. The master of the bark then requested him to bring the tug alongside and pull her off straight, which he refused to do. He continued twisting her three times, until her rudder came up, and the bark, in coming off the rock, tore off her shoe, and was otherwise so injured that she filled in about 10 minutes and sank. The master of the bark endeavored to get her on the bank of the river, so as to avoid sinking in the channel, to this end letting go her port bow anchor and letting her stream anchor go astern, which was all he could do. It was alleged that the master of the Inca failed to exercise ordinary and reasonable care, caution, and maritime skill, first in towing the bark at the stage of the tide then existing, then in getting the bark aground, and in the method adopted in getting the bark off of said obstruction. By this negligence and want of skill the bark was wrecked and became practically a total loss to the owners. A survey was held upon the bark, after sinking, and, as repairs would have cost \$10,000, it was recommended by the board of surveyors that she be sold as she lay, which sale being had, the highest price bid for her tackle, apparel, and furniture was \$725, for which sum she was sold. Libellant alleges that he has been endamaged in the sum of \$12,200, whereof \$10,000 represents the value of the bark, her apparel, tackle,

and furniture at the time of her destruction, less the sum of \$725, for which she was sold, and the sum of \$2,500 represents the net freight upon the cargo being transported in the bark at the time she was sunk, and which was also lost, for all of which damages the representatives of the steam tug decline to settle with libelants.

Upon these averments, with suitable prayers, process issued, was served, and an answer was filed by the claimant of the Inca. The claimant is the South Atlantic Towing Company, a corporation of the state of Georgia.

The answer admits that the bark was lying at the spot alleged, and that she was well equipped and manned, but whether staunch or not they neither admit nor deny. They allege that the master of the bark was Christopher Edwards, a negro, and that the bark was an old vessel, about 27 years old, and was not in condition, as respondent is informed and believes, to be insured; that the place at which she was lying was an exceedingly dangerous one, because there was a large number of logs lying at the bottom of the river, and with said bark loaded down as deeply as she was, at low tide, her keel rested on these logs, occasioning serious danger of injury thereto and to her hull. The answer states, at the time mentioned in the libel, when she was ready to begin her voyage down the Satilla river, she had been pulled out from her dock and lay out in the stream afloat. It is admitted that the Satilla river was navigable, and had a sufficient depth to float in safety a vessel of the draft of the bark, and says the bark, according to the marks on her stern, drew 17 feet 7 inches aft and 16 feet 10 inches forward. It admits that it was necessary for the bark to employ a steam tug, and under the form of an admission avers that it was necessary for the bark to follow in the wake of the tug, and to be herself steered properly. The answer further admits that at 11 o'clock and 25 minutes the water in the river was still running down, although the tide had been rising since about 11 o'clock, and that it was not expedient, in the judgment of the master of the tug, to take the bark down the river on that stage of the tide. The respondent admits that about 1 o'clock the tug master announced to the master of the bark that he was ready to take her down the river, but denies any remonstrance on the part of the bark's master, and any such conversation on this subject, as that alleged in the libel. The answer then sets forth that it was high tide at St. Andrews Sound on February 8, 1903, at 9 minutes past 4 o'clock p. m., which would have made it high water at the lower bluff mills, where the bark was lying, at about 5 o'clock p. m.; that it was low water at the said mills at about 11 a. m.; that thereafter the flood tide began at that point, occasioning a rise in the river for about an hour and a half, the water in said river during the said period of an hour and a half running down still, and at 12 o'clock at said mill on said day the flood tide had counteracted the flow of the water in the river, and then the flood tide was running up, and after said last-named hour the said flood tide was running up strong; that it was 1:45 p. m. when the tug got the bark and started down the river; and that the tide then was running very strong flood, with a depth of water in the channel of 24 feet. In the judgment of the master of the tug it was best to leave at that stage of the tide, so as to get to the shoals

lower down the Satilla river about high water. These shoals bear the profane designation of "Pull and Bedam," and are located 12 miles below; there being others, known as "Floyd Shoals," about 3 miles further down, and it being the design of the master of the tug to reach the last-named shoals about high water. There was plenty of water in the river above the shoals first mentioned, and by going down the river on that stage of the flood he would be enabled to get his tow safely across the shoals at high water. The answer insists that the tug was 360 feet ahead of the bark, instead of 200 feet, as alleged. It admits the bark had a man at the wheel, but denies that it was steered as nearly as possible in the wake of the tug. It admits that the bark went aground between a half a mile and a mile from the place of starting, but denies she went aground in following the tug, or that the tug drew the bark in such a way as to put her aground. The respondent does not know whether the bark ran upon a sunken rock or not, and alleges that, whether there was a rock there or not, the master of the tug neither knew nor should have known, because the same was entirely out of the channel, and in a bend of the river outside of the fairway, and the bark went aground by her own gross negligence. It is admitted that the tug made strenuous efforts to pull the bark off the obstruction, whatever it was, and failed to do so, but denies that the master let the bark swing with the tide, and then attempted to twist her off the rock, and denies that the master of the bark requested the tug to come alongside and pull her off straight, and that he refused to do so, and also the allegation that the tug twisted the bark three times until her rudder came up, but admits that, when she was finally pulled off, she filled rapidly and sank. It is alleged that the bark was out of the channel at least 120 feet.

The theory presented of the bark's misadventure by the tugboat is as follows: The Inca took the Ingersoll's hawser, which was about 60 fathoms in length, or about 360 feet; the said hawser being made fast on the bark to her port bow, and being made fast at the stern of the tug on her starboard bitts, which would have put the bark, in following the tug, with her port side in the wake of the starboard side of the tug. The bark was sharply built and easily steered, and should have been kept in the wake of the tug. The tug was in the command of Capt. Floyd, an experienced master, a licensed pilot, and entirely familiar with the Satilla river from the lower bluff mills to St. Andrews Sound. The voyage began at the proper time and stage of the tide, and for 6 miles there was a clear unobstructed depth in the channel of 24 feet; the channel being broad and ample, with no short bends in the river. When the bark started, it is alleged, her master was at the helm, and she proceeded a short distance when the master gave up the helm to one of his sailors, walking forward to the break of the poop, where he ought not to have been. His proper position, during the time of the progress of this vessel down, was at or near the helm, so that he might give direction as to the course of the vessel in keeping her in the wake of the tug. This was especially necessary, as there was a gradual bend in the river ahead, which the tug and tow were about to make. The channel was on the starboard side of the river going down. It was about 200 feet wide with a depth of 24 feet. About a quarter of a mile below the mills a gradual bend in the river set in, extending about half a mile.

The tug kept near the starboard shore, which required the bark to do the same; but, instead of doing this, the bark was steered with such gross carelessness and negligence that she was allowed to go off to port a distance of three times her width, thus throwing her out into the bight, and entirely out of the channel. The wheel ought to have been put to port, so as to keep the bark in the tug's wake; but, instead of this, the wheel was left alone and neglected, and consequently the bark immediately went out of her course, and did not come around as quickly as she would have done with her wheel to port, and the bark therefore went rapidly into the bight, and brought up on some obstruction which was entirely out of the channel, the nature of such obstruction not being known to the master of the tug or the respondent. So far as that part of the river was concerned, for six miles the bark could have been towed in perfect safety at any stage of the tide. It is further alleged in the answer that when the bark hauled up on the obstruction, whatever it was, the headway of the tug was stopped, and the master of the tug then knew the tow was aground. Thereupon the tug endeavored to pull the tow off, and failed in the first effort. The bark remained fast; the tide carrying her bow around to starboard, until she headed about across stream. Then the master of the tug, finding the tide was carrying the tow around, slowed the tug up and waited for the tide to rise, trusting to get her off with the aid of the tide. After waiting about 15 minutes the tug began a second time to pull the tow off, and after pulling for about 10 minutes, and finding she did not move, again slowed up to wait for the tide to rise. After waiting about 15 minutes more, the tug then proceeded the third time in her attempt to pull the tow off the obstruction, and succeeded. The bark was then towed down stream about five times her own length, when the mate of the bark sung out she was sinking. The master of the tug immediately starboarded his wheel, and put the tug over to the port shore, so as to ground the bark at or near shore as quickly as possible. The bark where she lay was full of water; the depth being four fathoms. The master and crew were on the poop deck of the vessel, which was about five feet above the water. It was about five minutes from the time the bark was pulled off the obstruction until she sank. Having done all that could be done, the tug took her departure for Brunswick. It is averred that the man at the wheel was a common sailor, with neither captain nor mate at hand to correct him. It is denied that the tug was unskillfully or negligently managed. It is alleged that all was done by the tug which could have been done to get her off the obstruction, and that the master of the tug acted with reasonable care, caution, and skill, denying all negligence and want of maritime skill. The answer alleges that the bark was wrecked and sunk solely on account of the gross carelessness and want of skill of her master and officers and crew.

The foregoing statement we think adequately presents the issues in controversy before the court. It is not in serious dispute that the bark was in all respects staunch and sound when, loaded with her cargo of lumber, she was lying in the Satilla river, awaiting the tug at the mills of the Hilton-Dodge Lumber Company. There is no proof whatever that her bottom had been damaged by supposititious logs, which might have been imbedded in the bottom of the stream. That she floated there

for days, and floated in the stream awaiting the tug, and floated in safety while going down the stream, until she grounded on the obstruction and sunk in five minutes after she was pulled off, makes it clear that her loss was due to such grounding, and to no other cause. Indeed, this ground of defense was not noticed by the proctor for respondent in his argument. Beginning, then, with the assumption that the loss of the Ingersoll, while in tow of the tug Inca and under the domination of her master, is plainly ascribable to the grounding, it becomes important to briefly state the law controlling in conditions like those under consideration.

In *The Margaret*, 94 U. S. 494, 24 L. Ed. 146, where a brig in charge of a tug did not answer her helm, the port line broke, and the starboard line broke also, and the brig was thrown by the force of the swell upon the end of a pier, a hole was stove in her quarter, and she sunk, where it was not denied that in the crisis the tug did all that could be done to relieve her from the perils of the situation, the Supreme Court, through Mr. Justice Swayne, observe:

"The tug was the dominant mind and will in the adventure. It was the duty of the brig to follow her guidance, to keep as far as possible in her wake, and to conform to her directions. The exercise of reasonable skill and care within this sphere was incumbent on the tow. It does not appear that there was a failure in any of these particulars. If the port line was too weak, the tug should have called attention to it. Silence was a fault. The tug was not a common carrier, and the law of that relation has no application here. She was not an insurer. The highest possible degree of skill and care were not required of her. She was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in everything relating to the work until it was accomplished. The want of either in such cases is a gross fault, and the offender is liable to the extent of the full measure of the consequences."

The court continue:

"The port of Racine was the home port of the tug. She was bound to know the channel, how to reach it, and whether, in the state of the wind and water, it was safe and proper to make the attempt to come in with her tow. If it were not, she should have advised waiting for a more favorable condition of things. She gave no note of warning."

It is true that in that case no serious attempt was made to inculcate the tow.

Another pertinent principle is stated in *Hughes on Admiralty*, par. 60, and is fully supported by authority:

"It is also settled that the mere occurrence of an accident raises no presumption against the tug, and that the burden is on the complaining party to prove a lack of ordinary care. At the same time, the ordinary care required of those engaged in the profession of towing is a high one, for they hold themselves out as experts. The measure of care required is similar to that required of pilots. In fact, they are pilots."

In the case of *Transportation Line v. Hope*, 95 U. S. 297, 24 L. Ed. 477, the Supreme Court, through Mr. Justice Hunt, say:

"As a necessary incident of this engagement [towing of a barge], the defendants were entitled and were bound to assume supreme control and direction of the plaintiff's boat, and of the persons in charge of her, so far as was necessary to enable them to fulfill their engagement, and they were bound to

exercise such degree of diligence and care as a prudent and skillful performance of the service for which they stipulated would require."

And again:

"As an expert, a tugboat man must know the channel and its usual currents and dangers. * * * He is liable for striking upon obstructions or rocks in the channel which ought to be known to men experienced in its navigation, but not for those which are unknown." Hughes on Admiralty, § 60.

These are established, and must control the court.

It is averred in the answer of the respondents in this case that the master of the tugboat had an experience of 15 years as pilot. This averment is irrelevant, if it did not mean that he was a pilot on the Satilla. His own testimony is that he was in and out there, towing vessels, frequently. It was with him a regular duty. If there was a sunken obstruction upon which such a tow as the Ingersoll might ground, unless it was wholly unknown to pilots familiar with that stream, he is chargeable with notice of its existence, and several pilots testified that they knew of the existence of this obstruction. The obstruction had been there for many years, and the information of its presence was handed down from father to son. It was caused by small vessels which formerly came to that river dumping their ballast of stones, and there was a number of mounds thus made in a line along that side of the channel. This was the testimony of the Faders, father and son, who had been pilots on that stream for many years. Capt. White, the master of the passenger steamboat Falcon, also knew of this danger to navigation, and stated that the elder Fader had told him about it. It was within a quarter of a mile of the mill of the Hilton-Dodge Lumber Company, where many vessels are loaded, many of them intrusted to the master of the Inca. He is therefore bound by the law to have known of its existence, and to have warned the master of the bark; and, if he saw any evidence of improper or dangerous steering of his tow with regard to this hidden danger to navigation, he was bound to warn the master of the tow to steer clear of it. In such a crisis, in the language of the Supreme Court in *The Margaret*, "silence was a fault."

If the testimony of the master of the tug and one of the principal witnesses for the respondent, a Mr. Ray, is true, such a warning was demanded. From the tug both Ray and Floyd, as they state, were watching the tow and commenting on the skillful steering by which she was kept in the wake of the tug. At this moment, as they were reaching the bend, according to their statement, the captain surrendered the helm to a seaman, and Capt Floyd of the tug exclaimed, "Look at the difference now!" Then both declared that the bark began to steer wildly. The captain of the tug testified that it began to "wobble all about." At that moment, taking his own statement as true, the duty of warning from him was imperative. This was especially true when he knew that there was no pilot on the tow, and when it appears that neither the master nor any of her crew were familiar with the river or its dangers. If by timely measures of precaution the danger could have been avoided, the master of the towboat will not be excused. *The Syracuse*, 12 Wall. 172, 20 L. Ed. 382. When towage is voluntarily attempted in dangerous and perilous places, the tug must exercise skill

and care commensurate with the peril it assumes to encounter. *The Adelia*, 1 Fed. Cas. No. 79 (decision by District Judge Fox, in Maine). In that case, while the tug master, doing the best he could, with full knowledge of the danger, through error of judgment permitted his tow to go on the rocks, the tug was held liable. It is true, as held in the case of *The Stranger*, 23 Fed. Cas. 220, No. 13,525, where the tow takes a sudden and unexpected sheer into danger, the tug is not liable; but it is not so clear, if the tow, with no pilot on board, is permitted to sag off to one side or the other into a danger of which the master of the tug has knowledge, that in the absence of warning the tug would not be liable. In the case of *The Stranger*, supra, commenting on the case of *The Angelina Corning*, 1 Fed. Cas. 910, No. 384, the learned judge remarks:

"It is very easy to see how a tug, knowing of the existence and location of a sunken rock, should be held responsible for running a tow upon such a rock, in consequence of a change of course resulting in the sagging or hanging off of the tow in such a way as to bring her upon the rock. In that case the tug would be in fault by not having made due allowance for the sagging of the tow in consequence of the change of course, which is very different from a case of sheering of the tow solely on her own account."

It seems, also, to be clearly settled that a tug, undertaking to tow a vessel in navigable waters, is bound to know the proper and accustomed waterways and channels, the depth of water, and the nature and formation of the bottom, whether in its natural state or as changed by permanent excavations. When all these conditions as they exist admit of safe towage, the tug is responsible for any negligence to observe them and be guided thereby. *The Florence* (D. C.) 88 Fed. 302; *The Henry Chapel* (D. C.) 10 Fed. 778; *The Effie J. Simmons* (D. C.) 6 Fed. 639; *The Robert H. Burnett* (D. C.) 30 Fed. 214. In *The Robert H. Burnett*, supra, the court held that the admission of the captain of the tug that he had no knowledge of the rock and had never heard of the reef showed ignorance of a notorious fact and left him without excuse.

From these legal considerations it seems clear that, if we confine our attention solely to the testimony of the master of the tug, as it relates to the critical moment, and the diagram or chart of the river put in evidence by respondent, there can be little doubt as to its liability.

It appeared from the evidence that at the time of the misadventure she was going ahead with all her power. Taking the diagram as true, in connection with the testimony of Floyd, we discover these facts: The river is 375 or 390 feet wide at the point where the *Ingersoll* grounded. This was on the port side of the vessel, and on the left-hand side of the river. The channel was 200 feet wide. According to the testimony of Floyd the obstruction which caused the loss of the vessel was 60 feet to the left-hand edge of the channel. The bark was 142 feet long and 40 feet wide, and it is safe to conclude that, if all Floyd said was true, around the natural sweep of the tow at the end of a hawser 300 feet long would have carried the tow to the point where she struck. There were peculiar reasons, therefore, why the tow should have received the most careful instructions to avoid this danger. There was at least 24 feet of water everywhere in that neighborhood, except on these ballast mounds. Besides, the master of the tug must have known that, while

she was going around the bend, the strong flood tide, striking the tow on the starboard bow, would have a tendency to bear her off to port and on these obstructions. That she was wobbling, and that she was following her own course, Floyd testifies. It does not appear, nor is it pretended, that any caution was given by any one aboard the tug. It appears, moreover, that she did not strike the obstruction with her stern, and as she went out of the way only 60 feet from the edge of the channel, and came up on the rocks under the mizzenmast, the probabilities are very strong, if Floyd's testimony is true, that her sagging or divergence from the channel was due to the curve in the river and the force of the tide, and not to any fault or misconduct on the part of the tow. All of these conditions were vital to the safety of his tow, and, if the tug and bark pursued the course indicated by Floyd, the tug would seem liable because the master of the tow was not warned of the danger. The master had as little knowledge of the width of the channel as of the presence of the sunken rocks or the force of the tide at that point.

But, if the testimony of the officers and the available members of the crew of the Ingersoll can be accepted, the facts illustrate conduct on her part far more inculpatory. Not only does it appear from this evidence that, after having been warned, the master of the tug started the voyage at a dangerous stage of the tide, but that he kept down the left side of the river, and dragged the bark directly on the ballast mounds. When notified by the cries from the tow that the bark was aground, he slacked the hawser, and she floated. He then started ahead again, and dragged her further up on the mound, where she stuck. It is then contended by the libelants that, instead of waiting for the rise of the tide, which in a little while would certainly have floated her, notwithstanding the protests of the master of the tow, who cried out that he was damaging the tow, Floyd tried to "twist" her off by alternately slacking, or slowing down, and then going ahead at full speed. His own testimony on this subject is exceedingly injurious to his side of the case. He said:

"I pulled her just as hard as we could pull her, right straight down the river. I kept her as near heading down the river all the time as it was possible for me to do with my boat."

He was asked:

"How far starboard did the tide swing the vessel? A. It swung the vessel until she headed almost across the river."

This was when her bottom was on the rock. He continued:

"When the vessel swung, it carried the tug around with her, pulling all we could pull. The tide carried the vessel's bow right around after her, so as to be nearly about across the river. After the vessel had swung around as far as she was going, I held up pulling for a few minutes. Q. For what purpose did you stop? A. I did not want the vessel to swing any further. Q. You waited a few minutes? A. After I found that the vessel had stopped swinging, I slowed the boat down a little; gave one bell. I waited for about ten minutes. Then I what we call 'hooked' her up again; that is, rang the jingle bell, and that pulled the vessel's head down the river then about a point and a half or maybe two points, not over two points. I found she was not going any further. I slowed the boat down again and waited about 15 minutes, and then I hooked the boat up again, and the vessel jumped right off

the obstruction—just slid off, and swung around behind the boat, and you could see the vessel settling down in the water. Q. She sunk immediately? A. Yes, sir."

Now it does not seem difficult to discover bad judgment from these facts. It is not difficult to account for the injury to the Ingersoll, which caused her to sink in five minutes. It is plain that her bottom under the mizzenmast was ground into nothingness by the alternate action resulting from pulling with full speed and slowing up on the part of the tug. It will be observed that the hawser from the tug was attached to the port bow of the Ingersoll. The Ingersoll was grounded near her stern. She was not so fastened, however, but that the tide readily swung her up stream. The resistance of her full length was offered to the tide when the tug would slow up pulling. This would make her swing with the tide, and, when it would go ahead at full speed, superadd to the power of the tug the power of a mighty lever to be found in the bark 142 feet long, which was constituted by the hull of the ship. This would impart a reverse action. It is probable that there are not many wooden vessels which could have long withstood this grinding movement, and when, in a few moments, the tide had risen sufficiently to float her, she immediately sank. It is true that a number of witnesses from Brunswick, where the tug is owned, testified that this was the proper way to get the tow off; but two or more were stockholders in the defendant company, and the court does not feel obliged, on account of expert testimony of this sort, to disregard what seems the obvious inferences, even from the evidence of Floyd. Since subsequent soundings, also made by Floyd, at the equivalent stage of the tide, found 17 feet of water on this mound, it does not admit of a doubt that an exhibition of a half hour's patience would have floated the bark off without any damage. It may have been desirable on his part to make haste in order to cross the shoals below; but it was much better to lose a tide than to lose a ship. The vessel, while old, was strong and staunch. She had just been repaired. Mr. John Swan, one of the owners, who appeared, and who evidently, from his appearance, is a man of intelligence, testified that she had been recently repaired at a cost of \$5,000. The voyage preceding that on which she was lost had been to Porto Rico with a valuable cargo, much of it refined sugar. There was no evidence whatever as to her unsoundness, except that some of the shoe which floated up after the wreck had been pierced by the toredo. This did not affect her hull or her staunchness. Certain, it is true, the burden of proof is on the respondent to show she was unseaworthy, and no such proof was offered, save the fact with regard to a portion of her shoe, as just stated.

An attentive consideration of the evidence satisfies the court that, notwithstanding the irreconcilable conflicts in the evidence, the testimony of the witnesses for the libelant is entitled to credence. Capt. Christopher Edwards appeared and testified orally, and seemed to be telling the truth. The testimony of the master of the tug seems incredible. He testified that nobody on the bark sung out, or gave any call to him for help, in all the time the bark was fast. In view of the imminent peril of the bark, the fact that she was aground for nearly a half hour, the contradictions by the libelants, and the utter improbability of this

statement, it is wholly disregarded by the court, and throws the gravest doubt on all the testimony of Floyd.

It is alleged in the libel, for what reason in law the court cannot divine, that this witness Edwards is a negro. He does not appear to be a negro. But, if this was important, no witness testified that he was a negro. On the other hand, the cook of the bark testified that the master of the tug was himself a negro. He is as little like a negro as Capt. Christopher. It appears, then, that, so far as the race question is involved, the evidence does not preponderate either for the libelant or respondent.

A decree will be ordered adjudging the respondents liable for the full value of the Ingersoll, together with the freight charges lost, less the price for which she sold, and a reference to the master will be directed to ascertain and report the sum of such damages.

J. ROSENBAUM GRAIN CO. v. CHICAGO, R. I. & T. RY. CO. et al.

(Circuit Court, N. D. Texas. June 23, 1903.)

No. 131.

1. INTERSTATE COMMERCE—ATTEMPTED REGULATION BY STATE COMMISSION.

A state railroad commission is without power to require a railroad company to cancel and abolish "proportional tariffs" which apply only to interstate or foreign shipments, and which were adopted with the approval of the Interstate Commerce Commission, to prohibit the company from permitting export shipments of grain to be stopped in transit within the state for cleaning, grading, etc., or by similar orders to attempt to regulate interstate or foreign commerce.

2. SAME—INVALID ORDERS—INJUNCTION.

Complainant owned a large grain elevator at Ft. Worth, Tex., and was engaged largely in buying grain in other states for shipment and export, shipping the same over the defendant railroad company's lines to Ft. Worth, which was its southern terminus, transferring it there to its elevator for cleaning and grading, and then reshipping, availing itself of the proportional tariff on through shipments put in force by the defendant and other connecting companies. The Texas Railroad Commission, also made defendants, without notice to either complainant or the railroad company entered orders requiring the company to cancel its proportional tariffs, prohibiting it from permitting grain shipped on export billing to be transferred into complainant's elevator, and requiring it to cancel any contracts it might have with complainant whereby it had undertaken to pay any sum of money for any purpose whatever. It was further required to file a notice of compliance with such orders by a given time, under penalty of the institution of "such proceedings as may be found proper and adequate to enforce compliance" therewith. Complainant alleged in its bill that defendant railroad company had given notice of its intention to obey such orders, being moved thereto, as alleged, by the fact that it had other interests pending before the commission of great importance to itself. *Held*, such facts not being controverted, that complainant was entitled to a preliminary injunction restraining the commission from enforcing its orders until the final hearing, as operating to cause complainant irreparable injury in its business.

In Equity. On motion for preliminary injunction.

Capps & Cantey, for complainant.

C. K. Bell, for respondents.

MEEK, District Judge. I shall be brief in ruling upon the complainant's application for a temporary injunction. In response to the order to show cause why a temporary injunction should not issue, the defendants, the Railroad Commission of Texas and E. R. McLean, have filed an answer which in its nature is a demurrer to the bill. In view of this answer, it is proper on this hearing to take the allegations of complainant's bill to be confessed as true.

I will not quote from the allegations of the bill, nor set forth its substance at length. In my opinion, it exhibits a state of facts that appeals strongly to a court of chancery. I will pass directly to a consideration of the order promulgated by the Railroad Commission of Texas on the 28th day of May, 1903, and the effect of its enforcement upon the complainant, as these constitute the grounds of complaint in this action. The order directed against the railroad company includes five different commands, and begins as follows:

"After careful consideration of the facts developed in this case, it is hereby ordered by the Railroad Commission of Texas:

"(1) That the Chicago, Rock Island & Texas Railroad Company shall forthwith cancel out all so-called proportional tariffs on grain products from and to points reached by its railway, whether local or in connection with any other lines of railroad."

It will be most convenient to discuss the provisions of the order by paragraphs.

The so-called "proportional tariffs" on grain products, which the railroad company is required to cancel, are defined by the bill of complaint to be a collection of freight rates which apply upon interstate shipments from certain given points to certain other given points, when the commodities shipped originate beyond the place of shipping, or their ultimate destination is beyond the point to which the proportional rates apply. The "proportional tariffs" in effect with the Chicago, Rock Island & Texas Railroad Company are effective with all other roads doing business in the state of Texas for like service. So far as this action is concerned, they are shown to be tariffs applying wholly to interstate business, and only to affect commerce between the states. They are subject to regulation by the Interstate Commerce Commission, and have been published and scheduled in accordance with the interstate commerce act, and approved of and acquiesced in by the Interstate Commerce Commission and all of the different roads on which they are effective. The complainant, the J. Rosenbaum Grain Company, a corporation organized under the laws of Illinois, and a citizen and resident of that state, has invested a large sum of money in a grain elevator at Ft. Worth, the southern terminus of the Chicago, Rock Island & Texas Railroad. It is largely engaged in the business of buying and selling grain for domestic uses and purposes and for export to foreign countries. It purchases grain in that region of the country north of Texas and yet tributary to the Gulf of Mexico. Having erected an elevator at the southern terminus of what is known as the "Rock Island System," it makes large purchases of grain in the country served by that system, and consigns it for shipment through Ft. Worth when it is meant for export by way of the Gulf of Mexico. The right of stoppage in transitu is exercised at Ft. Worth, and the grain is put through the elevator for

the purposes of cleaning, clipping, grading, assorting, sacking, and otherwise preparing it for continued transportation. On shipments of grain, where the complainant can take advantage of the "proportional tariffs," this is done. Complainant has large contracts on hand for the purchase and shipment of export grain. Owning the grain elevator at Ft. Worth, it has made its arrangements to do business along the line of the Chicago, Rock Island & Texas Railroad and its northern connection, the Chicago, Rock Island & Pacific Railroad. With the "proportional tariffs" canceled as required by the order, the complainant would not be able to comply with its contracts for the purchase and shipment of grain, by reason of the lower and "proportional tariffs" being in effect on other railroads in favor of its competitors. The usefulness of its grain elevator at Ft. Worth for some of the most important purposes for which it was erected would be entirely destroyed. In passing this order, the Railroad Commission of Texas lays its hand upon interstate commerce, and seeks to control and regulate the same, notwithstanding the Interstate Commerce Commission is given and has exercised authority over these matters in accordance with the provisions of the interstate commerce act. Section 8 of article 1 of the Constitution of the United States provides, among other things, that the Congress shall have power to regulate commerce with foreign nations and among the several states. Ever since the decision of Chief Justice Marshall in the case of *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, it has been the settled law that the power of Congress to legislate regarding and to regulate interstate commerce and commerce with foreign nations is exclusive, and all state legislation regulating such commerce is unconstitutional. Unquestionably this paragraph of the order of the Railroad Commission is illegal and void.

The second provision of the order complained of is as follows:

"(2) That said Chicago, Rock Island & Texas Railroad Company shall forthwith stop the practice of allowing or permitting export grain to be unloaded in the elevator of the J. Rosenbaum Grain Company at Fort Worth for any purpose, but all grain moved over the rails of said railroad company on export billing and at export rates shall be delivered by said railroad company to its connections in the same cars in which it moves over the rails of said railroad company and with seals unbroken, or, if transfer is made, that the same be done by said railway company."

This order, as well as the first, under the allegations of the bill and by its own terms, relates to and affects interstate or foreign shipments of grain. It deprives the complainant of the right, recognized by the Interstate Commerce Commission and by the orders and rules of the Railroad Commission of Texas, to stop export grain in transit for the purpose of cleaning, grading, etc. It in effect directs that grain purchased by the J. Rosenbaum Grain Company shall move through Ft. Worth under seal in the cars in which it reaches this point, or shall be transferred by the railroad company to connecting carrier without being stopped or treated at the elevator of complainant. This provision renders it impracticable for the complainant to use its elevator at Ft. Worth for one of the purposes for which it was constructed, and impossible to fulfill its contracts for the exportation of grain under the method it has arranged. It also materially affects and in part destroys the value of complainant's property at Ft. Worth. This portion of the

order, in my opinion, is also illegal and void, for the reason that by its terms it seeks to regulate and control interstate shipments, and the Railroad Commission of Texas in passing it acts upon a subject beyond its jurisdiction and control.

The next provision of the order is as follows:

"(3) That said Chicago, Rock Island & Texas Railroad Company be, and the same is hereby, instructed and required to cancel any contract or contracts it may have with the said J. Rosenbaum Grain Company whereby said railroad company has undertaken to pay to said grain company any sum of money for any purpose whatsoever."

This sweeping command, according to the allegations of complainant's bill, relates to and affects a long-term contract which exists between the complainant and the Chicago, Rock Island & Texas Railroad Company for the transfer of grain through complainant's elevator from the cars of the railroad company to the cars of connecting carriers at a given rate per car for such service. It appears from the bill that this contract is fair and legitimate, and one which is usual and customary under conditions similar to those that exist at Ft. Worth. The bill charges that the transfers of grain made under the provisions of this contract have been only such shipments as originated without the state of Texas, and therefore constituted commerce between the states. Here again the Railroad Commission of Texas lays its hand upon interstate commerce, and seeks to regulate and control a minor detail of interstate shipments of grain. It also seeks to wipe out of existence a contract between citizens which, under the allegations of complainant's bill, is a fair and legitimate one. In this respect the order is not only illegal and void by reason of its attempted control of the details of interstate commerce, but it is also void because it destroys the contract of a private citizen, and deprives it of its right to perform a stipulated service and to collect therefor the charges agreed upon. It destroys another of the uses for which complainant's elevator was constructed, and in effect deprives the complainant of its property without due process of law, and is therefore repugnant not only to the Constitution of the United States, but to the Constitution of the state of Texas as well.

The fourth provision of the order will not receive my consideration.

The next and last provision is as follows:

"(5) That said Chicago, Rock Island & Texas Railroad Company is hereby directed and required to file notice in writing with the Railroad Commission of Texas of a full compliance with all the requirements on or before June 10th, 1903, and, upon failure to do so, this commission will cause to be instituted such proceedings as may be found proper and adequate to enforce compliance with the orders hereinbefore made."

This provision, according to the answer of the Railroad Commission, fixes the character of the instrument. It avers that:

"It does not appear from complainant's bill, or from the order entered by the Railroad Commission, * * * that the Railroad Commission has done anything or threatened to do anything of which complainant can lawfully complain; the defendant Railroad Commission * * * has merely notified the Rock Island Railroad of their intention to resort to the courts of the country for the purpose of asserting such rights as the state of Texas may be able to maintain. The commission could have asserted these rights without giving the Rock Island Railroad Company notice of its intention to do so. The notice is merely a courtesy extended to the road."

The language of the order is strictly mandatory in all of its parts. It is true the only penalty provided or suggested for a noncompliance on the part of the railroad company is that the commission will cause to be instituted such proceedings as may be found proper and adequate to enforce compliance with such orders. In this respect the document is, as urged by the Attorney General in his argument, simply a notice of a resort to the courts of the country on the part of the commission in event its commands are ignored. Whether this is a notice to the railroad company that the commission will resort to the courts and prosecute the railroad company for its failure or refusal to comply with the order of the commission (which the Railroad Commission and the Attorney General assert it is not), or whether it is a notice that actions will be instituted by the commission, in event of a refusal or failure to obey the order, for the purpose of accomplishing through the courts the same results as are sought to be accomplished by the order, is immaterial. In the consideration of the matters before me I must look to the effect of the enforcement of this order as is provided by its terms upon the J. Rosenbaum Grain Company. The complainant charges that it had been notified by the defendant the Chicago, Rock Island & Texas Railroad Company that this company intends to carry out and observe the order, and that it has threatened to obey same, and that the complainant believes and fears the railroad company will carry out and perform its behests, unless enjoined and restrained from so doing. It is also charged that the railroad company has many and divers subjects of legislation pending in the state of Texas, and many and divers subjects of importance to itself pending before the Railroad Commission of Texas, and now on the point of adjudication and determination by the said commission, and the complainant believes, and therefore avers and charges, that the defendant railroad company is terrorized and intimidated by reason thereof, and will observe the void and illegal order because of its fear of incurring the displeasure and opposition of said commission. These allegations stand unchallenged by any of the defendants, and for the purposes of this hearing must be taken as true. Therefore, on account of the threatening attitude and impending action of the railroad company, induced by the order of the Texas Railroad Commission now under consideration, the complainant is about to suffer a great and irreparable injury, which it seeks to avoid through this action. The Attorney General, in his argument before me, insisted that this action contemplated the enjoining of the Railroad Commission of Texas from bringing actions in the proper courts against the defendant railroad company for possible violations of the law that would render it amenable and subject to the consequences which are sought to be brought about by the terms of the order entered by the Railroad Commission. I do not so consider the purposes or prayer of the bill. The record before me is absolutely silent as to any infractions of law, either state or national, by the complainant or the defendant railroad company. If, in the putting into effect of the "proportional rates," or in the application thereof to particular shipments, the railroad company has violated the law, it is not my intention by any order entered in this cause to relieve it from merited prosecution. As stated in the beginning, the bill of complainant, in my opinion, sets forth equities which should

appeal to a court of chancery. An answer on the facts should at least be exacted from the body which promulgated the order, the enforcement of which would result in the destruction of complainant's alleged valuable and inalienable rights. The order entered, notwithstanding its character and drastic nature, and notwithstanding the vital effect of its enforcement on the J. Rosenbaum Grain Company, was entered without notice either to the railroad company or to the complainant, and without any hearing whatever.

It was suggested by the Attorney General, in his argument, that under the arrangement existing between the railroad company and the complainant, and by reason of there being in effect the "proportional tariffs" on grain, it was possible for the complainant to secure an unjust and unfair advantage over other dealers and shippers of grain. As to whether or not the complainant has received unfair and unjust advantages over competitors, and as to whether or not the railroad company has discriminated in its favor, the record before me is silent. In event the arrangements between the railroad company and the complainant, and the existence and effectiveness of the "proportional tariffs" on grain, have resulted in discrimination in favor of the complainant, and consequent violations of the law, this could be shown, and it would then have such bearing upon the complainant's application for redress as might be deemed proper.

It is asserted that the order of the commission was made under the provisions of subdivision 3 of article 4571 of the Revised Statutes of the State of Texas of 1895, which is as follows:

"(3) The said commission shall have power and it is hereby made its duty, to investigate all through freight rates on railroads in Texas; and when the same are, in the opinion of the commission, excessive or levied or laid in violation of the interstate commerce law, or the rules and regulations of the Interstate Commerce Commission, the officials of the railroads are to be notified of the facts and requested to reduce them or make the proper corrections, as the case may be. When the rates are not changed or the proper corrections are not made according to the request of the commission the latter is instructed to notify the Interstate Commerce Commission and to apply to it for relief."

The procedure adopted by the commission in this instance is quite different from that provided by the law. The railroad company was not notified that its "proportional tariffs" were excessive, or were levied or laid in violation of the interstate commerce law, or the rules and regulations of the Interstate Commerce Commission; nor was any request made to the officials of the railroad to reduce its rates or to make proper corrections therein. Without being advised of any facts whatever, the railroad company was ordered to "cancel out" certain of its "proportional tariffs," while such "proportional tariffs" were left in effect on all other roads doing business in the same territory and performing similar service.

The order entered also goes far beyond any authority conferred by this provision of the law. The law relates solely to rates and their correction. The order of the commission not only directs the cancellation of "provisional tariffs," but also commands the cancellation of all contracts existing between the railroad company and the J. Rosenbaum Grain Company. Nor is the penalty for failure or refusal to obey this

order notice to the Interstate Commerce Commission of the infractions and application to it for relief. The order issued, both in form and in substance, is so at variance with the method of procedure and authority conferred by the act quoted that it is difficult to recognize it as being promulgated thereunder.

Upon deliberation, I have determined that the temporary injunction prayed for against the Chicago, Rock Island & Texas Railroad Company should not be granted. It should not be enjoined from altering or canceling the "proportional tariffs" in effect on its line, nor should it be enjoined from breaching its contract with the complainant, as for such breach it is presumably fully able to respond in damages. The railroad company, being relieved from the necessity of obedience to the commands of the commission, will presumably fulfill its contract. If it is violating the law and discriminating in favor of the complainant, the J. Rosenbaum Grain Company, either through the means of its "proportional tariffs" or its contract with complainant, it should not be permitted to take refuge behind an injunction of this court in event it is prosecuted for such violation.

A decree temporarily enjoining the Railroad Commission of Texas, its individual members, and E. R. McLean, its secretary, will be prepared by the solicitors for the complainant, in conformity with the views I have expressed.

SANBO v. UNION PAC. COAL CO.

(Circuit Court, D. Colorado. May 12, 1904.)

No. 4,463.

1. WRONGFUL DEATH—ACTIONS—FOREIGN ADMINISTRATOR—RIGHT TO SUE.

An action for the wrongful killing of a servant in the state of Wyoming, brought under a statute of that state, cannot be maintained in the courts of Colorado by an administrator appointed in Colorado.

Doud & Fowler, for plaintiff.

Teller & Dorsey, for defendant.

HALLETT, District Judge (orally). No. 4,463, Andrew Sanbo, administrator of the estate of August Wainianpaa, against the Union Pacific Coal Company, is an action to recover damages for the death of plaintiff's intestate. The complaint charges that the defendant is a corporation organized in Wyoming, and operating coal lands in that state, and it employed August Wainianpaa to work in its mines, and that he was killed in the mine from certain machinery not being fenced as required by a statute of the state of Wyoming. Thereupon, owing to the negligence of the defendant in failing to fence such machinery in the mine, the company became liable to pay the plaintiff damages under the law of that state. The section of the law of Wyoming is set out in the complaint, and it provides that, if the life of a person employed in a mine shall be lost from failure to comply with the provisions of the act, the administrator of the estate of the person whose life shall be lost

¶ 1. See Death, vol. 15, Cent. Dig. § 36.

may recover damages for the loss. Defendant demurred on the ground that an administrator appointed in the state of Colorado, as the plaintiff alleges he was appointed, has no right of action for a death occurring in Wyoming under the statute of that state. In the argument of the demurrer the plaintiff's counsel relied upon certain decisions of the Supreme Court of the United States and the Supreme Courts of other states, in which it has been held that an administrator appointed in a foreign state to that in which the injury occurred may maintain an action under the provisions of Lord Campbell's act. The principal case upon which counsel relied is *Dennick v. The Railroad Company*, 103 U. S. 11, 26 L. Ed. 439. In that case it was held that an action arising under Lord Campbell's act in the state of New Jersey might be prosecuted in New York by an administrator appointed in that state. Upon this decision, and numerous others, no doubt now exists as to the right of an administrator, appointed either in the state in which the injury occurred or in the state in which the action may be brought, to maintain an action for damages based upon that act. In the discussion of the subject in the various authorities as to the right of an administrator appointed in a foreign state there are some peculiarities which may be worth while to mention in this connection. A case which arose in South Carolina, which is entitled "*Ex parte Northeastern Railroad Company*," reported in 38 S. E. 634, 54 L. R. A. 660, presents the question whether, when the deceased resides in a foreign state, and is killed by an accident occurring upon a railroad, an administrator may be appointed in that state in which the accident occurred to bring a suit under Lord Campbell's act in the state in which the accident occurred. In this instance, after the administrator had been appointed and had brought suit for the death of his intestate, the railroad company applied to the court in which the administrator was appointed to revoke the letters issued to him upon the ground that the deceased had no residence in the state of South Carolina, but was a citizen of the state of Florida, and his property other than that which arose from the killing upon the railroad was all in the state of Florida. The court decided that an administrator could be so appointed even where there was no property of the deceased within the state, and the sole purpose of the appointment was to maintain a suit upon Lord Campbell's act. This, however, was so close a question that the court was divided upon it, and there was a dissenting opinion filed by one of the judges. The argument was close and learned on the part of both the judge dissenting and the majority of the court. The same thing occurred in Nebraska, in *Missouri Pacific R. Co. v. Bradley*, which is reported in 51 Neb. 596, 71 N. W. 283, in respect to the right to make an appointment in a case of loss of life, under Lord Campbell's act, in the state in which the death occurred; and there the court, consisting of three judges and three commissioners (who had no vote), affirmed the judgment below; the chief justice and the commissioners dissenting. In a case which is reported in 168 U. S. 447, 18 Sup. Ct. 105, 42 L. Ed. 537 (*Stewart v. The Baltimore & Ohio Railroad Company*), the question was considered, and there the court seems to have proceeded upon the theory that the real parties in interest were the next of kin, who would take the amount recovered under the provisions of Lord Campbell's act. The

case arose in the state of Maryland—that is to say, the injury occurred in that state—and the action was brought in the District of Columbia by an administrator appointed in that district. Under the Maryland act the suit was to be brought by the state for the use of the next of kin, who would become entitled to the damages, and the court discussed the question very much upon the point whether the action was for a penalty. It does not appear that any question was made as to the right of an administrator appointed in the District of Columbia, except in connection with the main question whether a suit could be brought elsewhere than in the state of Maryland. The court said:

"A negligent act causing death is in itself a tort, and, were it not for the rule founded on the maxim, '*Actio personalis moritur cum persona*,' damages therefor could have been recovered in an action at common law. The case differs in this important feature from those in which a penalty is imposed for an act in itself not wrongful, in which a purely statutory delict is created. The purpose of the several statutes passed in the states in more or less conformity to what is known as 'Lord Campbell's Act' is to provide the means for recovering the damages caused by that which is essentially and in its nature a tort. Such statutes are not penal, but remedial, for the benefit of persons injured by the death. An action to recover damages for a tort is not local, but transitory, and can, as a general rule, be maintained wherever the wrongdoer can be found. It may well be that, where a purely statutory right is created, the special remedy provided by the statute for the enforcement of that right must be pursued; but where the statute simply takes away a common-law obstacle to a recovery for an admitted tort it would seem not unreasonable to hold that the action for that tort could be maintained in any state in which the common-law obstacle has been removed."

Further on the court says:

"The two statutes differ [that is, in Maryland and in the District of Columbia]. The two statutes differ as to the party in whose name the suit is to be brought. In Maryland the plaintiff is the state; in this district the personal representative of the deceased. But neither the state in one case nor the personal representative in the other has any pecuniary interest in the recovery. Each is simply a nominal plaintiff."

From the whole course of the opinion the court was not very far from the conclusion that the beneficiaries might possibly, under some circumstances, maintain the suit without an administrator or the state as plaintiff. Other courts have not adopted this view. I do not know of any decisions among those I have seen—which have been quite numerous—that go so far as this case in that direction. But this explains very fully that the decisions under Lord Campbell's act as to the right of an administrator to maintain a suit in a state foreign to that in which the accident occurred are no authority to uphold the contention of plaintiff that this suit is well brought. The Wyoming act gives a right of action to the administrator of the estate of the person killed. Lord Campbell's act gives the fund recovered to the next of kin, differently arranged in different states. Sometimes it is the widow, or, in case of the death of the wife, a husband; sometimes it is the children, sometimes the parents; and following down the line to the next of kin in some remote degree, where there are none nearer to receive it. In no case does the fund recovered go into the general estate of the deceased

person. This was decided in *Martin v. The Baltimore & Ohio Railroad*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311, and in very many other cases. It is difficult to understand how an administrator appointed in the state of Colorado can recover a fund which is to be distributed in Wyoming and according to the laws of Wyoming. It is quite true that, when an administrator has been appointed in the state in which the deceased resided, he, or perhaps some other person, may be appointed ancillary administrator in another state with a view to maintain an action in that state. Not, however, if the law of the state in which the action is to be brought allows a suit to be maintained by the administrator of another state. This fund, if any shall be recovered, is to be distributed under the laws of Wyoming, and the plaintiff administrator cannot be charged with any duty of that kind. Suing in a foreign jurisdiction, he apparently could only be charged with distributing the estate under the law of this state. Upon that it seems clear enough that an administrator, under the Wyoming act, appointed elsewhere than in the state of Wyoming, has no right of action. The language of the Supreme Court in the case of *Stewart v. The Baltimore & Ohio Railroad Company* is significant upon that point:

"It may well be that, where a purely statutory right is created, the special remedy provided by the statute for the enforcement of that right must be pursued."

That is this case. This is purely a statutory right; a right where none existed before, and none would exist but for the statute; and as that statute declares that the action must be brought by an administrator in the state of Wyoming, he only has a right of action under the provisions of the law.

The demurrer to the complaint will be sustained on the ground that the plaintiff administrator appointed in the state of Colorado has no right of action in the case.

THIEL DETECTIVE SERVICE CO. v. McCLURE.

(Circuit Court, W. D. Kentucky. March 14, 1904.)

1. FEDERAL COURTS—EQUITY JURISDICTION—ACTION AGAINST EXECUTORS.

An unsecured creditor of a deceased person having a mere legal demand which has not been reduced to judgment is not a cestui que trust in such a sense as to be entitled, in the absence of fraud, gross wrong, or unreasonable delay on the part of the decedent's executor, to maintain a bill in equity in the federal circuit court against such executor to compel an accounting.

2. SAME—DECEDENTS' ESTATES—SETTLEMENT.

Federal courts have no original jurisdiction in respect to the administration and general settlement of the estates of deceased persons.

3. SAME—SUITS AT LAW.

Though a creditor of a deceased person may establish the validity of his claim by a suit at law in the federal courts, provided requisite jurisdictional elements are present, yet on recovering judgment, if the same is not paid, the creditor must ordinarily seek relief by a marshaling of assets in the state courts having jurisdiction of the settlement of estates.

4. SAME—CONFLICTING JURISDICTION.

Where, at the time a creditor of a deceased person filed a bill in equity in the federal court to compel an accounting by the executor, a suit in equity had already been begun in the state court under a state statute for a similar purpose, to which complainant was not made a party, the state court having first assumed jurisdiction, complainant's bill was not maintainable.

Robert D. Vance, for complainant.
Yeaman & Yeaman, for defendants.

EVANS, District Judge. This is a bill in equity brought by the complainant, a citizen of Missouri, against defendants, all of whom are citizens of Kentucky. The complainant avers that it was employed by Mary H. McClure and Henry D. McClure to inspect, audit, and balance the books of the Anchor Roller Mills at Corydon, Ky., and that, pursuant to said employment, it performed labor and services and incurred expenses in the course thereof and in connection therewith, to the value and amount of \$3,533.23, all of which the said Mary H. McClure and Henry D. McClure promised and agreed to pay, but have not done so. No judgment at law has been obtained against either of the alleged employers, nor is any sought in this action. It appears from the bill that Mary H. McClure died in Henderson county, Ky., on September 8, 1903, after having made and published her last will and testament; that the will was admitted to probate on October 26, 1903, by the Henderson county court; and that on November 4, 1903, Henry D. McClure, the executor named therein, was duly qualified as such by that court. A copy of the will is filed, and the devisees thereunder and certain creditors of the deceased are made defendants to the bill, which was filed on December 21, 1903, less than two months after the executor qualified, and probably before he had had time to take an intelligent survey of the whole situation. Much the larger part of the estate of the testatrix appears to be land located in this state, and probably in Henderson county. It is not claimed that she was insolvent, though it is averred that her personal estate will not be sufficient to pay her debts, and that no inventory thereof had then been returned. As already stated, no personal judgment is sought against Henry D. McClure, either individually or as executor. On the contrary, the object of the bill is to secure an accounting by the executor in this court, a reference to the master to ascertain the debts due from the estate of Mary H. McClure, a settlement of the accounts of the executor, and a sale under this court's decree of so much of decedent's real estate as may be necessary to pay such of her debts as may not be satisfied by her personal estate. In short, it is a suit brought, within seven weeks after the executor qualified, for the general administration and settlement of the decedent's estate, such probably as might, when the time was ripe, be brought in the proper state court under section 428 et seq. of the Civil Code of Practice, and with due regard to sections 3837 to 3908, inclusive, of the Kentucky Statutes of 1903. The defendants have demurred to the bill, upon the

¶ 4. Conflict of jurisdiction with state courts, *Louisville Trust Co. v. City of Cincinnati*, 22 C. C. A. 356.

ground that this court has no equitable jurisdiction in the premises, and that there is no equity in the bill.

It seems to the court, after a very careful examination of the subject, that the demurrer must prevail under the stress of several propositions which are clearly settled in the federal jurisprudence.

1. An unsecured creditor of a decedent, who has a mere legal demand which has not been reduced to judgment, is not a cestui que trust in such sense as to be entitled, in the absence of fraud, gross wrong, or unreasonable delay by an executor, to maintain a bill in equity in this court against that officer of the probate court who has the estate in course of administration. *Walker v. Brown*, 63 Fed., at page 212, 11 C. C. A. 135, affirming (C. C.) 58 Fed. 23; *In re Foley* (D. C.) 76 Fed. 395. The alleged debtors in this case are entitled to demand a trial by jury if, as they manifest a purpose to do, they contest the claim of the complainant, and the latter cannot deprive them of that right by bringing its suit in equity in the first instance. *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358. It is not certain that the executor in this case will refuse or be unable, in the regular course of administration, to pay any judgment that may be rendered at law on complainant's alleged debt, and thus save the large expense of a settlement suit in equity. At all events, no reason is shown why, like other simple contract creditors, the complainant should not first exhaust its remedy at law, or, at least, judicially establish its claim. Unless the complainant be in fact and in law a creditor of the decedent, it certainly could not maintain this action, even if other considerations did not prevent it. It is equally certain that it could not be regarded as a creditor if it should be determined at law or otherwise that its demand was not maintainable. It is quite clear, therefore, that it should establish its demand at law as the first step, and afterwards, if the executor does not pay the judgment, avail itself of any equitable remedy open to it. Here the correct order has been reversed, and what might possibly have been proper as the last step is attempted to be made the first.

2. Federal courts have no original jurisdiction in respect to the administration and general settlement of decedents' estates. *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, and cases cited. What powers they may exert to enforce the rights of judgment creditors against executors, or whether they would entertain a suit brought by such creditors under section 428 of the Code, we need not now discuss.

3. But in any event it is perfectly competent for a creditor, by a suit at law in the federal courts (where other requisites of jurisdiction exist), to establish the validity of his claim, though, when he has obtained a judgment thereon which the personal representative does not satisfy, it seems that his debt thus established must ordinarily take its place with the other debts of its class, and for its enforcement against the estate of the decedent, if the executor does not pay it, the creditor must ordinarily go into such state court as may be charged with the duty of administering the estates of decedents, and such as may be competent to marshal the assets and distribute the estate in satisfaction of debts, and otherwise, according to local law. *Yonley v. Lavender*, 21 Wall. 276, 22 L. Ed. 536; *Kittredge v. Race*, 92

U. S. 121, 23 L. Ed. 488; *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867. Otherwise, where an estate is insolvent, a simple contract creditor, being a citizen of another state and having a claim for over \$2,000, might come into the federal court, and by means of its process secure payment in full, while local and other creditors having no such opportunities might obtain only a small and much reduced pro rata. Herein is found one of the strong grounds for the doctrine announced in *Yonley v. Lavender*, 21 Wall. 279, 22 L. Ed. 536; and see, also, *Byers v. McAuley*. Equality among unsecured creditors of an insolvent estate can only be reached through leaving the general administration of estates to the state tribunals, which, unlike the federal courts in many instances, can obtain, by either actual or constructive service, jurisdiction over all parties having an interest in the res to be administered, whether they be citizens of the same state or not. There might be exceptions to this rule where the state courts refused to act, or where their long delay would defeat justice or show abdication of jurisdiction. Nor do the authorities cited control cases like *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260, *Hayes v. Pratt*, 147 U. S. 557, 13 Sup. Ct. 503, 37 L. Ed. 279, and *Comstock v. Herron*, 55 Fed. 803, 5 C. C. A. 266, in which no general administration of a decedent's estate was sought, but only the enforcement by legatees or distributees of certain definite trusts, or some other equitable rights which do not involve such administration. Nor would they apply to mortgagees or other secured creditors.

We must not overlook the fact that there is a manifest difference between the case of an unsecured creditor, whose remedy is at law, and that of a legatee or distributee, whose remedy is always in equity, unless in cases where the executor has assented to the legacy. 1 *Story's Equity*, § 591. And it may be remembered that if a creditor's judgment is not given full faith and credit in the state court, a federal question arises which can be settled by the Supreme Court. Of course, other peculiar circumstances might make exceptions to the general rules mentioned, but none of those circumstances appear in this case.

It results that there is nothing to do but sustain the demurrer and dismiss the bill, with costs, but without prejudice to complainant's right to sue at law, and it will be so ordered, unless the plaintiff shall manifest a desire to amend.

(April 4, 1904.)

After the delivery of the foregoing opinion, the complainant filed an amendment to its bill. It shows that on December 5, 1903, 16 days before the complainant's original bill was filed in this court, the personal representative of Mary H. McClure had commenced a suit in equity in the Henderson circuit court, under section 428 et seq. of the Civil Code of Practice, to settle and distribute the estate of the decedent. To this suit complainant was not made a party. The showing thus made by the amended bill renders it perfectly obvious that, when this suit was brought, the state court had already acquired jurisdiction and control

over the subject of the general settlement and distribution of the decedent's estate, and it follows that there can be no doubt, even if any had before existed, that this case is clearly within the rules laid down in *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, and other cases cited in my former opinion. True, it may be that the complainant may possibly be delayed or embarrassed by the Kentucky statute which forbids the institution of suits at law against personal representatives to recover judgments on demands against the decedent until six months have elapsed after his qualification, but even if such a statute can apply to actions in this court, still, under cases like *Payne v. Hook*, there does not seem to be any reason why, when the complainant has reduced its demand to judgment, it may not, by the proper proceeding in equity, on the executor's bond or against the persons who received them, secure its share of the assets of the decedent, even though they may have been distributed to heirs or legatees or creditors under the judgment of the state court in a suit to which complainant was not a party. Probably, under a qualified appearance for that purpose, and upon a showing of the facts, complainant might secure from the state court an order withholding from distribution enough of the estate to meet its demand when established. But whether all this be so or not, the question is now simply one concerning the equitable jurisdiction of this court. We hold that upon complainant's own averments this court has not now jurisdiction in equity to give the relief sought, and consequently we must sustain the demurrer to the bill as amended. Judgment will be entered sustaining the demurrer and dismissing the bill, with costs. The dismissal, however, should be without prejudice to complainant's right to bring such other suit in the premises as may be proper.

THE CHAUNCEY M. DEPEW.

(District Court, S. D. New York. May 13, 1904.)

1. COLLISION—VESSEL LYING AT END OF PIER—NEW YORK STATUTE.

The New York statute prohibiting vessels from lying at the end of a pier in the North or East river, and providing that "any vessel * * * so lying shall not be entitled to claim or demand damages for any injury caused by any vessel entering or leaving any adjacent pier," is penal in character, and is not to be extended by construction; and the exemption from liability it gives extends only to injuries to a vessel so lying which result from her obstructing the entrance to an adjacent pier. Where a canal boat lying at the end of a pier in East river headed to the northward was struck on the bow and injured by a barge in tow alongside a tug, which the tug was intending to leave at the end of the pier to be worked around to the south side by hand, the statute affords the tug no protection from liability.

In Admiralty. Suit for collision.

James J. Macklin, for libellant.

Butler, Notman, Joline & Mynderse, and Archibald G. Thacher, for claimant.

ADAMS, District Judge. This action was brought by the libellant, Thomas A. Quigley, to recover the damages sustained by reason of

collision between his canal boat William S. Deyo, about 100 feet long, and the barge Sharon, in tow of the steamtug Chauncey M. Depew, on the 15th of May, 1903, about 10:30 o'clock P. M. The canal boat was lying, duly lighted, outside of three other boats, at the foot of 91st Street, East River, waiting to be picked up by a tug and towed away. The Depew, with the barge Kingston and, outside of her, the barge Sharon, on the starboard side, and the Rhinebeck, on the port side, was taking the Sharon to 91st Street, intending to leave her there.

There is some controversy with respect to the Deyo's position at the pier, it being contended by the libellant, that she was lying headed to the northward, with her starboard side away from the pier, and by the claimant, that she was lying headed to the southward, with her port side away from the pier. The preponderance of the testimony supports the libellant's claim in this respect and I conclude that the boat's starboard side was exposed to contact with vessels approaching the pier. The Deyo's starboard bow was driven in and she was more injured by the collision than would have resulted from an ordinary contact of navigation. The tug was, therefore, in fault.

It remains for consideration, whether the tug can find exemption from liability under the provisions of chapter 378, § 879, p. 314, Laws N. Y. 1897, which provides:

"It shall not be lawful for any vessel, canal boat, barge, lighter or tug to obstruct the waters of the harbor by lying at the exterior end of wharves in the waters of the North or East river, except at their own risk of injury from vessels entering or leaving any adjacent dock or pier; any vessel, canal boat, barge, lighter or tug so lying shall not be entitled to claim or demand damages for any injury caused by any vessel entering or leaving any adjacent pier."

The tug was taking the Sharon to 91st Street, intending to leave her, for discharge of her cargo of hay, etc., on the south side. The tide was flood. In the slip to which the boat was bound, the water is shoal, there not being enough for tugs to go in. The usual method of putting a boat in there, is to take her to the end of the pier, have her get a line out and then give her a start around to the side, from which point she would be worked in by hand. On this occasion, the tug came up the river, rounded to in the Gate, then headed down and worked the boat in, intending to put her against the end of the pier, but while rounding to, the master of the tug found it was occupied. The master of the barge asked the master of the tug to land him alongside of a boat lying on the south side of the pier but the latter replied: "You will have to land on the end."

It is evident that the Sharon was bound, for a brief time at least, for the end of the pier and the question to be determined is, whether the tug is exempted from the liability, which would attach to her for negligent navigation in bringing her too violently in contact with this stationary boat, by reason of the statute.

In the several times this statute has been under consideration in the admiralty courts, it has been held that the statute did not absolve the moving vessel from liability. *The F. W. Devoe* (D. C.) 94 Fed. 1019; *The Cincinnati* (D. C.) 95 Fed. 302; *The Dean Richmond* (D. C.) 103 Fed. 701, affirmed 107 Fed. 1001, 47 C. C. A. 138; *The Buenos Aires*

(D. C.) 119 Fed. 493. In *The Cincinnati*, Judge Thomas said (page 304):

"The *Cincinnati* was not 'entering or leaving any adjacent dock or pier.' The *Fletcher* was obstructing *Starin's* slip to the south, but the *Cincinnati* was not seeking to enter that slip, and her entrance thereto was not anticipated, nor had she any right therein. The statute undoubtedly intends to prevent the use of piers forming the boundaries of slips to or from which another vessel seeks entrance or exit. A vessel in passage may not rake a ship lying at the end of a pier in the river, and exculpate itself from responding therefor upon the ground that it was making its way in a fog and trying to find and enter its proper slip, and that the injured ship was at the end of the pier, in violation of the statute. A broader view of the statute than that here adopted is inconsistent with its words and spirit, and incompatible with the necessities of the port, which the legislature may be presumed to have considered."

In *The Dean Richmond*, on appeal, Judge Wallace, referring to the statute, said (page 1002, 107 Fed., page 139, 47 C. C. A.):

"We think it to be the meaning of the statute to subject vessels lying at the end of piers to all risks of injury caused by other vessels in entering or leaving the docks next adjacent thereto. As it is in the nature of a penal statute, it is not to be extended to cover cases which are not clearly within its terms." * * * "The statute does not say in terms that the offending vessel shall assume the risk for all injuries caused by any vessel entering any dock or leaving any pier adjacent to that at which the offending vessel is lying, and there is room for interpreting it as meaning that she shall assume all risk for injuries from vessels entering or leaving any dock or pier adjacent to the offending vessel. It has been held in several adjudications that a vessel so moored at the head of a pier as to obstruct the proper navigation of another vessel in making her entrance to, or exit from, her dock or wharf, as where she is not lying abreast the pier, or her bow or stern project across the dock, infringes on the privileges of the other, and is responsible for the damages caused by a collision, if the other vessel has exercised due precautions. *The Canima* (C. C.) 32 Fed. 302; *The Etruria* (D. C.) 88 Fed. 555; *The Martino Cilento* (D. C.) 22 Fed. 859. The purpose of the present statute would seem to remove all controversy in such a case in respect to the extent of the obstruction caused by the manner in which the vessel is moored, and in respect to the navigation of the vessel whose privilege has been infringed. A broader view of the statute is incompatible with the necessities of the harbor, which the legislature may be presumed to have considered."

The barge here though ultimately bound for the south side of the pier, was at first bound for the end of the pier and collided when endeavoring to reach the latter position. She was not strictly, therefore, "entering or leaving any adjacent dock or pier," but going to the end of the pier and attempting to do what is sought to be interposed here as a barrier to recovery. The case is not clearly enough within the terms of the statute to justify the allowance of its interposition.

Moreover, the collision, though with a vessel at the end of the pier, was not at a part of the moored vessel which in any way interfered with the moving vessel's course in obtaining the position she ultimately sought. The contact was with the bow of the moored vessel, which the testimony shows was entirely out of the way of the moving vessel in going to the lower side of the pier and the latter's privilege was obviously not infringed. The master of the tug testified, on cross examination, referring to the *Deyo*:

"Q. You could have avoided her easy enough, that is, so far as that part is concerned, between 20 feet aft of her bow and stern, assuming her stern

pointed up stream. Is that right? It was only necessary for you to touch that part in making your landing of the barge, 20 feet abaft of the bow? A. That is all."

The Deyo was lying at the end of the pier, waiting to be towed away, and got the best position she could. The captain testified:

"Q. Why were you not put in the slip there? A. Because we couldn't get in there. The tug claims he couldn't put me in there on account of the low tide, one side; on the low tide, the captain said he couldn't get in there. The other side they were unloading ice and wouldn't let us lay there."

I do not think the circumstances of this case will justify denying the allowance of the damages the libellant is entitled to recover by the admiralty law.

Decree for the libellant, with an order of reference.

KASADARIAN v. JAMES HILL MFG. CO.

(Circuit Court, D. Rhode Island. May 19, 1904.)

No. 2,737.

1. MASTER AND SERVANT—INJURIES TO SERVANT—PLEADING.

Where the first four counts of a declaration charged that plaintiff, a helper engaged in assisting in changing the dies on a press, was injured by the fall of the plunger from an unknown cause, and such fall might have been due either to the negligence of a fellow servant in charge of the press or to some cause which could not reasonably have been anticipated and guarded against by the master, such counts did not state a cause of action.

2. SAME—DUTY OF SERVANT.

Where plaintiff, a mere laborer called on to exert his strength in changing a heavy die, part of a power press, was injured by the falling of the plunger, he was not necessarily chargeable with the duty of a close inspection of the condition of the machinery near which he was set to work, but was entitled to assume that the person in immediate charge of the machine had properly performed his duty to make it safe before requiring plaintiff to work about it.

3. SAME.

Where a declaration in an action for injuries to a laborer directed to assist in changing heavy dies, part of a power press, charged negligence in the employment of an incompetent die setter, and alleged that such person negligently directed plaintiff to assist in changing the dies without taking proper precautions to prevent a fall of the plunger, and that the plunger, from some unknown cause, fell and injured plaintiff, such allegations sufficiently stated a cause of action, since the competency of the die setter, and whether it was negligent to change the dies without effectually providing against the fall of the plunger, were for the jury.

On Demurrer to Declaration.

Frank Healy, for plaintiff.

Herbert A. Rice, for defendant.

BROWN, District Judge. The plaintiff's hands were injured by the fall of the plunger of a power press at a time when the plaintiff was engaged in helping to set a die. It is alleged that the plunger fell from

some cause unknown to the plaintiff. The immediate management of the operations of the power press, including the starting, stopping, and changing of dies, obviously was not a duty which the master had contracted to perform in person or by a vice principal. It is not alleged that the plaintiff was charged with any duty in respect to the control of the machine; and, from the allegation that the plaintiff was "engaged in the operation of helping to set a die on said press while said press was not in use and apparently harmless," it does not follow that the master was under any obligation to instruct the plaintiff either in the management of the machine or in the use of the safety device which formed part of the machine. The mere allegation of the existence of a duty to give warning or instructions is of no avail unless facts are pleaded from which it appears, or from which a jury may find, that a duty to give warning or instructions existed. *Fortin v. Manville Co.*, 128 Fed. 642 (decided in this court March 22, 1904).

Was the master guilty of any breach of duty in failing to warn the plaintiff of the danger of a fall of the plunger? It does not appear that the machine was in any respect defective; and it does appear that the machine was provided with a safety device which, if applied, would have prevented the fall of the plunger. Apparently, the plaintiff's theory of the case is that a failure to use the safety device was a failure by the master to provide the plaintiff with a safe place to work. The temporary application of a safety device, and the control of the machine during the operation of changing dies, were a part of the duties of those in immediate charge of the machine, and not a part of the master's general duties.

In the first four counts of the declaration, there are no allegations showing that the machine was not in charge of a competent man. It appears, however, that the plaintiff was merely an unskilled laborer or helper. The fall of the plunger may have been due either to negligence of a fellow servant in charge of the power press or to some cause which could not reasonably have been anticipated and guarded against by the master. If, as is alleged in the fifth count, the plaintiff was working as a helper to the person in charge of the machine, who had control of the changing of the dies and of the machine at that time, a failure to set the safety device, and an attempt to set the dies while the machine was still capable of being connected with power through the treadle, cannot be said to be a failure of the master to perform any of his duties. The only danger inferable from the declaration is the danger that the person in charge of the machine might undertake to change the dies before the flywheel had stopped, and that at this time the treadle, in some way, might be operated, and cause the fall of the plunger, unless it was blocked by the temporary application of the safety device. Unless it was the duty of the master to foresee that the change of dies might be attempted while the flywheel was still in motion, and that the treadle might be operated at this time, there was no reason to give warning. If, however, it was negligent to change the dies under such circumstances, this was negligence in the temporary management of the machine. The master's duty in this respect could have been performed by placing a competent person in charge of the machine. If there was a duty to give warning, it must be predicated upon the possibility of

negligence of the person in charge of the machine. The ordinary method of providing against negligence of this character would consist, not in giving warning of the consequences of negligence, but in placing in charge of the machine a person who would not be negligent.

I am of the opinion that the first four counts of the declaration are not demurrable on the ground that they show a voluntary assumption of risk or that the plaintiff was guilty of contributory negligence. A mere laborer, called upon to exert his strength in handling heavy dies, is not necessarily chargeable with the duty of a close inspection of the condition of the machinery near which he is set to work. On the contrary, he may be entitled to assume that the person in immediate charge of the machine has properly performed his duty; and the mere fact that a flywheel is running on a shaft in the vicinity of the machine does not, in itself, necessarily inform him that the machine has not been made safe for the operation of changing the dies.

The fifth count charges negligence in employing an incompetent die setter, and alleges that this person negligently directed the plaintiff to work in changing the dies without taking proper precautions to prevent a fall of the plunger, and that the plunger, from some cause unknown, fell. Whether the die setter was incompetent, and whether it was negligent in the die setter to change the dies without providing effectually against the fall of the plunger, either by setting the safety device or by waiting until the flywheel had ceased to revolve, are questions for the jury under the allegations of the declaration. But the gist of this count is negligence of the defendant in employing an incompetent servant. While the precise cause of the fall of the plunger is said to be unknown, and while the mere fall of the plunger gives rise to no presumption of negligence of the master in the performance of his duty, it may give rise to a reasonable presumption of negligence of the fellow servant in control of the machine. Even should it appear that the treadle was operated, and caused the fall of the plunger, it cannot be held on demurrer that this would necessarily relieve the defendant from liability. Whether there was reasonable cause to anticipate the operation of the treadle during the change of dies, and whether reasonable diligence required that this should have been foreseen and guarded against, are questions for the jury.

I am of the opinion that neither of the first four counts discloses a cause of action, but that none of the causes of demurrer to the fifth count is sufficient. Demurrers to the first four counts sustained on the ground that neither count sufficiently states a cause of action. Demurrer to the fifth count overruled.

CHICAGO & N. W. RY. CO. v. ANDREWS.

(Circuit Court of Appeals, Eighth Circuit. April 6, 1904.)

No. 1,889.

1. RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Plaintiff stepped upon a railroad crossing at a small station directly in front of a train which was moving eastward at a speed of 50 miles an hour, and was struck and injured. It was in the daytime, and he testified that he stopped momentarily 6 feet north of the track, and listened and looked in the direction from which the train was approaching, but could not see because of smoke and steam blown across the track by a strong northwest wind from a pumphouse 200 feet west of the crossing, the smoke-stack of which was 25 feet high and 18 feet north of the nearest rail. He also testified that he did not hear the train nor any whistle. The engineer testified that he saw plaintiff apparently about to cross the track, and gave two alarm whistles. Eighteen out of 19 witnesses for both parties also testified that they heard such whistles. A number of other witnesses testified that they looked along the tracks westward, and readily and plainly saw the approaching train, and there was no testimony except plaintiff's that the view was obstructed. *Held* that, in view of the physical facts, as well as such testimony, the testimony of plaintiff that he stopped and looked and listened without seeing or hearing the train was contrary to all reasonable probability, and not worthy of credence; that, if the view was obstructed nearly to the crossing, as he testified, such fact required him, in the exercise of ordinary care, to take greater precautions before going on the track, and in either event he was guilty of such culpable negligence as precluded him, as matter of law, from recovering for the injury, conceding the negligence of the railroad company.

2. EVIDENCE—NEGATIVE TESTIMONY.

The rule that affirmative testimony is to be preferred to negative is not an absolute one, which requires the entire rejection of negative testimony, but is applied as a proper means of determining the relative value or weight of testimony. Where the attention of those testifying to a negative was not attracted to the occurrence which they say they did not see or hear, and where their situation was not such that they probably would have observed it, their testimony is not inconsistent with that of witnesses who were in a situation favorable for observation, and who testify affirmatively and positively to the occurrence.

Thayer, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

Frank F. Dawley (N. M. Hubbard, Jr., and Charles E. Wheeler, on the brief), for plaintiff in error.

George H. Carr and B. O. Clark (James P. Hewitt, A. C. Parker, and Craig T. Wright, on the brief), for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge. This was an action by Andrews against the railway company to recover damages for personal injuries sustained by him in a street crossing accident wherein he was struck

¶ 2. Negative testimony, see note to Delaware, L. & W. R. Co. v. Devore, 52 C. C. A. 82.

See Evidence, vol. 20, Cent. Dig. § 2434.

130 F.—5

by one of the company's passenger trains. The petition charged the company with negligence in propelling its train over the crossing at a high rate of speed without ringing the bell or giving other timely warning. The answer denied the statements of the petition, and alleged that the injury was due to plaintiff's negligence in not exercising proper care and caution for his own protection. Plaintiff recovered in the Circuit Court. The controlling question is whether the jury should have been directed to return a verdict for defendant because of contributory negligence on the part of plaintiff. Defendant's double-track railroad crosses Main street in Scranton, a small town in Iowa, at right angles, the railroad extending east and west and the street north and south. The north track is used by east-bound trains and the south track by those west-bound. The space occupied by the tracks in the vicinity of the crossing is about 50 feet in width. The crossing is at grade, and the tracks extend westward in a straight line over level ground for a mile and a half or more. West of the street and north of the tracks, but not less than eight feet from the north rail, are a water tank, pumphouse, and toolhouse—all small structures. The distances from the center of the street to these structures are about: water tank, 90 feet; pumphouse, 200 feet; and toolhouse, 375 feet. The pumphouse is used to shelter a stationary engine employed in pumping water into the water tank. The smokestack to this engine is approximately 12 inches in diameter and 25 feet in height, and is 18 feet from the north rail. North of the tracks and west of the street about 800 feet are stockyards. The accident occurred about 11 o'clock in the forenoon, January 24, 1901. A west-bound freight train upon the south track was moving slowly toward the crossing. An east-bound passenger train, called the "Chicago Special," struck plaintiff as he stepped upon the north track on his way over the crossing to a grain elevator south of the tracks. This passenger train usually traveled at a high rate of speed, and did not stop at Scranton. On this occasion it was composed of one of the largest passenger engines, weighing 90 tons, and eight cars, was traveling about 50 miles an hour, and was an hour late. Plaintiff was a stone mason, 40 years of age, in good health, and had good hearing and eyesight. He had worked much in the neighborhood of the railroad, frequently crossed the tracks at the crossing, knew of the double track, the surroundings at the crossing, and the speed of the Chicago Special. He also knew that a train might pass at any time, and that some of the trains, including this one, did not stop at Scranton. It will be assumed that the evidence showed negligence on the part of defendant in that the bell on the passenger engine was not rung as required by the statute (section 2072, Code Iowa 1897), and that the flagman at the crossing, instead of being where plaintiff was accustomed to see him, was at a place where he could not be seen by plaintiff, and failed to give warning of the approach of the passenger train. In approaching the crossing from the north, the view of the railroad to the west was somewhat obstructed by the structures and the stockyards before named, and, while there was a conflict in the evidence upon the point, it will be assumed that plaintiff was not negligent in failing to see the approaching passenger train before he reached

the immediate vicinity of the tracks. The claim that plaintiff's negligence proximately contributed to the injury rests largely upon the evidence bearing upon the extent to which the view to the west along the tracks was obstructed by smoke and steam from the pumphouse. Plaintiff testified that no whistle was sounded; that he approached the crossing to a point near the center of the street, and within about six feet north of the north rail; that the west-bound freight train on the south main track was then nearing the crossing, "was going very slow," and "did not make any noise to amount to anything"; that from this point he looked carefully along the tracks in both directions, and listened attentively, but could not see or hear any train other than the freight train; that the view along the tracks to the west was entirely obstructed by heavy smoke and steam from the pumphouse, which was being carried upon and across the tracks by a strong wind from the northwest, and that this smoke and steam extended "clear to the crossing." In view of the other evidence, it is important to note plaintiff's specific description of the precaution taken by him for his own safety. He testified:

"I walked down to the track, where I went to cut across. * * * I came to a halt, and stopped and listened, and I looked west and see this [pumphouse] smoke, saw this [freight] train coming up over the east side on the south track slowly, and looked for this other [west-bound] passenger, which was about due, east of it; then stopped again, with my left foot over the rail of the north track; then heard the chickering of the rail of the north track; then I looked up. When I heard the chickering I looked up, and threw up my right hand and jumped. When I looked up I saw the [east-bound passenger] train. The engine seemed to swell right up—to come right up. Then I made a desperate leap to get out of the way, and said 'Oh!' as I jumped. * * * I looked west first, then I looked east, and I saw this freight. The head of the freight engine was * * * near about the street line on the east side of the street. * * * A team had just crossed the street ahead of me, across the track. * * * The smoke that came from this pumphouse did not obstruct the view of the crossing at all as I looked south. * * * [Before I reached the crossing] this freight train from the east was a little east of the street. I had seen it. I see it moving up that way. I hurried in order to cross ahead of it. I hurried down to the track. As I walked down towards the track, I walked pretty fast so as to get ahead of that [freight] engine. I intended to cross ahead of the [freight] engine, if the coast was clear. * * * Q. So that you looked west, to see if there was a train coming, when you first reached the track? How close were you then? A. Oh, about six feet, I should judge. The freight engine had not yet crossed. I came down to a halt then. Just stopped and looked up the track, and then looked east. Where I stopped still was near about the center of the crossing. I was not between the rails. Was outside of the north rail; near about six feet from the north rail. When I thought there was no danger, I moved to get across the track. When I finally started to go across the track, I did not stop any more, but it was the engine of the passenger train that stopped me. * * * At the time, after I listened, I made the start across the track, and stepped my right foot and then the left, and I was over the north rail when I heard the jar or chinkling of the rails, and I looked up and saw the train coming right at me. * * * I placed my eyes on this freight train, and advanced across the track, and heard the chinkling of the rails, and looked up and saw this train, and jumped to the right off the track. * * * I did not see the other train until I heard the chinkling of the rails and looked up as I was moving across the street and jumped to the right. * * * When I looked towards the west for the train, I saw a man in the middle of the track, just coming in that smoke—just coming that way. I could not tell who that was, his back was to me. He was not as far away as the toolhouse. He was along by the tank, in there. * * * This man had been in the middle of the track

and went up that way. He was getting right just into the edge of the smoke. I do not know where he went to then. He had disappeared when I turned my head to look. That cloud of smoke did not hide him. He was going right into the smoke when I saw him. I could not see into the smoke a little ways. I saw the man right in the edge, the smoke whirling around him. * * * I turned, and looked east for the other trains, and looked for this [freight] train across the track. Q. Then did you look back again to the west? A. No, sir; not until I heard the chickering of the rails. Q. When you passed the water tank, you only looked west once, did you? A. Once. When I looked at the train—saw the train. Q. After passing the water tank, you only looked west once until the time you were struck—just the instant before you were struck? A. No, I looked, I think, twice, because I turned my head and looked up the track, and then stepped on this plank and looked up there again, and saw this man advance up the track in the middle, and then saw this [freight] engine, and looked eastward, and ventured across the track. * * * Q. And just before taking these two steps that brought you to the track; that is, the last time you looked to the west? A. No, sir; I looked again just before I advanced to step on the track; that is when I saw the man. At that time I could not see any engine. I don't know whether the man got hit by the engine. I was not looking that way then. Q. After you saw that man disappear in the cloud of smoke, you only took just one step or so before you got hit, did you? A. The second step. Q. The second step after you looked west and saw the man, you got hit? A. Stepped with the right foot first, and then with the left foot over the north rail. I got the left foot clear over the rail. I saw the engine, and made a desperate effort to get out of the way. I don't know how close the engine was. I thought it was right after me; seemed to swell right up and strike me with terror. Q. You did not see it until the instant it struck you? A. Just as I gathered myself to jump, it came right at me, and I just said 'Oh!' as I jumped. * * * I did not hear anything but the chickering of the rail, was all the signal I had of that train; that was too late to do me any good. * * * Q. Now, when you stopped and stood there, and looked west to see if you could see the train, you say the cloud of smoke prevented you from seeing down the track, so that the look did not help you any. You could not determine whether there was a train or not when you looked, could you? A. No, sir. The time I stood there listening about two steps north of the track was pretty short. It was a very short time. Q. You did not wait there long enough to do any more than just look and turn back again and look? A. And look at the crossing and this other [freight] train to see if the coast was clear. * * * I looked west first. Q. Then you saw the smoke, and then you looked east and walked across? A. No, I looked east and to this other [freight] train. And I started to go across. [On my way to the crossing] I noticed some men out west there. Did not know who they were. Noticed them up there about the toolhouse. Just noticed a handcar there. Noticed men up there. * * * When I got down within a couple of steps, and looked west, I did not see anything of the section men. All I saw was one man advancing up in the center of the track. He was up a little above the tank. * * * Q. And nothing to obstruct your view down that track for a whole mile, except this smoke you speak of? A. The smoke and the man in the center of the track. * * * [On my way down to the crossing] I met Mr. Holden, and said 'Good morning.' I walked rather fast from there down to the six feet from the tracks. Not just expressly for the purpose of crossing ahead of the freight train. I was in a hurry for my business that I had to perform. I did not think I was a little late in getting there. I thought I had plenty of time to do it, but I didn't usually go lounging along; * * * am a quick active man in that way. * * * Q. But so far as the [freight] train alone was concerned, you would have had time to go through ahead of the freight train? A. I would not have had plenty of time."

Seven witnesses for plaintiff gave testimony bearing upon some of the matters to which plaintiff testified. Shaffer, who was on Main street at a considerable distance north of the crossing, says plaintiff stopped a few feet north of the north rail, and looked both east and west. Taft, Robertson, Shaffer, and Clews say that smoke in con-

siderable quantity was coming from the pumphouse, but none of them says or indicates that it obstructed, or was sufficient to obstruct, the view along the railroad. Williams, who came over the crossing from the south about two minutes before the accident, says he looked to the west along the tracks for a quarter of a mile, and "I had no trouble making up my mind there was no train anywhere near me towards the west. I could see all right. There was nothing to prevent me from seeing." Clews, who was in the toolhouse, heard the "rumbling of the train and the clatter of the rails" about five seconds before the train passed the toolhouse, and "heard two short whistles after the engine and part of the train had passed that point." The other six heard two sharp blasts of the whistle given at the water tank. Taft also heard the rumbling of the train before the two blasts of the whistle. None of the seven heard the train or its whistle prior to the times stated. This is the whole of the evidence produced by plaintiff upon the subject under consideration.

Of the witnesses for the defendant, five, who were in the immediate vicinity of the crossing, say they looked along the tracks to the west, past the water tank and pumphouse, and readily and plainly saw the approaching train; and four, who were at or west of the pumphouse, say they looked along the tracks to the east, and readily and plainly saw the crossing and objects about it. All were in positions where they necessarily looked through the identical space in which plaintiff locates the smoke, and all refer to the time when the train was approaching and was within a mile of the station. Olive, a druggist, testified that he started west along the north track on his way home; that when near the water tank he saw the approaching train about a mile away, and retraced his steps to the sidewalk on the west side of the street and north of the tracks, where he remained until after the train passed; that he followed the train with his eyes, and when it was whistling saw the steam from the whistle; that after passing the stockyards the whistle was sounded sharply and loudly more than once; that the smoke did not interfere with the view of the tracks to the west, or prevent seeing the train; and that he was the second person to reach plaintiff after the accident. McClure, assistant cashier of a bank at Scranton at the time of the trial, but station agent for defendant company at the time of the accident, says he looked to the west out of the bay window in the south side of the depot, which was immediately north of the tracks and east of the street, and distinctly saw the train about a half mile from the station. Sparks, the engineer of the passenger train, testified that he saw objects about the crossing for three-quarters of a mile as he approached the station; that he saw the plaintiff, and, as the latter did not appear to notice the approach of the train, a succession of short blasts of the whistle was given, commencing before the train reached the pumphouse. Thompson, the head brakeman of the freight train, testified that he was on the depot platform about 200 feet east of the place of the accident, and readily saw the passenger train approach from near the stockyards; that he heard the danger signals and saw plaintiff; that plaintiff did not appear to notice the coming train, and he (the witness) hallooed with all his might to attract plaintiff's atten-

tion, and was the first to reach plaintiff after the accident. Griffe, a farmer, who was in a poultry store which faces west on Main street, says he heard a shrill whistle, and on stepping out of the door heard two other blasts of the whistle and the rumbling of a train, and then saw the passenger train pass the water tank. Six of defendant's witnesses, including the engineer and fireman of the passenger train, say a station whistle and a crossing whistle were distinctly sounded before the stockyards were passed. Ten of them say there was whistling before the water tank was reached, and eleven say there was whistling at the water tank. All but one of the eleven saw the train before it reached the crossing, and those familiar with the operation of trains describe the later blasts of the whistle as "danger signals."

Counsel for defendant call attention to the rule which prefers the testimony of a witness who testifies to an affirmative to that of a witness who testifies to a negative (*Stitt v. Huidekoper*, 17 Wall. 384, 394, 21 L. Ed. 644; *Rhodes v. United States*, 25 C. C. A. 186, 79 Fed. 740; *Allen v. Bond* [Ind.] 14 N. E. 492, 496), and urge that it be applied to the testimony respecting the sounding of the whistle. The rule is not absolute. *Northern Pacific Railroad Co. v. Freeman*, 174 U. S. 379, 381, 19 Sup. Ct. 763, 43 L. Ed. 1014. It rests upon common experience, and is applied as a proper means of determining the relative value or weight of conflicting testimony, and not as a basis for the entire rejection of negative testimony. But where the attention of those testifying to a negative was not attracted to the occurrence which they say they did not see or hear, and where their situation was not such that they probably would have observed it, their testimony is not inconsistent with that of credible witnesses who were in a situation favorable for observation, and who testify affirmatively and positively to the occurrence. There is then no conflict. *Horn v. B. & O. Ry. Co.*, 4 C. C. A. 346, 351, 54 Fed. 301; *Hubbard v. Boston & A. R. Co.*, 159 Mass. 320, 34 N. E. 459; *Culhane v. N. Y. Cent., etc., Co.*, 60 N. Y. 133, 137. We do not deem it necessary to consider the opportunity for observation possessed by each of plaintiff's witnesses, or the effect to be given to their testimony that they did not hear the earlier whistling described by defendant's witnesses. It is sufficient to say that of the 19 witnesses who testified about the blowing of the whistle, all but plaintiff, irrespective of the party by whom they were called, declared that at least two danger signals were sounded at the water tank by the whistle of the passenger engine. Considering the speed of the train, that there were two of the signals, necessarily sounded in succession, and that the occasion for giving them must have been conveyed to the mind of the engineer before either of them was given, this evidence is nothing short of a perfect demonstration that the engineer, before passing the space which plaintiff says was filled with smoke, looked directly through it, and saw plaintiff about to cross the tracks. It is equally a demonstration that plaintiff could have looked through the same space and have seen the approaching train. There is also the testimony of nine witnesses, as before stated, who say that, at the very time when plaintiff claims to have looked, they looked along the tracks through the same space, and readily and plainly saw the objects beyond it. And Wil-

liams, plaintiff's witness, declares he saw through this space two minutes before, and found it free from obstruction. Of all the witnesses plaintiff alone says he looked along the tracks and found the view obstructed by smoke; that he listened, and could not hear the train. He is mistaken. Common knowledge tells us that in the presence of a strong wind blowing across the track the train could not have been entirely or largely obscured by smoke issuing from a small smokestack 25 feet in the air and only 18 feet from the track. The action of the wind would necessarily dissipate the smoke, and prevent it from falling to the ground in large volume so near the track from which it was being discharged. If plaintiff had looked with any care, he would have seen the train. It was there. His presence upon the track and the collision were practically simultaneous. His mistake is disclosed by his own testimony, wherein he admits his controlling anxiety to cross in advance of the freight train, and says: "I placed my eyes on this freight train, and advanced [two steps] across the track, and heard the chinkling of the rails, and looked up and saw this [passenger] train." He actually stepped immediately in front of the moving train. If plaintiff had listened attentively, he would also have heard the approaching train before he took the two unfortunate steps. Common knowledge tells us that a train of cars drawn over a railroad track by a 90-ton engine at a rate of 50 miles an hour makes a great noise, and that even a strong wind, not of extraordinary or unusual velocity or force, does not render it possible for such a train to come unexpectedly upon one who possesses a good sense of hearing and is reasonably employing it for his protection under circumstances which otherwise permit its free use. That plaintiff, in possession of good sight and hearing, could have looked and listened, and not have seen or heard the train, which must have been in plain view, and making a great noise, is contrary to all reasonable probability, in opposition to the physical facts, and impossible of belief. In these circumstances his testimony that he looked and listened is entitled to no credence, and does not create a conflict in the evidence. *Artz v. Chicago, etc., R. R. Co.*, 34 Iowa, 153, 159; *Staford v. Chippewa, etc., Co.*, 110 Wis. 331, 345, 349, 85 N. W. 1036; *Marland v. Pittsburgh, etc., R. R. Co.*, 123 Pa. 487, 490, 16 Atl. 624, 10 Am. St. Rep. 541; *Hauser v. Central R. R. Co.*, 147 Pa. 440, 445, 23 Atl. 766; *Myers v. B. & O. R. R.*, 150 Pa. 386, 390, 24 Atl. 747; *Lake Erie, etc., R. R. Co. v. Stick*, 143 Ind. 449, 459, 463, 41 N. E. 365; *Kelsay v. Mo. Pac. Ry. Co.*, 129 Mo. 362, 374, 376, 30 S. W. 339; *Payne v. C. & A. R. R. Co.*, 136 Mo. 562, 575, 579, 584, 33 S. W. 308; *Chicago, etc., Ry. Co. v. Pounds*, 27 C. C. A. 112, 114, 82 Fed. 217; *So. Ry. Co. v. Smith*, 30 C. C. A. 58, 62, 86 Fed. 292, 40 L. R. A. 746. In *Chicago, etc., Ry. Co. v. Pounds*, *supra*, the plaintiff had testified that about 50 feet before reaching the crossing "he looked south, but did not see any train, and could not see down the track more than 300 yards, to a place where a fence approached the track, because the wind raised a cloud of dust which obstructed his view beyond that point." It was said by Judge Thayer, in speaking for this court:

"It is suggested, however, that there was evidence tending to show that at one point, about 50 feet from the crossing, the plaintiff did glance down the track, but failed to see the train, and that such testimony rendered it necessary for the jury to determine whether he exercised due care. There are two answers to this suggestion. In the first place, it seems physically impossible that the plaintiff could have looked at the point indicated without seeing the train, which was then in plain view, and was seen by every one else in his vicinity."

The duty of persons approaching and going upon railroad crossings has heretofore been the subject of careful consideration in this court. *Reynolds v. Great Northern Ry. Co.*, 16 C. C. A. 435, 69 Fed. 808, 29 L. R. A. 695; *Pyle v. Clark*, 25 C. C. A. 190, 79 Fed. 744; *Chicago, etc., Ry. Co. v. Pounds*, supra; *Chicago, etc., Ry. Co. v. Rossow*, 54 C. C. A. 313, 117 Fed. 491. In the *Pounds* Case the subject is fully covered in Judge Thayer's opinion as follows:

"The doctrine is too well settled to admit of controversy that a person is guilty of culpable negligence if he walks or drives upon a railroad crossing in close proximity to an approaching train, which is in plain view, and might have been seen for a considerable distance before he reached the track. The precautions which a person traveling upon the highway must take when he approaches a railroad crossing are so well defined that it is no longer the province of a jury to decide whether such person was guilty of negligence in those cases where it is obvious that in approaching the crossing he failed to look up and down the track as he might have done, and thereby avoided all risk of injury. It is universally conceded that a person omits not only a reasonable but a necessary precaution when he drives upon a railroad crossing, at a place where his view is unobstructed, without looking along the track with sufficient care to ascertain with certainty whether a train is coming from either direction. A railroad track is in itself a warning of danger, because trains may be expected to pass at any moment. Therefore the courts have repeatedly declared that a person is, as a matter of law, guilty of contributory negligence if he drives upon a crossing without making a vigilant use of his senses of sight and of hearing. If either of these senses is impaired, or for any reason cannot be exercised to advantage, he ought to be more vigilant in the use of the other."

We adhere to this statement of the law because it is eminently right, and because it is sustained by the decisions of the Supreme Court of the United States, and by the decisions of courts generally. *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Schofield v. Chicago, etc., Ry. Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758; *Elliott v. Chicago, etc., Ry. Co.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068; *Northern Pacific R. R. Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; *Blount v. Grand Trunk Ry. Co.*, 9 C. C. A. 529, 61 Fed. 375; *MacLeod v. Graven*, 19 C. C. A. 616, 73 Fed. 627; *Shatto v. Erie R. R. Co.*, 59 C. C. A. 1, 121 Fed. 678; *Dunworth v. Grand Trunk Ry. Co.* (C. C. A.) 127 Fed. 307; *McCrorry v. Chicago, etc., Ry. Co.* (C. C.) 31 Fed. 531, by Judge (now Mr. Justice) Brewer; *Lake Shore & M. S. R. R. Co. v. Miller*, 25 Mich. 274; *Butterfield v. Western Railroad Corporation*, 10 Allen, 532, 87 Am. Dec. 678; *Fletcher v. Fitchburg R. R. Co.*, 149 Mass. 127, 21 N. E. 302, 3 L. R. A. 743; *Debbins v. Old Colony R. R. Co.*, 154 Mass. 402, 28 N. E. 274; *Salter v. Utica, etc., R. R. Co.*, 75 N. Y. 273; *Heaney v. Long Island R. R. Co.*, 112 N. Y. 122, 19 N. E. 422; *Foran v. N. Y. Cent., etc., R. R. Co.*, 64 Hun, 510, 19 N. Y.

Supp. 417; *Flemming v. Western Pacific R. R. Co.*, 49 Cal. 253; *Oleson v. L. S. & M. S. Ry. Co.*, 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149; *Marty v. Chicago, etc., Ry. Co.*, 38 Minn. 108, 35 N. W. 670; *Haetsch v. Chicago, etc., Ry. Co.*, 87 Wis. 304, 58 N. W. 393; *Steinhofel v. Chicago, etc., Ry. Co.*, 92 Wis. 123, 130, 65 N. W. 852.

The general rule is that a person going upon or over a railroad crossing is required to use for his own protection ordinary care—such care as men ordinarily exercise under the same or similar circumstances. The amount of care which will satisfy this requirement is necessarily adjusted to and varies with the danger to be guarded against. As the danger, or the probability of injury therefrom, increases, so do men ordinarily increase the care which they exercise for their own protection. If, therefore, when plaintiff approached the crossing, smoke interfered with the view along the tracks to the west, and prevented him from readily or plainly determining whether a train was coming from that direction, he was at once apprised of the increased danger, and it became his duty to exercise greater caution and vigilance for his own safety than would have been required otherwise. This is what men in general would have done, and is what a man of ordinary prudence would ordinarily have done. It is what the law imperatively requires of one in such a situation. Among the cases last cited, the following applied this rule where the view along the track was obstructed by smoke, dust, or otherwise: *Chicago, etc., Ry. Co. v. Pounds*; *McCrary v. Chicago, etc., Ry. Co.*; *Shatto v. Erie R. R. Co.*; *Butterfield v. Western Railroad Corporation*; *Fletcher v. Fitchburg R. R. Co.*; *Debbins v. Old Colony R. R. Co.*; *Heaney v. Long Island R. R. Co.*; *Foran v. N. Y. Cent., etc., R. R. Co.*; *Flemming v. Western Pacific R. R. Co.*; *Oleson v. L. S. & M. S. Ry. Co.*; *Marty v. Chicago, etc., Ry. Co.* Instead of adjusting his caution and vigilance to the increased danger, plaintiff, according to his own statement, made only the most casual observation of the surroundings, and hastily advanced upon the track without in the least assuring himself that a train was not approaching from the west. His observation was not even sufficient to enable him to judge whether the claimed obstruction by the smoke was of some permanence, or was merely momentary, and would be lifted by the next gust of wind. He testified:

"Q. * * * You could not determine whether there was a train or not when you looked, could you? A. No, sir. The time I stood there listening about two steps north of the track was pretty short. It was a very short time. Q. You did not wait there long enough to do any more than just look, and turn back again and look? A. And look at the crossing and this other [freight] train to see if the coast was clear. * * * I looked west first. Q. Then you saw the smoke, and then you looked east and walked across? A. No. I looked east and to this other [freight] train. And I started to go across."

He took but two steps when the train was upon him. It is impossible to regard this otherwise than as gross negligence. With no real precaution for his own safety, and not acting under any controlling necessity, plaintiff stepped from a place of entire security to one of great danger, when a moment's reflection and attentive observation would have avoided the injury.

We assume, as before stated, that defendant was negligent in not complying with the statutory requirement to ring the bell, and in not having the flagman at his accustomed place to give warning of the approach of the train. If plaintiff's injury were the proximate result of this negligence of defendant company unmixed with negligence of his own, he would be entitled to recover; but this is not the case made by the evidence. The controlling rule is stated in *Railroad v. Houston*, 95 U. S. 697, 702, 24 L. Ed. 542:

"Negligence of the company's employes in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure."

Plaintiff's contributory negligence was so conclusively shown by the evidence that the court erred in not directing a verdict for defendant. *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L. Ed. 867; *Pleasants v. Fant*, 22 Wall. 116, 120, 22 L. Ed. 780; *Herbert v. Butler*, 97 U. S. 319, 320, 24 L. Ed. 958; *Montclair v. Dana*, 107 U. S. 162, 2 Sup. Ct. 403, 27 L. Ed. 436; *North Penn. R. R. Co. v. Bank*, 123 U. S. 727, 733, 8 Sup. Ct. 266, 31 L. Ed. 287; *Elliott v. Chicago*, etc., R. R. Co., 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068; *Union Pacific Ry. Co. v. McDonald*, 152 U. S. 262, 282, 14 Sup. Ct. 619, 38 L. Ed. 434; *Southern Pacific Co. v. Pool*, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed. 485; *Coughran v. Bigelow*, 164 U. S. 301, 307, 17 Sup. Ct. 117, 41 L. Ed. 442; *Patton v. Texas & Pac. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Dist. of Columbia v. Moulton*, 182 U. S. 576, 582, 21 Sup. Ct. 840, 45 L. Ed. 1237.

The judgment is reversed, with a direction to grant a new trial.

THAYER, Circuit Judge (dissenting). I am not able to concur in the view that the trial court should have instructed the jury, as a matter of law, that the plaintiff below was guilty of contributory negligence, and could not recover for that reason. As I construe the majority opinion, it is conceded that the evidence adduced at the trial tended to show, and that a jury might have found, that the defendant railroad company was guilty of negligence, such negligence consisting in running one of its trains, which was an hour behind time, through a village of considerable size, and across one of its main traveled streets, at a rate of speed approximating 50 miles an hour, without giving the customary warning signals of its approach, and without having a flagman at the crossing to warn people that a train was coming. Distressing accidents are very likely to occur when a train is run at such speed across the streets of a town, at grade, especially when the customary signals of its approach are not given

and flagmen are not at their posts of duty, so that the act complained of cannot be regarded otherwise than as one of gross negligence.

It is further conceded in the majority opinion that, as the plaintiff below approached the track from the north, his view to the west was obstructed so that it cannot be said that he was guilty of negligence in failing to see the approaching passenger train until he had reached the track, and was on the point of crossing it. Now, the plaintiff himself testified that when he reached the track he halted, and both looked and listened, as it was his duty to do; that his view to the west, the direction in which he first looked, was obstructed, except for a distance of about 175 feet, by a cloud of smoke on the track, which came from the pumping station; that after glancing to the west he looked east, from which direction a train was about due, and, not seeing any train in either direction, he then stepped on the track with a view of crossing it, when for the first time he heard the approaching train, and, turning, saw the engine emerging from the cloud of smoke which up to that time had obscured his view to the west. Thereupon he jumped back, but, owing to the speed of the train, was not able to get out of the way in time to avoid being struck by the engine. The majority of the court say that, in view of the situation, the plaintiff's testimony "is entitled to no credence, and does not create a conflict of evidence," for which reason it should have been disregarded, and the jury directed to find a verdict in favor of the defendant. I do not concur in that view. I think that this court has no right to disregard the plaintiff's testimony, and that it cannot do so without usurping the functions of the jury. In this class of cases it may at times happen that the testimony of a witness to the effect that he looked in a given direction and did not see an approaching train is so far at variance with the physical facts of the situation as to justify a court in disregarding it because if he looked he must have seen it. The case in hand is not of that kind. It is by no means impossible, or even improbable, that the plaintiff did look west along the track as far as his view would extend, and that he neither saw nor heard the approaching train, if it gave no warning of its coming. A cloud of smoke falling on the track on a dark lowering day such as that on which the accident occurred would naturally render a train invisible for a few moments to one standing where the plaintiff appears to have stood, although it may have been visible to persons standing elsewhere. Any one who has ever stood on a railroad track on a dark, cloudy day and observed the effect of a cloud of black smoke drifting across the track can well understand that this train may have been invisible to the plaintiff until it emerged from the smoke in the manner which he describes. The train was moving at the rate of 74 feet per second, which would enable it to cover the intervening space between the crossing and the point where the smoke was drifting across the track in about two seconds. Besides, it is not improbable that in the midst of other noises in and about the station, occasioned in part by the freight train which was moving on the adjoining track toward the crossing, the plaintiff did not in fact hear the coming train until it was almost upon him, and too late to get out of the way. In view of these considerations I agree with the

learned judge of the trial court that it was the right and the duty of the jury, rather than of this court, to say whether the plaintiff had given a truthful account of his conduct on the occasion in question, and, if they found in his favor, to say whether, in view of all the circumstances, he did not exercise that degree of care in crossing the track which a footman of ordinary prudence in his situation would have exercised. There is no evidence in this record that when the plaintiff started to cross the track he had any knowledge that the train from the west was belated, and had not passed the station. The plaintiff says that when he approached the crossing on the morning of the accident he did not know whether it had passed the station or not, but "guessed" that it had gone. He acted upon the assumption, therefore, that no train from the west was expected, and, hearing no warning signals, and finding no flagman at the crossing, he may have stepped on the track, which he could cross in a few seconds, with only a momentary glance to the west. Under such circumstances as these a momentary glance to the west would be all that a foot passenger could reasonably be expected to give before attempting to cross the track. At all events, it was the function of the jury to say whether he acted with ordinary prudence, or should have waited longer until the smoke cloud floated away, and studied the situation more carefully. Upon the whole, therefore, I conclude that it cannot be said that 12 reasonable men, listening to the testimony which is contained in this record, must have found that the plaintiff testified falsely, and that he went on the track heedlessly, without looking to the west or listening. Twelve jurors, acting under proper instructions, have in fact found to the contrary of this contention, and this court should not reverse that finding if the right of juries to determine issues of fact is to be further respected. I think the judgment below should be affirmed.

In re PACIFIC MAIL S. S. CO.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1904.)

No. 1,035.

1. SHIPPING—LIMITATION OF LIABILITY FOR SINKING OF VESSEL—INCOMPETENCY OF CREW.

Under Rev. St. § 4463 [U. S. Comp. St. 1901, p. 3045], which requires every steam vessel carrying passengers to have in her service a full complement of licensed officers and full crew sufficient at all times to manage the vessel, as well as by the general maritime law, the crew must not only be sufficient in numbers, but competent for all the duties they may be called on to perform in any exigency that is likely to happen, and unless such a crew is supplied the owners are not entitled, under section 4493 [U. S. Comp. St. 1901, p. 3058], to a limitation of liability under section 4283 [U. S. Comp. St. 1901, p. 2943] for damages to persons and baggage growing out of the loss of the vessel.

¶ 1. Limitation of liability of shipowners, see note to *The Longfellow*, 45 C. C. A. 387.

2. SAME.

The passenger steamer *City of Rio de Janeiro* on her return voyage from Hongkong and intermediate ports struck on a sunken rock outside San Francisco in a fog and darkness, and sank in 20 minutes thereafter, carrying down a large number of her passengers and crew. She carried eleven lifeboats, all of which should have been launched in five minutes, but only three were launched at all, and two of those were swamped by improper handling. The crew were sufficient in number, but were Chinese, and only two were able to understand the language spoken by the officers, who were white men, and they had never been drilled in launching the lifeboats. Held, that the vessel was not manned by an efficient and competent crew, such as it was the duty of the owners to provide; that the insufficiency of the crew was the paramount cause of the damages to persons and baggage; and that such owners were not entitled to a limitation of liability for damages to persons and baggage arising from the sinking of the vessel.

Appeal from the District Court of the United States for the Northern District of California.

See 126 Fed. 1020.

William Denman, R. P. Henshall, Gavin McNab, Thomas & Gerstle, W. P. Humphrey, R. H. Countryman, W. H. Willitt, Chickering & Gregory, R. H. Cross, Bien & Jackson, A. Morgenthal, Corget & Goodwin, Charles E. Snook, and Roger Johnson, for claimants.

Charles Page and Ward McAllister, for Pacific Mail S. S. Co.

William Denman, for Kate West et al.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The steamship *City of Rio de Janeiro*, whose home port was San Francisco, on entering the Bay of San Francisco on the 22d day of February, 1901, on one of her return trips from Hongkong and intermediate ports, struck a reef of rocks near the Golden Gate, and within 20 minutes sunk beneath the waters, carrying down a large number of her passengers and crew and all of her cargo. Shortly thereafter, to wit, March 19, 1901, the Pacific Mail Steamship Company, owner of the ship, filed in the court below its petition for limitation of liability, alleging therein that the sinking of the ship occurred by reason of the perils of the sea, and praying for a limitation of liability, and for the privilege of contesting any liability for the losses that occurred. The court below directed a reference to its commissioner to ascertain and report the value of the ship and freight pending. Evidence was taken showing the amounts collected by the petitioner on the ship's outward voyage for passage money and freight and the amount received and agreed to be paid upon the return voyage. In respect to the question of freight pending it was shown that all goods lost had been shipped under bills of lading containing these provisions:

"Freight for the same to be paid in United States gold coin, said freight to be considered earned, steamer or goods lost or not lost at any stage of the entire transit. * * * The foregoing bill of lading is issued subject to the terms and conditions of an act of Congress of the United States of America, approved February 13, 1893, entitled 'An Act relating to Navigation of Vessels, Bills of Lading, and to certain obligations, duties and rights in connection with the carriage of property,' (Acts of 52d Congress, 2d Session, page 445,

Chap. 105,) the provisions of which are hereby made a part hereof, and are deemed to control and express the contract of the parties hereto in all cases where there may be (if there be any such cases) a difference between the expressed provisions of the bill of lading and the terms of such Act of Congress."

Based upon evidence introduced before the commissioner, that officer reported to the court findings to the effect that the petitioner was, and still is, the sole owner of the steamship, the value of which, in its wrecked condition, was \$150; that the voyage which terminated in the wreck and loss of the ship began at Hongkong, China, on the 22d day of January, 1901; that the freight money collected at Hongkong and way ports for the voyage to San Francisco, and that which was to have been collected at the latter place, "is earned and the freight pending in this cause," and appraising the value of the ship and her freight pending as follows:

| | |
|---|--------------------|
| Steamship City of Rio de Janeiro, and her tackle, apparel, machinery, and furniture | \$ 150 00 |
| Freight and passage money pending..... | 24,827 93 |
| Total | \$24,977 93 |

The commissioner took no account of the freight or passenger money collected on the outward voyage of the ship.

To his report the claimant Sarah Guyon, administratrix of the estate of Henry Guyon, deceased, filed these exceptions:

"(I) Claimant excepts to the following finding of said report and appraisal: 'I do further find that the voyage which terminated in the wreck and loss of the aforesaid steamship at the entrance to San Francisco Harbor on the 22d day of February, 1901, began at Hongkong on the 22d day of January, 1901,' on the grounds: (a) That there is no evidence before the commissioner to show that the said voyage began at Hongkong, China. (b) That the evidence conclusively established that the voyage for which the freight was pending at the time of the said wreck began at San Francisco on or about December 14, 1900, and extended through the ports of Honolulu, Yokohama, Kobe, Nagasaki, Shanghai, to Hongkong, and return to San Francisco, touching at the same ports in the reverse order.

(II) Claimant excepts to the following finding: 'I do further find the freight and passage money pending for the aforesaid voyage to be the sum of \$24,827.93,' on the grounds: (a) That the term 'aforesaid voyage' is ambiguous, and that it cannot be determined therefrom whether the said term applies to the voyage on which the City of Rio de Janeiro was wrecked or whether it refers to the portion of the voyage beginning at Hongkong January 22, 1901; claimant admitting the said sum to be the freight pending for the latter, but excepting to the said sum as a finding of the freight for the entire voyage. (b) That the evidence conclusively shows the freight pending for the voyage on which the City of Rio de Janeiro was wrecked to have been \$55,412.95.

"(III) Claimant excepts to the following finding and appraisal: 'I do further appraise the value of the said steamship and her freight pending as follows:

| | |
|--|--------------------|
| Steamship City of Rio de Janeiro, her tackle, apparel, and furniture | \$ 150 00 |
| Freight and passage money pending..... | 24,827 93 |
| Total | \$24,997 93 |

—On the grounds: (a) That the evidence conclusively shows that the venture in which claimant was interested was the sending of the City of Rio de Janeiro on a voyage from San Francisco to Asiatic ports and return to carry for hire passengers, freight, and mails, and that the freight pending for the

portion of the voyage from San Francisco to Hongkong, amounting to \$30,202.11, should be added to the \$24,827.97 earned on the homeward trip of the voyage; making the total appraisement for the freight pending \$55,040.04 (b) That the evidence shows conclusively that the value of the ship after the wreck was \$500, and that this sum should be included in the said appraisement. (c) That the appraisement of the said vessel should be amended as follows:

| | |
|-------------------------------------|-------------|
| Freight pending for venture..... | \$55,040 04 |
| Wreck \$500.00; boats \$150.00..... | 650 00 |
| Total | \$55,690 04 |

"Wherefore claimant prays that the said exceptions to the said report and appraisement be allowed, and that the said appraisement be recommitted to the said commissioner, with instructions to amend the same by adding thereto the item of \$30,212.11 as for freight pending for the outward trip of the voyage on which the said steamship sank, and the item of \$500 as for the value of the ship after the wreck."

The petitioner filed the following:

"Petitioners except to the following finding of said report and appraisement: 'And that which was to have been collected at San Francisco.' Wherefore petitioners pray that the said appraisement be recommitted to the said commissioner, with instructions to amend the same by deducting the sum of \$13,729.17 for freight which was to have been collected at San Francisco."

All of the exceptions were overruled.

Various claims having been filed for damage by reason of loss of life and for loss of goods, baggage, etc., the cause came on for trial before the court upon its merits. The court found and held that the sinking of the ship was not due to any peril of the sea, but to the gross negligence of her master and pilot; after which the petitioner moved for a reduction of the bond so far as it represented freight pending, which motion was denied.

In and by its final decree the court below awarded damages to various of the claimants who were representatives of lost passengers, or who had themselves suffered injury, in amounts aggregating \$35,125, but limited the liability of the petitioner for such damages to the sum of \$24,977.93, with interest thereon from March 19, 1901, which sum, with interest, was directed to be paid into the registry of the court within 10 days, and to be apportioned among the various claimants to whom damages were so awarded after the payment out of such fund of all the costs of the proceeding except the cost incurred in the proceedings relating to the appraisement of the steamship and her freight pending, which the petitioner was directed to pay. The court held against the claims of Clara Barwick, and Ruth Miller as executrix of the estate of Sarah Wakefield, deceased.

From the decree various of the claimants, as also the petitioner, have appealed. The ground of the petitioner's appeal is that, inasmuch as the court below found and held that the loss occurred solely by reason of the negligence of the ship's officers, and not by reason of any peril of the sea, it erred in holding that pending freight included either any prepaid freight or prepaid passage money, or any uncollected and uncollectible or unearned freight, and that, instead of limiting the liability of the ship to \$24,977.93, it should have been limited to the sum of \$4,483.53, which latter sum, it is contended on

the part of the petitioner, is the aggregate amount of the value of the ship and her freight pending. The main ground of the appeal of those of the claimants whose appeal is from that portion of the final decree adjudging "that the liability of the Pacific Mail Steamship Company for said damages be and hereby is limited to the sum of \$24,977.93 and interest thereon from March 19, 1901," is that the crew of the lost steamship "spoke and understood only the language of a race and nation different from the officers immediately in command over them in the launching of the lifeboats on said vessel, and that they could not speak or understand the commands of said officers, and that they had never been drilled in the launching of the lifeboats to train them to launch the same without commands, and that the said crew was therefore not sufficient at all times to man said steam vessel carrying passengers, and that the injury to claimants arose from said insufficiency," and "that the officers of said City of Rio de Janeiro in command of her eleven lifeboats could not speak any language which the members of the crew immediately under their command in launching said boats could understand, which said crew had not been trained in launching said boats, and therefore that said Pacific Mail Steamship Company has not supplied a full complement of officers sufficient at all times to manage a steam vessel carrying passengers, and that the injuries to the claimants arose through said insufficiency."

It is apparent that, if this position of the claimants is well founded, the petitioner is not entitled to any limitation of its liability, the questions presented on its appeal become immaterial, and the claimants to whom damages were awarded by the court below will be entitled to judgment for the full amounts so awarded them, together with their costs, whether the voyage on which the disaster occurred should include the round trip from San Francisco to Hongkong and back, as contended on the part of the claimants, or is limited to the return trip from Hongkong to San Francisco, as contended on the part of the petitioner. The record shows that the disaster occurred about half past 5 o'clock of the morning of February 22, 1901. The fog was so dense that the day afforded no light. It was very dark, but the water was smooth, and there was but little, if any, list to the ship as she sank, which she did in 20 minutes from the time of striking the rocks. She carried 211 persons and 11 lifeboats, 3 of which were swung by davits from the sides of the ship, and 8 of which were on skids on the roofs of the deckhouses. Their equipment and the apparatus for launching them was good. The evidence is that under such conditions five minutes was ample time for the lowering of the boats. It further shows that there was no panic among the passengers or crew; that the passengers behaved well; and that the captain, immediately upon the ship's striking the rocks, sounded the alarm, and called the crew to the boats. Each of the boats was commanded by a white officer, and manned by a part of the Chinese crew. Yet but three of the eleven boats were lowered into the water, one of which (the aft quarter boat No. 10) was lowered by Officer Coghlan and the ship's carpenter, and but three of the hundred and odd passengers that the ship carried were taken into any boat. There

must, in the very nature of things, have been some paramount, controlling cause for all this. And that cause, we think, is very easily to be seen. It was not merely for the reason that the men depended upon to man the boats were Chinese. To the contrary, the evidence is that the Chinese make excellent sailors. We extract the following from the testimony of Capt. Seabury, a most competent and experienced mariner, and who, at the time of giving his testimony in this cause, had completed his sixty-fifth round voyage from San Francisco to the Orient for the petitioner:

"A. Every time I have been to sea on this side of the continent, and every time I have had a white crew, we have always had trouble with them getting drunk; especially sailing days. At times at sea—when I ran to Australia, where I made five voyages—twice we had a white crew, and there was scarcely a day but I did not have to go to the police court on account of some row that they made. I have always found the Chinese crew obedient, able to do their work, and always on hand in bad weather, and not eyeservants. You do not have to watch them in the ordinary run of work. Q. During those sixty-five voyages, Captain Seabury, have you ever encountered any typhoons? A. Yes, sir; two or three. Q. And any bad weather? A. Yes, sir; I had a very bad one last September. Q. At the time did you have a Chinese crew? A. Yes, sir; on this same ship. Q. How did they behave in time of peril? A. As well as any men could possibly behave. They never stow away in dark nights in bad weather. They are always right there, and you can always make sure of them. Q. Have you ever seen them in time of wreck? A. I never have been wrecked, not since I have been steamshipping. I have in sailing schooners. We had pretty nearly a wreck on the Alaska in 1879, and had to turn back. Q. With a Chinese crew? A. Yes, sir. Q. Did they behave well? A. Yes, sir. Q. How many men have you on the China now in your crew? By the word 'crew' I mean sailors. I do not mean men in the steward's department, or men in the steerage department, or men in the fireroom. I mean crew—sailor men. Mr. Denman: I object to the question as incompetent, irrelevant, and immaterial, and in no way referring to the City of Rio de Janeiro, the ship in issue. A. Thirty-two. Mr. McAllister: Q. Thirty-two men? A. Yes, sir. Q. Can any of those men speak English? Mr. Denman: The same objection. A. All of them can speak English. Some cannot speak quite so well as others, but all of them can understand when you give them an order about the ship. Mr. McAllister: Q. Can you give to a majority of that crew yourself an order in English to haul this rope, or do this or that, whatever you saw fit? A. Yes, sir. Q. And would they understand you? A. Yes, sir."

But how about Chinese sailors, or sailors of any other class or race, who cannot understand the orders that become necessary in the course of their duties because of a lack of knowledge of the language in which they have to be given? That is the question we have to consider and determine here.* It is declared by section 4463 of the same statutes [U. S. Comp. St. 1901, p. 3045] that:

"No steamer carrying passengers shall depart from any port unless she shall have in her service a full complement of licensed officers and full crew, sufficient at all times to manage the vessel, including the proper number of watchmen. But if any such vessel is deprived of the services of any licensed officer,

*Section 4493 of the Revised Statutes of the United States provides that "whenever damage is sustained by any passenger or his baggage from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel, shall be liable to each and every person so injured, to the full amount of damage if it happens through any neglect or failure to comply with the provisions of this title, or through known defects or imperfections of the steaming apparatus or of the hull. * * *"

without the consent, fault, or collusion of the master, owner, or any person interested in the vessel, the deficiency may be temporarily supplied, until others licensed can be obtained."

It is, as was said by Judge Hawley in *Re Meyer* (D. C.) 74 Fed. 885, "the duty of the owners of a steamer carrying goods and passengers, not only to provide a seaworthy vessel, but they must also provide the vessel with a crew adequate in number, and competent for their duty with reference to all the exigencies of the intended route"; not merely competent for the ordinary duties of an uneventful voyage, but for any exigency that is likely to happen, such, for example, as unfortunately did happen in the present case—the striking of the ship on a reef of rocks—and the consequent imperative necessity for instant action to save the lives of passengers and crew. The duty rested upon the petitioner to be prepared for such an emergency, not only by reason of the statute cited, but by the general maritime law. In the case of *The Bark Gentleman*, Olcott, 115, Fed. Cas. No. 5,324, it was held that the owners were liable for furnishing an inadequate crew, which they shipped at the Gambia river, West Africa, large enough in numbers, but sick with fever. In *Tait v. Levy*, 14 East, 482, it was held that, where the captain did not know the coast, and entered the enemy's port, and was captured, the vessel was "incompetently fitted out," because there was no proper master for the purpose of the voyage. In *Parsons v. Empire Transportation Company*, 111 Fed. 202, 208, 49 C. C. A. 302, we held that, where the owners appointed an incompetent superintendent to manage ships in Alaskan waters, they were not entitled to a limitation of liability for loss arising from sending out a barge in wintry and stormy weather. There can, in our opinion, be no doubt that the crew of a ship must be not only sufficient in numbers, but also competent for the duties it may be called upon to perform. The case shows that the City of Rio de Janeiro left the port of Honolulu, on the voyage under consideration, with a crew of 84 Chinamen, officered by white men. The officers could not speak the language of the Chinese, and but two of the latter—the boatswain and chief fireman—could understand that of the officers. Consequently, the orders of the officers had to be communicated either through the boatswain or chief fireman, or by signs and signals. So far as appears, that seems to have worked well enough on the voyage in question, until the ship came to grief, and there arose the necessity for quick and energetic action in the darkness. In that emergency the crew was wholly inefficient and incompetent, as the sad results proved. The boats were in separate places on the ship. The sailors could not understand the language in which the orders of the officers in command of the respective boats had to be given. It was too dark for them to see signs (if signs could have been intelligibly given), and only one of the two Chinese who spoke English appears to have known anything about the lowering of a boat; and there had been no drill of the crew in the matter of lowering them. Under such circumstances it is not surprising that but three of the boats were lowered, one of which was successfully launched by the efforts of Officer Coghlan and the ship's carpenter, another of which was swamped by one of

the Chinese crew letting the after fall down with a run, and the third of which was lowered so slowly that it was swamped as the ship went down. We have no hesitation in holding that the ship was insufficiently manned, for the reason that the sailors were unable to understand and execute the orders made imperative by the exigency that unhappily arose, and resulted so disastrously to life, as well as to property. It results from what has been said that the court below also erred in denying the appellant Clara Barwick's claim made on her own behalf and that of her minor children, for damages for the death of her husband, on the ground that he was a fellow servant of the master and pilot of the ship.

The action of the court in respect to the claim of Ruth Miller, executrix of the estate of Sarah Wakefield, deceased, was, in our opinion, correct.

The judgment is reversed, and the cause remanded, with directions to the court below to enter judgment against the petitioner denying its application for a limitation of liability, and in favor of the respective claimants for the full amount of damages it has heretofore awarded them, with interest and costs, and in favor of the claimant Clara Barwick for such amount of damages as the court shall find from the evidence already taken, or that may be taken, she is entitled to by reason of the death of her husband, and by reason of the loss of his personal effects; and against the claim of Ruth Miller, as executrix of the estate of Sarah Wakefield, deceased, in so far as it is based upon her death.

BRYAN v. DUPOYSTER et al.

(Circuit Court of Appeals. Sixth Circuit. May 14, 1904.)

No. 1,272.

1. MORTGAGE—VALIDITY—LIFE TENANT.

An instrument in the nature of a mortgage executed by a trustee *held* to create no lien on land which could be enforced after the death of the cestui que trust, who had himself created the trust, on the ground that the deed from an ancestor, by which he obtained title, conveyed to him only a life estate, as had been adjudged by the highest court of the state.

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

The following is the opinion of the Circuit Court, by Evans, District Judge, filed June 23, 1903;

Since the filing of the court's opinion upon the demurrer to the bill of complaint, the defendant Joseph C. Dupoyster has answered, elaborately setting forth his defenses, and, the testimony having been taken, the case is now before the court for final adjudication. Manifestly the status is radically different from what it was when the court, in the opinion referred to, stated the grounds upon which it did not sustain the demurrer to the bill. Towards the close of that opinion the court endeavored to clearly and specifically give those reasons. It has now become necessary to analyze the agreement sued on, as well as the evidence. By that agreement, made in September, 1890, but never acknowledged or recorded, "Jos. C. Dupoyster, acting as the trustee for Ben S. Dupoyster," and not otherwise, stipulated that upon the contingencies stated therein the writing should "have the force and effect of a lien

against the lands and improvements embraced in the said Fort Jefferson Improvement tracts" for the payment of the debt described therein. If J. C. Dupoyster had any authority to act in the premises, it came through a paper dated August 20, 1887, to be referred to more fully hereafter. The agreement sued on does not specifically describe the estate (whether fee simple or less) of Ben S. Dupoyster in the land, but it goes without saying that neither that person, nor any trustee or representative acting in his stead, could mortgage a greater estate therein than was owned by Ben S. Dupoyster. We must therefore, at the outset, ascertain what that estate was, and now proceed to do so.

It appears from one of the exhibits filed with the bill of complaint, and also from the testimony, that in 1859 Thomas Dupoyster conveyed the land described in the bill to Ben S. Dupoyster for life, with remainder to the heirs of the defendant Joseph C. Dupoyster, and it also appears that on the 15th day of June, 1889, the Court of Appeals of Kentucky, in an opinion delivered in the case of Ft. Jefferson Improvement Company v. Dupoyster and others, a copy of which is filed in the record, and which is unofficially reported in 51 S. W. 810, 21 Ky. Law Rep. 515, 48 L. R. A. 537, distinctly held, first, that that deed was the deed of the grantor therein; second, that, properly construed, it conveyed the land to Ben S. Dupoyster for life, with remainder to the children of Jos. C. Dupoyster; and, third, that the remainder thus created for the said children vested in the oldest child to begin with, and opened up in succession as other children were subsequently born. There was a clear and specific adjudication both as to the validity of the deed of 1859, and as to what is its proper construction. This court is by no means at liberty either to question or disregard that adjudication. The matter was properly before the Court of Appeals, and the case was one concerning real estate situated in Kentucky. A conveyance of the land by Dupoyster to the Ft. Jefferson Improvement Company had been set aside by the lower court. The judgment of that court as to all of these matters was affirmed, and, while the judgment appealed from was on some points reversed, such reversal was in respect to other phases of the case clearly indicated in the opinion referred to, and the cause was remanded for further proceedings in accordance with that opinion. The reversal, as plainly appears from the opinion, in no wise affected the adjudication to which I have referred. It therefore appears certain that Ben S. Dupoyster had only an estate for life in the land.

A deed of trust was made on August 20, 1887, by Ben S. Dupoyster to his brother, the defendant Joseph C. Dupoyster, and, under what was supposed to be the authority thereby conferred, the latter, as trustee, executed the paper called a "mortgage," and which is sought to be enforced by this suit. That instrument is dated September 17, 1890. A copy of it embodied in the bill of complaint does not show accurately how it was signed (indeed, the manner of signing it, as shown by that copy, is quite incorrect), but the original paper, filed as an exhibit with the complainants' deposition, does show that it was signed, "B. S. Dupoyster by J. C. Dupoyster, Trustee," and not, as copied in the bill, "B. S. Dupoyster and J. C. Dupoyster, Trustee." It does not appear ever to have been acknowledged or recorded, nor does the original, which is filed, show that Ben S. Dupoyster ever signed, acknowledged, or was a party to it in the direct sense. J. C. Dupoyster executed the paper only as trustee, the language used being "Jos. C. Dupoyster, acting as trustee for Ben S. Dupoyster, both of Ballard county, Ky., party of the first part." In no sense did he act in his individual capacity in the transaction, nor otherwise than in his representative capacity, presumably under the authority supposed to be conferred by the deed of trust above mentioned. It is insisted that under section 2356 of the Kentucky Statutes the mortgage was void, because Ben S. Dupoyster did not join therein as the statute requires, and that it was ineffective because the deed of trust did not authorize the making of a mortgage at all. I do not find it necessary to pass upon either of these objections, although the authority under the deed of trust to make a mortgage at all may be greatly doubted, and I have always supposed that the proper construction of the section referred to, and which in substantially the same form had long been on the statute books of the state, was only to forbid the enforcement of a mortgage, or a deed of trust in the nature of a mortgage, by strict fore-

closure, or otherwise than by a suit in equity, unless the mortgagor, or the grantor in a deed of trust in the nature of a mortgage, expressly joined in a sale of the premises. I think that construction would accurately express the limitations meant to be fixed by the section.

If we assume that the paper sued on, though never acknowledged or recorded, is a valid mortgage on Ben S. Dupoyster's interest in the land, as between him and the complainant, we shall assume as much as it by any possibility authorizes by its language. Ben S. Dupoyster died March 5, 1891. If he had only a life estate in the mortgaged premises, that estate manifestly terminated on that date. Under the construction put by the Court of Appeals upon the deed of Thomas Dupoyster made in 1859, Ben S. Dupoyster clearly had a life estate only in the land, unless he by some possibility inherited some other interest from some one or more of Joseph C. Dupoyster's children to whom the remainder belonged. Joseph C. Dupoyster had only four children, to wit, Leona D. Dupoyster, who was born September, 1861, and died, without having been married and without issue, April, 1883; Ruelva E. Dupoyster, who was born in 1872, and died in August, 1883, without having been married and without issue; Dalva Dupoyster, born September, 1866, now the wife of J. P. Edwards; and Joseph B. Dupoyster, born in October, 1873. Joseph C. Dupoyster is the defendant, and still lives. So do two of his children, namely, Joseph B. Dupoyster and Mrs. Edwards. These being the facts, it follows that under no statute law of the state of Kentucky in force at any time since the oldest child of Joseph C. Dupoyster was born, nor any in force since the deed of 1859 was made, nor especially any in force in 1883, when the two children died, could Ben S. Dupoyster previously to his death have been an heir of either of J. C. Dupoyster's children. It is therefore altogether clear that all the interest in the land which Ben S. Dupoyster ever owned was a life estate under the deed of 1859, and that that interest expired with him on March 5, 1891; thus extinguishing every interest in the land to which a mortgage by Ben S. Dupoyster, or his trustee on his behalf, could extend.

It is urged that J. C. Dupoyster represented, and that Ben S. Dupoyster also represented, to the complainant, when the transactions occurred, that one or both of them owned the fee-simple title to the land, and that the destruction of the clerk's office aided them and was availed of by them in imposing upon the complainant; but, as against certain owners of the land, namely, Joseph C. Dupoyster's wife and his two children, Joseph B. Dupoyster and Mrs. Edwards, who are not pretended to have been present nor to have aided in the accomplishment of the deceit, and who are not parties to this suit, these propositions, even if true, can have no weight. It will not do to hold that owners of land lose the benefit of the notice legally resulting from duly recording their deeds in cases where the clerk's office shall happen to be destroyed without their fault, nor can the title to real estate be taken from legitimate owners by the false representations of strangers to strangers. The complainant might well have had a cause of action at law for the deceit if Joseph C. Dupoyster misled him by fraudulent misrepresentations, but such right would probably be limited to that sort of action, and cannot be so expanded as to involve the right to make the land of innocent third parties, or even that of Joseph C. Dupoyster himself, directly and in kind liable for such misrepresentations. In short, assuming the paper sued on to be a valid mortgage upon the interest of Ben S. Dupoyster in the land, there was nothing for it to operate upon when this suit was brought on the 9th day of May, 1902, nor, indeed, at any time since March 5, 1891, when he died.

It is quite true, as the learned counsel for the complainant insist, that the rights of the children of J. C. Dupoyster who are not parties to this action cannot be affected by the court's decree herein, and it is equally true that adverse claimants of land need not, under certain circumstances, be made parties to a bill to enforce a mortgage thereon, although it may be observed that, under numerous states of case, all parties in interest, and especially those in possession, should be included, but these matters do not reach the difficulties the complainant encounters. His own exhibits and the answer and the evidence demonstrate that his mortgagor, notwithstanding the failure to accurately describe in the mortgage his estate, and whether it was the fee-simple

or less, had only a life estate in the mortgaged premises. The record shows that this estate expired in 1891, quite 11 years before this suit was instituted. There was no claim for a receiver for the rents and profits of the estate, or for their sequestration to the mortgagee's use, prior to the death of Ben S. Dupoyster in March, 1891, and the complainant's bill is adjusted only to the relief prayed for therein, to wit, a sale of the land. Ben S. Dupoyster having died, his interest was gone before this suit was brought, and, as J. C. Dupoyster certainly did not mortgage his individual interest in the land, the mortgage sued on did not cover that interest. So that, when the record demonstrates that when this suit was brought there was no interest in the land described in the bill which could be subjected to the mortgage sought to be enforced, the question necessarily arises, should the chancellor do the vain and useless thing of attempting under his decree to sell an interest or estate which obviously does not exist? Manifestly such a course would be absurd, and for that reason wholly inappropriate in a judicial proceeding. The court should not shut its eyes to what is apparent upon the record, and which makes it obviously impossible for the court to pass any title to anything to any purchaser under a decree herein.

It may be, and probably is, true that Joseph C. Dupoyster inherited some interest in the land through one or both of his dead children, but I am clearly of opinion that there are no apt words in the paper assumed to be a mortgage to show that any individual interest of J. C. Dupoyster was intended to be embraced therein; but, even if the contrary be the case, the defendant the Ft. Jefferson Improvement Company might, and under the opinion of the Court of Appeals probably would, have a lien of a superior nature upon that interest in the land for the purchase money adjudged by the state court to be refunded to that company when the deed to it was set aside, and, if so, this cause would not be ripe for a decree on such a phase of the case until there is a further hearing and showing as to what, if anything, has been done by the state court in that behalf. The record does not accurately advise of what was done after the return of the case to the Ballard circuit court, but comity would require this further information before we act; else we might run counter to the judgment of that court in a cause shown by the record to have been pending there long before this suit was begun. However, I by no means hold that under any possible view of the law or the evidence the complainant has any lien, by virtue of his mortgage or otherwise, upon any interest in the land which J. C. Dupoyster may have inherited from his dead children, which, as his wife appears to be living, could not exceed one undivided fourth thereof, viz., one-half of one-fourth and one-half of another one-fourth therein.

As at present advised, I should certainly hold that Joseph C. Dupoyster's individual interest, if any, in the land did not pass by virtue of the mortgage, nor by virtue of any matters of estoppel growing out of anything that occurred, particularly as the provisions of the Kentucky statute of frauds forbid the enforcement of any agreement for a sale or mortgage of real estate unless such agreement is in writing signed by the party to be charged. In view, however, of the contingency of an appeal from the judgment of this court, if the complainant shall now manifest to the court a desire to take further steps upon one single phase of the case alone, to wit, whether the Ballard circuit court has by its judgment directed or caused to be sold any interest in the land which may have been inherited by Jos. C. Dupoyster from his children who are dead to satisfy any lien to the Ft. Jefferson Improvement Company, adjudged, in the suit heretofore referred to, to have existed in favor of that company to secure the refunding of certain purchase money, he can have the opportunity to do so. But it should not be inferred by this that I shall hold that such interest of Jos. C. Dupoyster in the land is in any wise covered by the agreement which for the purposes of this case we have assumed to be a mortgage. I shall hold precisely the contrary if the question comes before me. Perhaps further steps are unnecessary, and, if not taken, then, upon the considerations stated, the bill should be dismissed, with costs in favor of Joseph C. Dupoyster. His codefendant is a mere formal party.

Another matter possibly ought not altogether to escape the attention of the court, though it was not argued. It is this: The debt of \$5,000 described in the so-called mortgage was not originally the debt of Ben S. Dupoyster, but

was the debt of the Ft. Jefferson Improvement Company. If Ben S. Dupoyster was bound for its payment at all, he was probably so bound only as surety or guarantor, though the nature of any obligation upon him to pay this debt of another nowhere appears outside of the mortgage, and, from this point of view, it may well be doubted, under section 482, Ky. St., first, whether J. C. Dupoyster had any authority to bind Ben S. Dupoyster for the debt at all without authority in writing from the latter; second, whether the deed of trust of August 20, 1887, authorized J. C. Dupoyster, as trustee, without the express consent of Ben S. Dupoyster, either to make Ben S. a guarantor of that debt, or to give a mortgage on the land of the latter to secure such a surety debt; and, third, whether the claim is not now barred either by time (seven years), under section 2551, Ky. St., or by laches, as a stale claim, under the principles announced in the cases of *Hayward v. National Bank*, 96 U. S. 617, 24 L. Ed. 855; *Badger v. Badger*, 2 Wall. 87, 17 L. Ed. 836; and in the numerous cases cited in Rose's Notes on them. This last result would not be avoided upon the facts stated in the bill of complaint as a reason for not sooner bringing this action, and, under the authorities, these results might be enforced in proper cases in equity, although there was no plea relying upon the statute of limitations, or where the state statutes did not apply. However, while suggesting the very pertinent possibilities arising upon these considerations, I do not put my judgment upon them. I prefer to put the decision of the case upon the grounds stated, viz., first, that as Ben S. Dupoyster's life estate expired, in 1891, there was nothing left for his mortgage to operate upon, even assuming that the debt had been validly guarantied and that the mortgage upon his interest in the land was authorized; and, second, that, as Jos. C. Dupoyster did not mortgage his individual interest in the land at all, the complainant had no enforceable claim against that interest. If these two reasons are well founded, the subject is exhausted, and further inquiry is unnecessary.

Exceptions.

Previous to the hearing, no formal exceptions to any of the testimony were filed, although certain vague objections were noted on the depositions while they were being taken. However, those objections in probably every instance were too general to be noticed, or to call for any judgment thereon. But under the order of submission it may be fair to say that some objections were made which should be disposed of:

(1) The court is of opinion that none of the exceptions made on behalf of the defendant should be sustained, and all of them are separately overruled.

(2) The complainant objects to the reading as evidence of certain letters from him to the defendant Joseph C. Dupoyster, filed by the latter as a part of his deposition, and consecutively numbered from 1 to 15, inclusive. These letters seem to have no legitimate bearing upon any issue in the case, and the complainant's objections to their being read or considered as testimony are sustained.

(3) The only other exceptions insisted upon in the order of submission which are not too general and vague to be noticed are those which relate to the copy of certain parts of the record from the state court marked "Exhibit X" in J. C. Dupoyster's deposition, and marked "April 2, 1903, Wm. Henderson," in William Henderson's deposition. The evident object of this testimony is to show that the complainant voluntarily became a party to the suit in the state court, and thereafter made a motion therein for the appointment of a receiver. Doubtless the defendant attaches importance to these facts as justifying the conclusion that the complainant, being a party, is bound by the judgment in the state court, and by the construction put by that court upon the deed of 1859, but, whether this part of the record is read or not, there is enough of the record otherwise in evidence without objection, including the opinion of the Court of Appeals, to show all that is necessary for the purpose of deciding this cause. Besides, the deed of 1859 is copied in the record presented by the complainant, and, even in the absence of the opinion of the Court of Appeals, this court would construe the deed the same way. The objection that the copy covers only a part of the record is not tenable, because it is open to the defendant to put in the parts he thinks will prove what he wants to prove, and to the complainant to put in other parts if he thinks other parts of the

record will neutralize the effect of what the defendant has put in. This would especially be true where the object is limited within such narrow bounds as make it manifestly unnecessary to produce an entire record to prove a single fact which may be as well established by a part of it. The points arising on the exceptions were but little, if at all, argued, but it is assumed that the other objections to this Exhibit X are based upon the provisions of section 905, Rev. St. U. S. [U. S. Comp. St. 1901, p. 677]. The copy offered is certified by the clerk of the state court, and, if the copy were authenticated by the seal of the court, it is doubtful whether the objection that his official character and that his attestation was in due form of law are not certified by the judge of the state court would be maintainable. The contrary was expressly held by Mr. Justice McLean in *Mewster v. Spalding*, 6 McLean. 24, 17 Fed. Cas. 242 (No. 9,513), and by Judge Deady in *Bennett v. Bennett*, 1 Deady, 299, 3 Fed. Cas. 212 (No. 1,318). These rulings were based upon the ground that, inasmuch as the federal courts are presumed to know and to take notice of the laws of all the states, they must be understood as knowing that the clerk's attestation is or is not in due form of law, and that the clerk's official character, etc., should be regarded as established if his certificate is fortified or authenticated by the seal of the court for which he is the clerk. As the clerk did not, under the seal of his court, authenticate the exhibit referred to, the exception of the complainant to the reading of that part of the testimony is sustained. Such exceptions as this, however, should always be taken in advance of the trial, so as to afford an opportunity to correct the omission, and the court on this account has been in much doubt on this point, and, if the proposition was considered as vital, would even now afford an opportunity to supply the omission.

Counsel will prepare a judgment accordingly.

Bloomfield & Crice and F. H. Sullivan, for appellant.

Bagby & Martin, for appellee Dupoyster.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a bill filed May 8, 1902, by the complainant (appellant) against the defendants (appellees) to foreclose what was claimed to be a mortgage on a tract of land containing about 3,500 acres, known as the "Ft. Jefferson Tract," in Ballard county, Ky. The defendant the Ft. Jefferson Improvement Company, although served, did not appear to the bill. Joseph C. Dupoyster filed an answer. To this the complainant filed a general replication. The case was heard upon the pleadings and proof, and a decree rendered dismissing the bill. The complainant below has appealed.

The case turns upon a construction of three conveyances. The complainant relies upon the following instrument, executed and delivered to him, as constituting a mortgage:

"This agreement made and entered into this 17th day of September, 1890, by and between Jos. C. Dupoyster, acting as trustee for Ben S. Dupoyster, both of Ballard County, Ky., party of the first part, and William S. Bryan, of St. Louis, Mo., party of the second part, witnesseth: That whereas the said party of the first part has sold to the Fort Jefferson Improvement Company, an incorporation, a certain tract of land known as the Fort Jefferson tract, situated in Ballard County, Ky., and supposed to contain thirty-five hundred acres, more or less, and whereas said party of the second part is interested in said tract to the value of five thousand dollars (\$5,000.00) in cash paid to the said party of the first part, and whereas the said party of the second part has agreed to receive in lieu of the said five thousand dollars (\$5,000) fifty thousand (50,000) shares of stock in the Fort Jefferson Improvement Company, and whereas, there are certain deferred payments to be made to the party of the first part by the said Fort Jefferson Improvement Company, now, therefore, if the said company or its legal representatives

should fail or refuse to meet and pay said deferred payments in the amounts and at the times agreed upon, then this agreement and instrument of writing shall have the force and effect of a lien against the lands and improvements embraced in the said Fort Jefferson tracts, for the purpose of securing to the said William S. Bryan, his heirs and assigns, the said five thousand dollars (\$5,000) herein named."

Conceding that this instrument, although never acknowledged, was in equity a mortgage upon the tract, it is clear, upon a careful reading, that it was executed, not by Joseph C. Dupoyster acting for himself, but by Joseph C. Dupoyster acting solely as trustee for Ben S. Dupoyster. It so states. Its operation therefore was limited to the interest which Ben S. held in the Ft. Jefferson tract on September 17, 1890. What interest did he hold in it at that time?

Joseph C. Dupoyster was created trustee for his brother, Ben S., by the latter's deed of August 20, 1887, which conveyed the Ft. Jefferson tract and other lands to the former upon a trust defined as follows:

"Said second party is to manage, sell and make deeds, rent, or lease any or all of the above lands according to his best judgment. And my just debts is to be paid out of the proceeds of the first sales, and if the second party should survive the first party, then the proceeds of such sales, rents, etc., to be paid to his second party's son, Joseph B. Dupoyster, after paying for a suitable monument at the tomb of said first party. The second party is to retain a liberal fee for his services in managing the above estate."

It is to be observed that this conveyance provides that, if Joseph C. Dupoyster should survive Ben S., then the proceeds of the sales, rents, etc., shall be paid to Joseph C.'s son, Joseph B., after paying for a suitable monument to Ben S. It purports, therefore, to pass to the trustee the control and disposition of the lands during the lifetime of Ben S., and seemingly recognizes Joseph C.'s son, Joseph B., as the owner of an interest in the lands after the death of Ben S.

The question which naturally suggests itself, in view of the peculiar phraseology of this conveyance, is, what interest did Ben S. have in the lands at the time he made it? And this brings us to a consideration of the terms of the deed of these lands of March 16, 1859, executed by Thomas Dupoyster, the father of Ben S. and Joseph C. Dupoyster, to Ben S. Dupoyster. This deed from Thomas Dupoyster, the party of the first part, to Ben S., the party of the second part, was upon the following express condition:

"It is expressly agreed and understood that said second party is to deed or will said lands to the bodily heirs of J. C. Dupoyster; in other words, the title and possession of said lands is only invested in said second party during his natural lifetime, then to said heirs of J. C. Dupoyster, and second party has the discretion of allotting said lands between said heirs as he may see proper, said second party."

"To have and to hold said lands during his natural lifetime and said heirs and their heirs and assigns together with all the appurtenances thereunto belonging forever with covenant of general warranty."

In an action brought by Joseph C. Dupoyster, in his own right and as administrator of Ben S., against the Ft. Jefferson Improvement Company, to recover the balance of the purchase price of the Ft. Jefferson tract, the Supreme Court of Kentucky held that this deed was genuine, and that it vested in Ben S. only a life estate, with remainder to the children of Joseph C., which vested in the first-born child, and opened up to

let in the after-born children. 21 Ky. Law Rep. 515, 51 S. W. 810, 48 L. R. A. 537.

Ben S. Dupoyster, therefore, at the time he made his brother trustee, and at the time his brother, as trustee, executed the alleged mortgage to the complainant, had and held only a life estate in the Ft. Jefferson tract. It was for this reason the circuit court of Ballard county, in the suit to which we have referred, set aside the sale of the Ft. Jefferson tract to the Ft. Jefferson Improvement Company, and rendered a judgment against Joseph C., individually and as administrator for Ben S., for \$10,000; this being the amount of the payments made by the improvement company on the land. But the court declined to make this judgment a lien on the land. It thus appears that Ben S. Dupoyster never had more than a life estate in the Ft. Jefferson tract, and this estate terminated on March 5, 1891, on which day he died. From that time on there was no interest existing in this land upon which the mortgage could operate.

This is enough to dispose of the case. But it is contended that Joseph C. and Ben S. falsely represented that Ben S. owned the tract in fee simple and that Joseph C. was authorized to mortgage it. If this were established, it might warrant a recovery in an action based on fraud, but it would create no lien upon the land such as is sought to be asserted in this suit.

Again, it is submitted that since Joseph C. had four children, two of whom died unmarried and without issue, he holds, as heir of these deceased children, a certain interest, said to amount to an undivided one-fourth, in the land. But if we concede this was shown, still the situation is not changed, for Joseph C. acted only as trustee for Ben S. in executing the alleged mortgage. He did not assume to mortgage any interest of his own.

The judgment of the court below is affirmed.

RUSSELL et al. v. HAYNER et al.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1904.)

No. 1,015.

1. MECHANICS' LIENS—STATUTES—CONSTRUCTION.

Civ. Code Alaska, §§ 262, 265, 266 (31 Stat. 534, c. 786), providing for and authorizing the foreclosure of mechanics' liens, should be liberally construed, but such lien, being of purely statutory creation, can be established only by a substantial compliance with the statute.

2. SAME—OWNER OF BUILDING—STATEMENT.

Under Civ. Code Alaska, § 262 (31 Stat. 534, c. 786), providing that every builder shall have a lien on a building erected or material furnished or labor performed thereon at the instance of the owner of the building, etc., and section 266, making it the duty of every original contractor within a specified time to file with the recorder a claim, with the name of the owner or reputed owner, if known, a statement of a lien, and a complaint to foreclose the same, failing to state the name of the owner of the building, or to state that the name of the owner was unknown, was insufficient, though it stated the name of the holder of the legal title to the land, and the name of a vendee at whose instance the building was erected.

3. SAME.

In order to establish a mechanic's lien under Civ. Code Alaska, § 262 (31 Stat. 534, c. 786), providing that every mechanic, builder, etc., performing labor on or furnishing material, shall have a lien on the same for work or labor done or material furnished at the instance of the owner of the building or other improvement, or his agent, etc., it must be alleged and proved that the work or labor was done "at the instance of the owner of the building or his agent"; a mere allegation that plaintiffs erected the structure at the instance of one who was in possession of the land under a contract to purchase with the owners being insufficient.

4. SAME—KNOWLEDGE OF OWNER.

A mechanic's lien cannot be established under Civ. Code Alaska, § 265 (31 Stat. 534, c. 786), providing that every building or other improvement constructed on any land with the knowledge of the owner, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner, etc., where it did not appear from the complaint that the owners of the lot on which the building was erected had any knowledge of the contract made by the person in possession, under a contract of purchase, with the contractors, for the construction of a building, or that the building was constructed at the instance of such owners.

5. SAME—FEDERAL COURTS—LAW AND EQUITY.

Since the distinctions between law and equity are preserved in the federal courts, where the complaint in a suit in equity to foreclose a mechanic's lien in a federal court was insufficient for that purpose, it was not sustainable for the purpose of permitting plaintiffs to recover a personal judgment against the person liable on the contract.

Appeal from the District Court of the United States for the Second Division of the District of Alaska.

This is a suit in equity to foreclose a mechanic's lien under the provisions of the Code of Alaska. Section 262 of the Civil Code reads as follows: "Every mechanic * * * builder, contractor, * * * and other persons performing labor upon or furnishing material * * * shall have a lien upon the same for the work or labor done or material furnished at the instance of the owner of the building or other improvement or his agent; and every contractor, subcontractor, architect, builder, or other person having charge of the construction, alteration, or repair, in whole or in part, of any building or other improvement as aforesaid shall be held to be the agent of the owner for the purposes of this Code." Section 265 provides that "every building or other improvement mentioned in section 262 constructed upon any lands with the knowledge of the owner, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein; and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this Code, unless such owner or person having or claiming an interest therein shall, within three days, after he shall have obtained knowledge of the construction, alteration, or repair, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon the land, or upon the building or other improvement situated thereon." Section 266 makes it the duty of every original contractor within a specified time to file with the recorder "a claim * * * with the name of the owner or reputed owner, if known." 31 Stat. 534, c. 786.

The court below sustained a demurrer to the complaint interposed by defendants Helen F. Hayner and Robert Hayner, her husband, upon the ground that the plaintiffs' lien is defective, and the complaint "does not state facts sufficient to constitute a cause of action," and, the plaintiffs having elected to stand on their complaint, the court ordered the suit to be dismissed, and that Helen F. Hayner and Robert Hayner have judgment for their costs. From this judgment the appeal is taken.

¶ 3. See *Mechanics' Liens*, vol. 34, Cent. Dig. §§ 225, 231.

The material allegations of the complaint necessary to be considered are "that Charles Seipel and Leo Bartz are the owners of that certain parcel of ground in Council City [describing it by metes and bounds as the southwest quarter of lot No. 3 in block No. 13]; that Helen F. Hayner is the occupant of the said premises by virtue of an agreement of purchase with the said Leo Bartz and Charles Seipel; * * * that on the 6th day of March, 1903, plaintiffs entered into a written contract with defendant Helen F. Hayner." The complaint also sets forth the contract between Helen F. Hayner and W. H. Russell and W. Myers. The lien of appellants, which is attached to the bill of complaint, after describing the land as set forth in the complaint, states "that Leo Bartz and Charles Seipel are the names of the owners of the said property, and that Helen F. Hayner is the name of the party who occupies the said property under an agreement to purchase, and is the name of the party with whom the contractors entered into a written agreement for the erection of the said building."

Sullivan & Fink, Gordon Hall, and Albert Fink, for appellants.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after making the foregoing statement). Did the court err in sustaining the demurrer and in entering judgment against the appellants?

The act relating to mechanics' liens should be liberally construed. The evident spirit and purpose of the act is to do substantial justice to all parties who may be affected by its provisions, and the courts should avoid unfriendly strictness and mere technicality. *Springer Land Ass'n v. Ford*, 168 U. S. 513, 18 Sup. Ct. 170, 42 L. Ed. 562; *Salt Lake H. Co. v. Chainman M. & E. Co.* (C. C.) 128 Fed. 509; *Hoooven v. Featherstone's Sons*, 111 Fed. 81, 91, 49 C. C. A. 229. But in following this rule courts should always be careful not to impair the force of the statute or fritter away its meaning by construction. *Davis v. Alvord*, 94 U. S. 545, 549, 24 L. Ed. 283; *Malter v. Falcon M. Co.*, 18 Nev. 209, 212, 2 Pac. 50. A mechanic's lien is purely of statutory creation, and can only be maintained by a substantial observance and compliance with the provisions of the statute. Whatever is made necessary to the existence of the lien must be performed, or the attempt to create it will be futile. A substantial adherence to the terms of the statute in the notice of the lien is indispensable. *Phill. on Mech. L.* (3d Ed.) § 9.

The merits of this case, as against Leo Bartz and Charles Seipel, or any other of the parties made defendants herein on the ground that they claim to have some interest in the property, are not involved upon this appeal. The sole question to be determined is whether or not the complaint states facts sufficient to constitute a cause of action against the appellees. There is no direct averment in the complaint, nor any positive statement in the lien, as to the name of the owner of the building, or any statement therein that the owner thereof was unknown. There is considerable diversity of opinion in the state courts as to whether the allegation of the ownership of the building is to be considered essential or not. This conflict arises principally upon the language of the statutes of the particular states. The weight of authority seems to be that, where the statute requires it, the name of the owner, if known, must be stated, and, if the name of the owner is unknown, that fact ought to be stated, and the name of the reputed owner given; that these

facts ought to be stated, independent of the description of the property, in a direct, clear, and positive manner. Phill. on Mech. L. (3d Ed.) § 345, and authorities there cited; Boisot on Mech. L. 379, and authorities there cited.

But even if it could be held that the allegation as to the ownership of the building was sufficient, still the complaint would be defective, because the statement in the lien that Leo Bartz and Charles Seipel are the names of the owners of the lot of land upon which the building was erected, and that Helen F. Hayner was the name of the party who was under an agreement to purchase, and that she was the person who entered into an agreement with the person for the erection of the building, is not sufficient to constitute a compliance with the provisions of the Alaska Code. In *Cross v. Tscharnig*, 27 Or. 49, 39 Pac. 540, it was expressly held that knowledge by the owner of land that improvements are being made on his land is necessary to sustain a lien thereon for work or materials used in such improvement; that a mechanic's lien claim which states that the material was furnished to one person, and that the land was owned by another, but does not state that the material was furnished at the request of the owner, is fatally defective, though it alleges that the person to whom the material was furnished was in possession of the land under a contract of purchase with the owner.

The mere fact that appellants built the structure at the instance of Hayner, who was in possession of the land under a contract of purchase with the owners, is not, of itself, sufficient to constitute a valid lien upon the building. In order to bring the case within the provisions of section 262, it must be alleged and proved that the work or labor was done "at the instance of the owner of the building, or his agent," for it is only where such facts appear that the provisions of section 262, to the effect that "every contractor, * * * builder, or other person, having charge of the construction * * * of any building as aforesaid, shall be held to be the agent of the owner for the purpose of this Code, * * *" applies. To authorize a lien under the provisions of this section, there must be an employment by the owner of the building, or his authorized agent, and the employment of the contractors by Helen F. Hayner, who was occupying the land under a contract of purchase, does not constitute the employment contemplated by this provision of the Code. *Gould v. Wise*, 18 Nev. 253, 258, 3 Pac. 30.

It does not appear from the complaint that the owners of the lot had any knowledge of the contract made by Hayner with appellants for the construction of the building, or that it was constructed at their instance. In order to bring the case within the provisions of section 265 of the Alaska Code, it was necessary for the appellants to have alleged in the complaint or lien that the building was constructed upon the land "with the knowledge of the owner or the person having or claiming any interest therein," for it is only in such cases that this section provides that it shall be held to have been constructed "at the instance of such owner or person or persons having or claiming any interest therein," unless the owner gives the notice therein prescribed, and this notice is not required to be given until after the owner shall have obtained "knowledge of the construction" of the building.

We have not overlooked the contention made in the brief of appellants to the effect that the answer of Bartz and Seipel, which is contained in the record, shows that the owners of the lot had knowledge of the erection of the building, and that it was constructed at their instance and request; but there is nothing alleged in the complaint or lien to that effect, and the answer of the owners of the lot cannot be considered by this court in determining the question before us—as to whether the complaint states facts sufficient to constitute a cause of action against appellees herein. The fact is that appellants were given the opportunity to amend their complaint, and, if there were any material facts that would show knowledge on the part of the owners of the lot, etc., they should have amended their complaint so as to properly present such facts to the court.

It is also claimed that in any event the court erred in sustaining the demurrer interposed by appellees, because the complaint shows facts sufficient to entitle appellants to recover a personal judgment against appellee Helen F. Hayner for whatever sum might be found due upon her contract with appellants. This might be true under the provisions of state codes which have abolished all distinctions existing under the common law as to suits in equity or actions at law, or under a state statute which expressly provides in the act relating to mechanics' liens that such a course may be pursued. But this is purely an equity suit, wherein appellants seek relief only under "the benefits of the law relative to the liens of mechanics and others." They could doubtless bring an action at law to recover a judgment against Helen F. Hayner for whatever amount of money is found due under the contract.

Upon the whole case, we are of opinion that the ruling of the court below was correct. The judgment of the District Court is affirmed, with costs.

BAER v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Circuit Court of Appeals, Fifth Circuit. March 8, 1904.)

No. 1,275.

1. VOLUNTARY BONDS—DAMAGES.

Where a voluntary bond was given in an equity suit pending in the federal court to cover damages arising out of certain orders of the court issued therein, which damages, if not saved to the parties by some protecting order specially given by the court, were *damnum absque injuria*, no recovery could be had on the bond, since no damages could be proved.

2. SAME—CONDITIONS—BREACH.

Where the court ordered a deposit of money as a condition of setting aside an injunction and the appointment of a receiver previously made, and, as part of the same order, directed the execution of a bond to the defendant in the receivership proceedings to indemnify him against any damages he might sustain by depositing the amount so previously provided, to abide the decree of the court in the event the cause should be finally adjudged in defendant's favor, the condition of the bond was not broken, though some of defendant's contentions were sustained; he having recovered little, if anything, after paying costs adjudged against him of the original deposit.

3. SAME—BONDS—CONSTRUCTION.

Where a bond given to secure a deposit made as a condition to the vacation of an order appointing a receiver and granting an injunction was

conditioned to indemnify against such damages as the court might determine had been sustained by reason of the deposit, the words "as the court might determine" should be construed as referring to the court then having jurisdiction of the issues in the case.

In Error to the Circuit Court of the United States for the Southern District of Florida.

This suit was commenced February 1, 1902, in the circuit court of Duval county, state of Florida, by filing the following:

"Declaration.

"In the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Fla.

"George J. Baer, Plaintiff, v. Fidelity & Deposit Company of Maryland,
Defendant.

"The plaintiff, George J. Baer, by his attorneys, sued the defendant, Fidelity & Deposit Company of Maryland, which is now, and was at the time of each of the several acts and things hereinafter mentioned, a corporation organized and existing under and by virtue of the laws of the state of Maryland, and duly authorized, in accordance with the laws of Florida, to do business as a surety company in Florida, for that the said defendant, by its certain writing obligatory, under its corporate seal, bearing date the 10th day of March, 1900, became bound unto the said plaintiff in the sum of five thousand dollars, subject to a condition that if the said defendant should well and truly pay to said plaintiff all such damages as the court might determine he might have already or might thereafter sustain by reason of his depositing the sum of forty-five thousand dollars in the National Bank of Jacksonville, to abide the decree of the Circuit Court of the United States for the Southern District of Florida, in a certain cause in said court then pending, wherein William R. Kerr, George W. Allen, Albert S. Laffin, and John P. Laffin were plaintiffs, and this said plaintiff was defendant, and giving bond in the further sum of fifteen thousand dollars in accordance with the order of said court in said cause, then the said obligation to be null and void, otherwise to remain in full force and virtue; and the said sum of forty-five thousand dollars was by this plaintiff deposited in the National Bank of Jacksonville, to abide the decree of the Circuit Court of the United States for the Southern District of Florida in the certain cause in said condition specified; and this plaintiff did give bond, executed by said defendant as surety, in the further sum of fifteen thousand dollars, in accordance with the order of said court in said cause in said condition specified; and by the final decree in said cause, said complainants were allowed and decreed but the sum of thirty-four thousand eighty-eight dollars and forty-nine cents (\$34,088.49); and that heretofore, to wit, on the 18th day of August, 1899, the sum of, to wit, twenty-five dollars, became due the plaintiff for a sum of money expended by the plaintiff for the services of his solicitor in and about the preparation of the certain bond, in the sum of fifteen thousand dollars, in the condition of said writing obligatory mentioned, and the same remains due and unpaid to this plaintiff, although payment thereof has often been requested of the defendant. And for a second breach of the said condition, this plaintiff says that heretofore, on, to wit, the 18th day of August, 1899, the sum of, to wit, seventy-five dollars, became due the plaintiff for a sum of money expended by the plaintiff and paid to said surety company as a first installment of the premium, to procure said company to become a surety upon the said bond in the sum of fifteen thousand dollars mentioned in the condition contained in said writing obligatory above set forth; and the same remains due and unpaid to this plaintiff, although payment thereof has often been requested of defendant. And for a third breach of the said condition, this plaintiff says that heretofore, on, to wit, the 18th day of August, 1900, there became due the plaintiff the sum of, to wit, seventy-five dollars, for a sum of money expended by the plaintiff and paid to said surety company as a second installment of the premium to procure said company to become a surety upon the said bond in the sum of fifteen thousand dollars mentioned in the condition contained in said writing obligatory above set forth, and the

same remains unpaid to said plaintiff, although payment thereof has often been requested of said defendant. And for a fourth breach of the said condition, this plaintiff says that heretofore, on, to wit, the 1st day of February, 1902, there became due the plaintiff for interest and damages suffered by the detention and deprivation of moneys of the plaintiff, to wit, ten thousand nine hundred and eleven dollars and fifty-one cents of said sum of forty-five thousand dollars so as aforesaid deposited in the National Bank of Jacksonville, to which complainants were decreed not to be entitled, from, to wit, the 5th day of June, 1899, until, to wit, the 1st day of February, 1902, the sum of, to wit, three thousand dollars, and that the same remains unpaid to this said defendant. And for a fifth breach of said condition, this plaintiff says that heretofore, on, to wit, the 1st day of February, 1902, there became due the plaintiff for money expended by him in payment of the costs of the clerk of the said court, upon the receiving, keeping, and paying out of moneys of the plaintiff, to wit, ten thousand nine hundred and eleven dollars and fifty-one cents of said sum of forty-five thousand dollars so as aforesaid deposited in the National Bank of Jacksonville, to which complainants were decreed not to be entitled, the sum of, to wit, twenty-seven and $\frac{28}{100}$ dollars, and the same remains unpaid to this plaintiff, although payment thereof has often been requested of said defendant. And for a sixth breach of said condition, this plaintiff says that heretofore, to wit, on the 1st day of February, 1902, there became due the plaintiff the sum of, to wit, twenty-five dollars, which sum this plaintiff became liable to pay for the services of his solicitor in attending the execution of the final decree of the court in said cause, distributing the said forty-five thousand dollars so as aforesaid deposited in the National Bank of Jacksonville. And the plaintiff demands five thousand dollars damages."

A copy of the bond sued on is as follows, to wit:

"In the Circuit Court of the United States, Southern District of Florida.

"William R. Kerr et al. v. George J. Baer.

"Know all men by these presents, that we, the Fidelity & Deposit Company of Maryland, are held and firmly bound unto George J. Baer, defendant in the above entitled cause, in the sum of five thousand dollars, for the payment whereof well and truly to be made, we hereby bind ourselves, our heirs, executors, successors and assigns.

"Witness our hands and seals this 10th day of March, A. D. 1902.

"The condition of the above obligation is such, that if the above bounden, the Fidelity & Deposit Company of Maryland, shall well and truly pay to the defendant, George J. Baer, all such damages as the Court may determine he may have already or may hereafter sustain, by reason of his depositing the sum of forty-five thousand dollars (\$45,000) in the National Bank of Jacksonville, to abide the decree of the Court in the above entitled cause, and giving bond in the further sum of fifteen thousand (\$15,000.00) dollars in accordance with the order of the Court in this cause, then this obligation to be null and void, otherwise to remain in full force and virtue.

"[Signed]

Fidelity & Deposit Company of Maryland,

"By D. U. Fletcher,

Its Attorney in Fact.

"[Corporate seal of said company.]

"Attest: R. Bowen Daniel, General Agent.

"Approved: James W. Locke, U. S. Judge."

The defendant demurred as follows:

"Now comes the defendant herein, by its attorney, and, demurring to the declaration herein, says that the same is bad in substance, and, for grounds of demurrer, specifies the following: (1) The facts alleged in the declaration fail to show that a cause of action upon the bond has accrued to the plaintiff herein. (2) The declaration fails to allege that the court has determined that the plaintiff has sustained any damage by reason of his depositing the sum of forty-five thousand dollars (\$45,000) in the National Bank of Jacksonville to abide the decree of the United States Circuit Court for the Southern District of Florida, and giving bond in the further sum of fifteen thousand dollars (\$15,000)."

And the circuit judge ruled:

"George J. Baer v. Fidelity & Deposit Co. of Maryland.

"The case of Russell v. Farley, 105 U. S. 433, 26 L. Ed. 1060, is considered conclusive upon the point that a chancery court is competent to determine damages upon a bond given in such court upon an injunction proceeding. That being so, it is considered that the language of the bond, in using the words 'the court,' is sufficient to determine the court in which damages should be determined before suit will lie against the surety; and it is therefore ordered that the demurrer herein to the declaration be, and the same is hereby, sustained, and the plaintiff be permitted to plead anew by the rule day of January, 1903.

"Jacksonville, Fla., December 17, 1902.

"James W. Locke, Judge."

Plaintiff declining to amend, final judgment was entered in accordance with the ruling on demurrer, and the plaintiff brought this case to this court for relief, assigning errors directed at the ruling on demurrer.

H. Bisbee and George C. Bedell, for plaintiff in error.

R. H. Liggett, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Nowhere in the declaration or exhibit do we find anything to show that the bond sued on was given under any law, order, or rule of court. So far as the transcript goes, it was a voluntary bond given in an equity suit, heretofore pending in the Circuit Court for the Southern District of Florida, wherein Kerr and others were plaintiffs, and Baer was defendant, to cover damages arising out of certain orders of court issued therein, which damages, if not saved to the parties by some protecting order specially given by the court, were *damnum absque injuria*. On such a bond no recovery can be had, because no damages can be proved. Russell v. Farley, 105 U. S. 433, 439, 26 L. Ed. 1060.

Both parties, in oral argument and briefs, ask us to look into the record in the said case of Kerr et al. v. Baer et al., 109 Fed. 1059, which, after final decree, was appealed to this court, and take judicial notice of, and treat as a part of this case, the order therein issued providing for the bond sued on. If we follow counsel in this request, and look into the said record, we find that the Circuit Court made an order providing for the deposit of \$45,000 by George J. Baer, and the giving of a bond of \$15,000, as conditions upon which an order appointing a receiver and granting an injunction in aid of such receivership would be set aside, and in the same order we find the following:

"And it is further ordered, adjudged, and decreed that the complainants herein, within three days from this date, do cause to be filed in this court a good and sufficient bond, payable to the defendant George J. Baer, to be approved by the court, in the sum of \$5,000, conditioned to indemnify the said defendant George J. Baer against any damages he may sustain by reason of depositing the aforesaid sum of \$45,000 in the National Bank of Jacksonville to abide the decree of the court in the cause, and giving bond in the further sum of \$15,000, in the event this cause shall be finally adjudicated in favor of the said defendant George J. Baer."

This order providing for the giving of the bond herein sued on distinctly provides that it was to be conditioned to pay damages in

the event that the cause should be finally adjudicated in favor of the defendant George J. Baer. The bond sued on is to be construed in the light of, and in connection with, the order of court requiring it, and therefore the condition to pay damages in the event the cause should be finally adjudicated in favor of the said defendant George J. Baer should be treated as written in the bond.

A further inspection of the record of this court in the same case shows that there was no final adjudication, so to speak, in favor of the defendant Baer. Many of the issues put forward by him were decided in his favor, but the decree of the court was against him, and that decree was predicated upon the proposition that there was a partnership between the parties, in which prior to the suit the defendant Baer held all the assets, and the decree finds that there was in the hands of George J. Baer a very large amount of partnership assets, of which \$34,088.44 were due the complainants, and \$9,986.12 were due to other parties, and the \$45,000 paid into court was awarded to pay the same; so that Baer recovered little, if anything, after paying costs adjudged against him, of the original \$45,000 deposited by him. And we may remark that this shows a very good reason why this court, in its final decree, although our attention was called thereto, allowed no damages in favor of Baer for having paid the \$45,000 into court, and for giving a bond of \$15,000; and it shows affirmatively that by neither giving bond nor paying the money into court under the order of the court was Baer legally or otherwise damaged.

And taking judicial notice, as requested, of the record in the former case, enables the better to follow the learned circuit judge in his construction of the bond in suit. With the former record before us, the words "as the court may determine," inserted in the bond, may well be construed as referring to the court then having jurisdiction of all the issues. It is hardly to be supposed that the court was inviting other and outside litigation to follow final decree in the case. A construction leading to such result should be avoided as not in harmony with equity practice and principles. Equity does not favor a multiplicity of suits, and, when a court of equity has jurisdiction for one purpose, it usually takes jurisdiction for all. And see *Oelrichs v. Spain*, 15 Wall. 211, 228, 21 L. Ed. 43.

In any proper view of the case before us, we are satisfied that the judgment dismissing the suit was correct, and it is affirmed.

THE ELIZA STRONG.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1904.)

No. 1,264.

1. SALVAGE—AMOUNT OF AWARD—REVIEW ON APPEAL.

A salvage award will not be set aside on account of its amount unless the appellate court is convinced that there was a manifest abuse of his discretion by the trial judge.

Appeal from the District Court of the United States for the Western District of Michigan.

The following is the opinion of the court below (Wanty, District Judge):

The steamer Eliza H. Strong, bound for Buffalo, left Duluth on the 27th of August, 1901, with a cargo of pine lumber, consisting of about 950,000 feet, 375,000 to 400,000 feet of which was in the hull. It stopped at Washburn and picked up the schooner Commodore. At about 11 o'clock on the night of the 29th, the Strong sprang a leak, and, in spite of all the efforts of the crew, the water gained on them so that the fires were put out, and the deck load aft began to move, and the crew took to the small boats. Very shortly thereafter part of the deck load aft went overboard, carrying the cabin and smoke stack with it. The crew boarded the Commodore, which sailed into Munising, arriving at about 2 o'clock the next morning. There being no night telegraph service at that place, and no tug stationed there, nothing could be done toward returning to the vessel that night, although this was the intent and purpose of the captain. At about half-past 9 o'clock in the evening of August 30th, the steamer Mueller, laden with a cargo of lumber, bound from Ashland to Chicago, discovered the Strong in her damaged condition, with a part of her deck load gone, and submerged aft, but her bow still out of water. After ascertaining that there was no one on board, a boat from the Mueller, manned by the mate, Louis Larson, and Seamen Ralph Higgie and John W. Bonner, went to the wreck; and Higgie got aboard the Strong on the weather side, and the mate and Bonner boarded her from the lee side. These three men hauled a 9-inch 100-fathom line from the Mueller onto the Strong, and the two seamen held it while the mate chopped away the bulwarks, and they then fastened the line around the stem and anchors of the Strong. The steering gear of the Strong was disabled, and, as the men could do no good aboard of her, after making the line fast, they returned to the Mueller, which towed the Strong at a rate of $2\frac{1}{2}$ miles an hour to Munising Bay, at the entrance of which, at about 9 o'clock in the morning, they met the tug Smith, having aboard the master of the Strong, and substantially all the members of his crew. The Smith had been employed to go out and bring the Strong into Munising. The Mueller declined to give up the Strong, but continued with her in tow, and put her on the beach, in soft mud, where she was protected from the sea, and lay in security in possession of the members of the crew of the Mueller until the marshal took possession of her under process in this cause. The libel was filed, claiming salvage in the sum of \$20,000; alleging the value of the Strong and her cargo to be \$40,000. William H. Strong, as master and bailee of the ship and cargo, claimed them; and, under the order of the court, an appraisal was made, placing the value of the steamer at \$4,500, and her cargo, consisting of 710,000 feet of pine lumber, at \$5,977.20, making the total \$10,477.20.

The Strong was not derelict, although the master and crew had abandoned her for the time being in order to go to Munising for the purpose of getting assistance to save the vessel and cargo. The *Island City*, 1 Black, 123, 17 L. Ed. 70; The *Bark Cleone* (D. C.) 6 Fed. 517, and cases cited on page 525.

¶1. Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.

See Salvage, vol. 43, Cent. Dig. § 133.

The service, however, was a salvage service (The Hyderabad [D. C.] 11 Fed. 749, and cases cited in that opinion and the note following it), although it is colored by the fact that the Strong would have been rescued by her own crew and the tug Smith within a few hours of her rescue by the Mueller, when the service would have been one of towage under contract, instead of one of salvage, under what the salvors thought was a case of derelict. The claimant objects to paying a large sum for a service which could have been contracted for at ordinary rates if the Mueller had not appeared on the scene, while the libelants object to having their work viewed in the light of ordinary service, and claim that it was an arduous and hazardous undertaking, requiring the exercise of great skill and daring, and that the Strong and her cargo might have found the bottom of the lake or the beach, but for the timely assistance of the Mueller. But on a review of the numerous cases, which it is unnecessary to cite, it would seem that the award should not be materially different on account of the ship being technically derelict or not. "Whether derelict or not, the salvage award will not depend upon any fixed rule of proportion. It will be reached as in every other case of salvage—a generous recompense to the salvors, so as to encourage them, and also to stimulate others. The service is the relief of property from an impending peril of the sea." The Eleanor (D. C.) 48 Fed. 842. It is easily conceivable that salvage might take place where the danger to property, the value of the property saved, the risk of life, skill, labor, and duration of service required, would be greater where the vessel was not actually derelict than in another case where it was. In either case the award should be based on the value of the property saved, the danger in which it was found, the risk of life and property required in the rescue, the skill and labor required, and the time lost in the service, together with the value of the means employed and risked.

In considering the question of the value of the property saved, I have come to the conclusion that the appraisal is about correct, although, in the light of a successful voyage afterwards to Buffalo, and the putting of the vessel in repair, the value of the vessel may now appear to be somewhat more; but that appearance comes from the successful issue of the undertaking to tow the vessel to Buffalo, and is based upon the cost of the repairs there. I find that the value of the Strong, in her damaged condition, and her cargo, at the time she was beached, was \$10,477.20. Taking into consideration all of the testimony in the case, it does not seem to me that there was anything bordering on the heroic in rescuing this vessel. The fact that Higgle boarded the damaged ship on the weather side, instead of approaching her on the lee side, where the mate and Bonner boarded her, and the holding of the line by the two seamen while the mate chopped away the bulwarks, would signify that the work could not have been so perilous as the argument of counsel might indicate. There was, of course, danger in boarding the vessel, but not of that unusual character which would have deterred ordinary seamen from the undertaking. The Mueller was never in danger, as the only harm which could come to her would be the parting of the line, and thereby endangering her propeller, wheel, and steering gear, the danger of which was obviated by the slow rate of speed at which she handled the tow. The Mueller's expenses were \$60 a day, and the service took 15½ hours, besides 3 hours longer to reach the course on which her voyage lay. As I have said above, the award in cases of this kind should not be made on the basis of a percentage of the value of the property saved, but should be fixed, under all of the testimony in the case, at an adequate amount, covering the service rendered under the circumstances; and I fix the salvage award in this case at the sum of \$1,300. The mate and seamen have intervened, and their proctor claims that the award should be divided by giving two-thirds to the crew and one-third to the ship, citing The Henry Ewbank, 1 Sumn. 400, Fed. Cas. No. 6,376; 21 Am. & Eng. Enc. Law (1st Ed.) 699-700. But on this branch of the case, as on the other, it seems to me that no hard and fast rule of proportion ought to prevail. It must occur to the least thoughtful mind that there are cases where the danger and work of the seamen might be trivial, and the expense to a great ocean liner in deviating from her course, delaying her voyage many days at enormous expense, would make the rule contended for by the interveners unfair. This award should be paid into the registry of the court, and

distributed as follows: \$500 to the owners of the Mueller; \$100 to the captain; \$100 to Larson, the mate; \$100 each to Seamen Higgle and Bonner; and the balance to the captain, mate, and each member of the crew in proportion to the wages respectively paid to them. Let a decree be entered accordingly.

C. E. Kremer, for appellant.

Frank S. Masten (Harvey D. Goulder and S. H. Holding, of counsel), for claimant.

R. G. MacDonald, for certain appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

PER CURIAM. This is an appeal from a decree allowing \$1,300 salvage to the owner and crew of the steamer Mueller for services in saving the steamer Eliza Strong and cargo. The appellants are the owners of the Mueller, who complain at the amount of the gross salvage allowance, and at the manner of distributing same between the owner and the officers and the crew of the Mueller.

If the matter of the amount of a salvage award, and its distribution between owner and crew, were not one so largely dependent upon the exercise of a sound judicial discretion, we might be disposed to regard the reward as somewhat meager. But neither the amount of the award, nor the method of distribution, is so unsatisfactory as to justify a disturbance of the decree, under the well-settled rule of this court not to set aside a salvage award on account of its amount unless we are plainly convinced that the discretion of the trial judge has been manifestly abused. The *R. R. Rhodes*, 82 Fed. 751, 27 C. C. A. 258; The *H. E. Runnels*, 82 Fed. 755, 27 C. C. A. 183.

Decree affirmed.

SUPREME COUNCIL A. L. H. V. DAIX.

(Circuit Court of Appeals, Third Circuit. May 10, 1904.)

No. 27.

1. BENEFIT LIFE INSURANCE—RENUNCIATION OF CONTRACTS BY ASSOCIATION—RIGHT OF MEMBER TO RESCIND.

Where an incorporated fraternal life insurance association renounced its contracts with members by the adoption of an invalid by-law assuming to arbitrarily reduce the amount payable on their certificates, the right of a member to elect to treat the contract as rescinded, and recover the payments made by him, is not lost by delay, so long as he has not recognized the illegal action by the payment of further assessments, nor done anything to mislead the association to its prejudice.

2. SAME—ACTION TO ENFORCE RESCISSION—LIMITATION.

A provision in the by-laws of a benefit life association limiting the time for bringing an action on any cause or claim arising out of any membership or benefit certificate to one year from the time the cause of action accrues, which from the context is shown to relate to actions after the death of a member to recover on his certificate, cannot be invoked by the association, after it has repudiated its contracts with members, to defeat an action by a member to enforce a rescission and recover payments made by him.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 127 Fed. 374.

Frank P. Prichard, for plaintiff in error.

John H. Sloan, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. It is conceded, as it must be, that the decision of this court in the case of *Supreme Council A. L. H. v. Black*, 123 Fed. 650, 59 C. C. A. 414, is conclusive here against the plaintiff in error (the defendant below), unless the plaintiff in this action (Daix) had lost his right to treat the contract as rescinded by reason of his delay of two years and three months in giving notice of his election to rescind, or the limitation of one year prescribed by the sixty-eighth general by-law of the defendant corporation had barred his action. These two grounds of defense are now to be considered.

1. Aside from the mere delay in signifying his election to rescind, nothing whatever is shown from which a waiver by Daix can be inferred. He received no benefits from the corporation. He did no act in recognition of the validity of the by-law passed in August, 1900, to take effect October 1, 1900, whereby the corporation undertook to reduce the amount payable on the death of Daix from \$5,000 to \$2,000. If Daix, after the receipt of the notice of October 1, 1900, had paid the assessment based on the attempted reduction, he would have signified acquiescence in the by-law. He therefore refrained from paying that assessment. Then the corporation, at the expiration of 30 days after the date of the notice of October 1st, expelled Daix from the order. This action of the corporation is thus recited in the affidavit of defense:

"By reason of the nonpayment of assessment number 39, which was called on October 1, 1900, the said plaintiff was suspended from the defendant order, and subsequently expelled, and therefore his benefit certificate became void, according to the laws of the said defendant."

Thus the corporation undertook to extinguish the rights of Daix under his benefit certificate. Thereafter the corporation steadfastly maintained the position that Daix's certificate was avoided and his rights lost. In this posture of affairs, upon what principle was Daix bound to give earlier notice to the corporation than he did of his election of remedies? We cannot see that he was under any obligation to move sooner in the assertion of his rights. He was not in the enjoyment of any of the fruits of the contract. Never having received anything of value from the corporation, he had no restitution to make. He did no act tending to mislead the corporation, nor any act indicating his intention to waive his right to treat the contract as rescinded. We do not perceive that the corporation suffered any legal or actual injury from the delay of the plaintiff in signifying his election to rescind. No such injury is alleged with sufficient precision in the affidavit of defense. The averments of the affidavit of defense in that particular were justly regarded by the court below as vague and insufficient. We cannot understand how the corporation could have been injured by the

delay of which it now seeks to avail itself. The position of the parties in point of fact had not changed. The corporation had repudiated its contract with Daix, and therein persisted. In conducting its business after the passage of the by-law of August, 1900, it pursued the policy deliberately determined on when that by-law was adopted. It is not suggested in the affidavit of defense, nor is it to be believed, that the corporation would have changed its course of action, had it received earlier notice from Daix of his intention to treat the contract with him as rescinded, and to sue to recover back the assessments he had paid.

2. The general by-law upon which the corporation relies to bar this action is as follows:

"(68) No action at law or in equity, in any court shall be brought or maintained, or any cause or claim arising out of any membership or benefit certificate, unless such action is brought within one year from the time when such action accrues. Such right of action shall accrue 90 days after all proofs called for, in case of death of a member, shall have been furnished. In all cases where no proof of death has been furnished by a beneficiary, as required within 12 months after such death, all claims that might have been made shall be regarded as abandoned, and no proof shall thereafter be received or any claim made thereon."

It is as clear to us as it was to the court below that this by-law has no application to the present cause of action. It is one of a group of by-laws under the general head, "Death—Notice—Proofs, etc.," and relates evidently to the named subjects. The plaintiff in this action was not proceeding to enforce any cause or claim arising out of his membership or benefit certificate. His action was based upon a rescission of the contract, and was to recover back what he had paid thereon.

We discover no error in this record, and accordingly the judgment is affirmed.

DOWSE et al. v. HAMMOND.

In re SWEETSER. Ex parte FLORENCE MACH. CO.

(Circuit Court of Appeals, First Circuit. April 26, 1904.)

No. 526.

1. **BANKRUPTCY—PROVABLE DEBTS—TAKING NEW PROMISE FROM BANKRUPT—EFFECT.**

Where, after a creditor had proved his debt in bankruptcy, evidenced by notes, he took from the bankrupt other notes for the same indebtedness without surrendering the original notes, he is not ordinarily presumed to have discharged the debt proved, nor to be precluded from maintaining his proof, while at the same time proceeding against the bankrupt personally on the new notes, so long as he has not received full satisfaction of his debt.

2. **SAME—COSTS.**

Where issues in the bankruptcy proceeding arising out of the mixed condition of the claims were caused entirely by the methods of a creditor, the trustees should not be charged with the costs of a proceeding to determine such issues.

Appeal from the District Court of the United States for the District of Massachusetts.

For opinion below, see 128 Fed. 165.

Warren Ozro Kyle (Fred Joy, on brief), for appellants.
Hollis R. Bailey, for appellee.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

PER CURIAM. The essential facts in this case are clearly stated in the opinion of the learned judge of the District Court, and his conclusions, as well as the method of reasoning by which he reached them, are entirely satisfactory to us. They need to be supplemented on only a single point, being that to which relates the first of the rulings which, according to his opinion, he was requested to make. The record does not show that the notes made by the bankrupt and his wife, described in the ruling as given to the creditor in question before the proof referred to therein was made, were received in discharge of any existing notes. Inasmuch as the notes originally held by the creditor, in accordance with the practice under the then existing bankruptcy statutes, must have been produced when the proof was made, the presumption is that the creditor retained them undischarged, and received those signed by the bankrupt and his wife merely as collateral thereto. Under those circumstances, it is so clear that the refusal of the district judge to give the ruling was correct that we need not elaborate in reference thereto.

The mixed condition in regard to the claims which are now in issue, which condition is fully explained in the opinion of the learned judge of the District Court, arose entirely from the methods of the creditor. Under the circumstances it was reasonably incumbent on the assignees, who are now the appellants, to bring the facts to the attention of the court—both to the District Court and to the appellate tribunal. In this respect this proceeding is quite analogous to those by trustees under a will, or other persons occupying trust relations, to obtain the instructions of the court with reference to any doubtful subject-matter coming within the scope of their duties; and they ought not to be charged with costs in favor of the creditor whose method of proceeding brought about the condition which requires investigation. Therefore we allow no costs on this appeal.

The decree of the District Court is affirmed, and neither party will recover any costs on appeal.

JAMES P. SMITH & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 11, 1904.)

No. 161.

1. CUSTOMS DUTIES—CLASSIFICATION—FILLED BOTTLES.

Paragraph 258, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650], relating to "anchovies * * * in bottles," and paragraph 276 of said act, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1652], relating to extract of meat, and providing that "the dutiable weight of the fluid extract of meat shall not include the weight of the package in which the same is imported," are not to be construed as re-

moving bottles containing the merchandise enumerated in said paragraphs from the provision in paragraph 99 of said act (Schedule B, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1632]), for "bottles * * * filled or unfilled, not otherwise specially provided for, and whether their contents be dutiable or free."

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the Circuit Court, Southern District of New York (124 Fed. 291), which affirmed a decision of the Board of General Appraisers sustaining the collector of the port of New York in his assessment of certain articles for duty purposes.

F. W. Brooks, for appellant.

Chas. F. Baker, for the United States.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. The articles in question are anchovies in glass bottles, and fluid extract of meat in glass bottles. No question is made as to the duty imposed on the anchovies and the extract of meat, but the importers protested against exaction of duty on the bottles. The importations are under the tariff act of 1897, and the relevant portions are:

"99. Plain green or colored, molded or pressed, and flint, lime, or lead glass bottles, vials, jars, and covered or uncovered demijohns and carboys, any of the foregoing, filled or unfilled, not otherwise specially provided for, and whether their contents be dutiable or free (except such as contain merchandise subject to an ad valorem rate of duty, or to a rate of duty based in whole or in part upon the value thereof, which shall be dutiable at the rate applicable to their contents) shall pay duty as follows: If holding more than one pint," etc.: "provided, that none of the above articles shall pay a less rate of duty than forty per centum ad valorem." Act July 24, 1897, c. 11, § 1, Schedule B. 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633].

"258. Fish known or labeled as anchovies, sardines, sprats, brislings, sardels, or sardellen, packed in oil or otherwise, in bottles, jars, tin boxes or cans, shall be dutiable as follows: When in packages containing seven and one-half cubic inches or less, one and one-half cents per bottle, jar, box or can; containing more than seven and one-half," etc., "* * * if in other packages, forty per centum ad valorem. All other fish (except shell-fish), in tin packages, thirty per centum ad valorem," etc. Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650].

"276. * * * Fluid extract of meat, fifteen cents per pound, but the dutiable weight of * * * the fluid extract of meat, shall not include the weight of the package in which the same is imported." Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1652].

We are clearly of the opinion that there is nothing in paragraphs 258 and 276 to take the bottles containing the articles therein specified out of the operation of the comprehensive language of paragraph 99, which calls for duty on the bottles, whether they be empty, filled with free merchandise, or filled with merchandise which is dutiable otherwise than ad valorem. Paragraph 276 expressly provides that the dutiable weight of the fluid extract shall not include the weight of the package in which it is imported, thus leaving the bottles to be assessed elsewhere. This is the more significant since the act, in some other

portions (e. g., paragraph 241), provides that the dutiable weight of the contents shall include the weight of all tins, jars, and other immediate coverings." Paragraph 258 does not lay an ad valorem duty on the contents of the bottles, and certainly does not include them with the dutiable measurement of contents. They must therefore find their place under paragraph 99.

The decision is affirmed.

LEAYCRAFT & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 13, 1904.)

No. 156.

1. CUSTOMS DUTIES—CLASSIFICATION—ARROWROOT STARCH.

Held, that the provision in paragraph 478, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 195 [U. S. Comp. St. 1901, p. 1680], for "arrowroot in its natural state and not manufactured," relates to the tubers or root of the arrowroot plant, though no importations are ever made in that form, and does not include the article commercially known as arrowroot, consisting of starch made from arrowroot tubers, which is more properly classifiable as "starch," under paragraph 285 of said act (Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 173 [U. S. Comp. St. 1901, p. 1653]).

Appeal from the Circuit Court of the United States for the Southern District of New York.

For decisions below, see 124 Fed. 999, and G. A. 4,491, T. D. 21,-405.

Stephen G. Clarke, for appellants.

D. Frank Lloyd, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. The importations in controversy were arrowroot in its starchy form, answering the dictionary definitions, which describe it as "a nutritive starch obtained from the root stalk" of several species of the maranta, "a plant which grows in the West Indies, and which was considered a specific for the wounds caused by poisoned arrows; hence its name." "In its preparation the tubers are mashed, and the pulp soaked in water. This dissolves out the starch, which is separated from the fibers by settling, and the water is then drawn off, and the starch cleansed, and finally dried in the sun."

The question is whether the importations fall within the enumeration of paragraph 478 of the tariff act of July 24, 1897, c. 11, § 2, Free List, 30 Stat. 195 [U. S. Comp. St. 1901, p. 1680], whereby "arrowroot, in its natural state, and not manufactured," finds a place upon the free list. They were subjected to duty under paragraph 285, of that act (section 1, Schedule G, 30 Stat. 173 [U. S. Comp. St. 1901, p. 1653]), as "starch, including all preparations from whatever substance produced, fit for use as starch." The two provisions, read

together, are to be construed as though they read, "starch * * * one and one-half cents per pound; but if arrowroot in its natural state and not manufactured, free."

The Board of General Appraisers and the court below held that the importations were not arrowroot, within the meaning of paragraph 478. In view of the fact, which seems to be established by the evidence, that the tuber is never imported into this country, it is difficult to understand why Congress should have taken pains to put it upon the free list, because there was no necessity for exempting from duty an article which practically is never subjected to duty. In the absence of any light from the previous tariff legislation, there would be fair room for argument that Congress meant to exempt the article from duty in its starchy form or crude condition. On the other hand, the term "arrowroot in its natural state" is the equivalent of the term "arrowroot in a state of nature," and that description would hardly fit an article which has been subjected to the various processes which have been mentioned by which it is converted into the starch. The previous tariff legislation, however, indicates that Congress was not unmindful of the distinction between arrowroot in its starchy form and in its natural state, and that its later legislation was intended to remove the former from the free list by exempting from duty only the root in its natural state, in case any might possibly be imported. The tariff act of March 3, 1883, c. 121, 22 Stat. 488, placed the article upon the free list by enumerating it simply as "arrowroot." By that designation, of course, the arrowroot of commerce, which is the same thing as the arrowroot of the dictionary definitions, was exempt from duty. By the tariff act of October 1, 1890, the article was placed upon the free list by the description "arrow root, raw or unmanufactured." This description narrows that of the former tariff act, and suggests the intention of Congress to place the root only upon the free list. The next succeeding tariff legislation, which was the act of August 27, 1894, describes the article similarly as "arrow root, raw or unmanufactured." The next succeeding tariff legislation is the act now in question, and the phraseology employed in paragraph 478 would seem intended to remove any doubt which might possibly arise from the provisions of the acts of 1890 and 1894, and to make more explicit the intention of Congress to withdraw arrowroot in its starchy or commercial form from the free list, and exempt from duty only the arrowroot in its natural state, as distinguished from any state to which it may be advanced by treatment.

The decision of the Board of Appraisers and of the court below is affirmed.

GOLDENBERG BROS. & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 13, 1904.)

No. 159.

1. CUSTOMS DUTIES—CLASSIFICATION—LACE NECKWEAR—WEARING APPAREL.

Lace neckwear is more specifically provided for in paragraph 339, Tariff Act July 24, 1897, c. 11, § 1, Schedule J, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662], as "wearing apparel * * * made wholly or in part of lace," than in paragraph 314 of said act (Schedule I, 30 Stat. 178 [U. S. Comp. St. 1901, p. 1659]), as "articles of wearing apparel of every description, including neckties or neckwear."

Appeal from the Circuit Court of the United States for the Southern District of New York.

For decisions below, see 124 Fed. 1003, and G. A. 4,879, T. D. 22,868.

This cause comes here upon appeal from a decision of the Circuit Court, Southern District of New York, affirming the Board of General Appraisers and the collector of the port of New York as to the classification for duty of certain lace articles of wearing apparel, commonly known as "neckwear." The goods were imported under Tariff Act July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626]. The relevant paragraphs are as follows:

In Schedule I, "Cotton Manufactures":

"Par. 314. Clothing, ready-made, and articles of wearing apparel of every description, including neckties or neckwear, composed of cotton or other vegetable fibre, or of which cotton or other vegetable fibre is the component material of chief value, made up or manufactured, wholly or in part, by the tailor, seamstress, or manufacturer, and not otherwise provided for in this act, fifty per centum ad valorem."

In Schedule J, "Flax, Hemp, and Jute, and Manufactures of":

"Par. 339. Laces, lace window curtains, * * * and other lace articles, * * * wearing apparel, and other articles made wholly or in chief part of lace, or in imitation of lace, * * * wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner * * * tamboured or appliquéed articles, fabrics, or wearing apparel; * * * all the foregoing composed wholly or in chief value of flax, cotton, or other vegetable fiber, and not elsewhere specially provided for in this act, whether composed in part of india rubber or otherwise, sixty per centum ad valorem: provided, that no wearing apparel or other article or textile fabric, when embroidered by hand or machinery, shall pay duty at a less rate than that imposed in any schedule of this act upon any embroideries of the materials of which such embroidery is composed."

Albert Comstock, for appellants.

D. Frank Lloyd, for the United States.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). The articles in question are certain cotton lace scarves, barbes, collars, fichus, ties, etc., and there is no dispute as to the facts, nor as to commercial designation. Concededly the articles are made wholly or in chief part of lace composed wholly or in chief value of cotton; concededly they are wearing apparel; concededly they are the particular variety of wearing apparel which is known as "neckwear"; concededly they are covered by the language of both paragraphs. The sole question is the one so frequently presented—which of the two paragraphs more specifically provides for them? In all such cases the thing to be sought for is the inten-

tion of Congress, and, if that is plainly expressed, it will prevail over technical rules of construction, and over decisions in other cases which are differentiated by some variation in the facts. The intent of Congress as to these articles seems reasonably clear. It fixed one rate of duty for ready-made clothing and articles of wearing apparel composed of cotton, and a higher rate for wearing apparel made of lace composed of cotton. Undoubtedly the phrase "wearing apparel made of lace composed of cotton" is more specific than the phrase "wearing apparel composed of cotton." The importers' sole reliance is on the two words "neckties" and "neckwear," which are found in paragraph 314 (Tariff Act July 24, 1897, c. 11, § 1, Schedule I, 30 Stat. 178 [U. S. Comp. St. 1901, p. 1659]), and which they claim constitute an *eo nomine* designation, which, in accordance with familiar principles, is more specific than the descriptive phrase "wearing apparel made of lace composed of cotton." But we are clearly of the opinion that Congress did not insert these two words with any intent to provide some specific and independent duty on neckwear. It was concerned solely with laying a uniform duty, by paragraph 314, on every description of articles of wearing apparel composed of cotton or other vegetable fiber, and, fearing lest some one might seek to differentiate neckwear from the class of wearing apparel (possibly on some theory that it was for ornament not for ordinary wear), Congress provided against that by inserting after the words "wearing apparel of every description" the words "including neckties or neckwear." The words last quoted were intended as words of expansion rather than as words of restriction.

The decision of the Circuit Court is affirmed.

RUTAN v. JOHNSON et al.

HEROLD, Collector of Internal Revenue, v. JOHNSON et al.

(Circuit Court of Appeals, Third Circuit. March 7, 1904.)

1. CIRCUIT COURT OF APPEALS—JURISDICTION—TIME FOR SUING OUT WRIT OF ERROR.

Under section 11 of Act March 3, 1891, c. 517, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552], creating the Circuit Courts of Appeals, such court is without jurisdiction to review a judgment on a writ of error not issued until more than six months after the entry of the judgment, notwithstanding it may have been allowed within that time.

On Motions to Dismiss for Want of Jurisdiction.

For opinion below, see 122 Fed. 993.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

PER CURIAM. In each of the two above-entitled cases the record discloses the same state of facts. Final judgment was entered on June 12, 1903. A bill of exceptions was signed and filed on September 22,

¶ 1. Jurisdiction of Circuit Court of Appeals, see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.

1903, and on the same day an assignment of errors was filed and a writ of error was allowed by the judge upon a petition presented and filed. The writ of error, however, was not issued until December 28, 1903, and on that day was filed in the court below. It follows, therefore, that the writ of error was not sued out within the time limited by the act of March 3, 1891 (chapter 517, § 11, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552]), namely, within six months after the entry of the judgment sought to be reviewed, and hence we have no jurisdiction. This conclusion is abundantly sustained by decisions of United States Circuit Courts of Appeals and the Supreme Court. *United States v. Baxter*, 51 Fed. 624, 2 C. C. A. 410; *Stevens v. Clark*, 62 Fed. 321, 10 C. C. A. 379; *City of Waxahachie v. Coler*, 92 Fed. 284, 34 C. C. A. 349; *Brooks v. Norris*, 11 How. 204, 207, 13 L. Ed. 665; *Scarborough v. Pargood*, 108 U. S. 567, 2 Sup. Ct. 877, 27 L. Ed. 824.

The writ of error in each of the above-entitled causes is dismissed for want of jurisdiction.

RAILROAD COMMISSION OF TEXAS et al. v. J. ROSENBAUM GRAIN CO.

(Circuit Court of Appeals, Fifth Circuit. March 14, 1904.)

No. 1,313.

1. **INJUNCTION—POWER OF FEDERAL COURTS—RESTRAINING ACTION BY STATE RAILROAD COMMISSION.**

A federal court, where it has jurisdiction by reason of the diverse citizenship of the parties and the federal questions involved, has power to grant an injunction to restrain a state railroad commission from putting in force an order the effect of which would be to cause damages to complainant for which an action at law would furnish no adequate remedy.

2. **SAME—PRELIMINARY ORDER—REVIEW.**

On an appeal from an order granting an injunction pendente lite before issue joined, where it appears that the cause is one involving controverted questions of fact, the court will not enter upon the merits to determine whether the injunction was improvidently granted.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

For opinion below, see 130 Fed. 46.

C. K. Bell, for appellant.

S. B. Cantey and Levy Mayer, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This is an appeal from an interlocutory order continuing an injunction pendente lite. The Circuit Court has jurisdiction of the controversy on account of the diverse citizenship of the parties and the federal questions involved, and we think it had power to issue the injunction complained of. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 363, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. The bill shows a case for equitable relief to prevent damages for which an action at law would furnish no complete and adequate remedy. On

this appeal we do not feel called upon to go further. *Kerr v. City of New Orleans*, 126 Fed. 920; *Massie et al. v. C. C. Buck* (decided by this court Feb. 16, 1904) 128 Fed. 27.

The order appealed from is affirmed.

THE MINNEAPOLIS.

(Circuit Court of Appeals, Second Circuit. March 4, 1904.)

No. 108.

1. COLLISION—SHIP MAKING BERTH—REFUSAL OF SMALL BOAT TO GIVE WAY.

A barge lying at the end of a pier in New York, although rightfully there, which refused the offer of a steamship to remove her temporarily while the ship was making her berth in an adjacent slip and to return her afterward, took the risk of injury from the docking of the ship if the latter was properly handled, and cannot recover therefor without proving fault.

Appeal from the District Court of the United States for the Southern District of New York.

The following is the opinion of the court below (Holt, District Judge):

I think that this case cannot be distinguished from the case of *The Etruria* (D. C.) 88 Fed. 555.

The libel should be dismissed, with costs.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing a libel brought to recover damages sustained by the scow *Austria*, while lying at the end of Pier 37, North river, by reason of coming into contact with the steamship *Minneapolis*, which was docking at Pier 39.

Louis B. Adams, for appellant.

J. Parker Kirlin and John M. Woolsey, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. There has been a complete failure to establish any of the faults specifically averred in the libel, and we concur with the District Judge in the conclusion that the cause is within the rule laid down in *The Etruria* (D. C.) 88 Fed. 555. The *Austria* was not in fault for shifting from the side to the end of Pier 37; she was there for a legitimate purpose, viz., to discharge the stone needed for an extension of that pier. But we are satisfied that the weight of evidence shows that, at a time early enough to avoid all risk, those who had the berthing of the *Minneapolis* in charge urged the captain of the scow to shift her position, and proffered the use of one of their tugs to remove her temporarily, with the promise to return her to her old position when the berthing might be completed.

The decree of the District Court is affirmed, with costs.

KIRK v. UNITED STATES et al.

(Circuit Court of Appeals, Second Circuit. January 25, 1904.)

No. 128.

1. PRELIMINARY INJUNCTION—RESTRAINING COLLECTION OF EXECUTION.

It is a proper exercise of discretion for a court to enjoin, on bond filed, *pendente lite*, the collection of an execution against the surety on a criminal recognizance, on a bill alleging facts which, if true, render the execution void.

Appeal from the Circuit Court of the United States for the Northern District of New York.

This cause comes here upon appeal from an order granting injunction against taking further proceedings to enforce or collect an execution until the trial and decision of the action on the merits, upon condition that complainant give a bond for the full amount of the claim against him, viz., \$40,000. The bond has been given.

For opinion below, see 124 Fed. 324.

T. L. Arms, for appellants.

A. J. Rose, for appellee.

Before LACOMBE and TOWNSEND, Circuit Judges.

PER CURIAM. We are of the opinion that it was a proper exercise of the court's discretion to preserve the status quo until it shall be determined by proof on the trial whether or not the person named in the recognizance was taken into the custody of the court under such circumstances as to relieve the surety, and whether the order forfeiting and estreating the recognizance was in fact made before the time when such person was ordered to appear.

The order is affirmed.

GOLDEN GATE MFG. CO. v. NEWARK FAUCET CO.

(Circuit Court of Appeals, Third Circuit. May 13, 1904.)

No. 44.

1. PATENTS—INVENTION—APPARATUS FOR RACKING LIQUIDS.

The Savage patent, No. 537,939, for an apparatus for racking liquids, is void for lack of patentable invention, the apparatus shown being merely an adaptation of the devices of the prior Mussel patents, Nos. 331,251 and 333,081, to use in filling barrels or packages already equipped with permanent tap and vent valves, previously in use, which did not involve invention.

Appeal from the Circuit Court of the United States for the District of New Jersey.

For opinion below, see 124 Fed. 531.

Wm. B. Greeley and Wm. A. Redding, for appellant.

Edwin H. Brown, for appellee.

Before ACHESON and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the court below, in a suit brought by complainant, as the owner of four patents, against the defendant, for infringement of the same. These patents are as follows: Patent No. 331,251, granted to C. Mussel, November 24, 1885, entitled "Apparatus for Filling Kegs with Beer"; patent No. 331,252, granted to C. Mussel, November 24, 1885, entitled "Method of Filling Vessels with Fermented Liquors"; patent No. 333,081, granted to C. Mussel, December 22, 1885, entitled "Apparatus for Filling Vessels with Fermented Liquors"; and patent No. 537,939, granted to W. C. Savage, April 23, 1895, entitled "Apparatus for Racking Liquids." The bill was dismissed in the court below, for want of infringement of the claims of the Savage patent and of the Mussel patents Nos. 331,251 and 333,081, when narrowly construed; the Mussel patent No. 331,252 being declared invalid, by reason of anticipation.

During the period of time between the final hearing and the entry of said decree, to wit, between November 19, 1901, and July 20, 1903, three of the four patents in suit, to wit, the three Mussel patents above referred to, expired, and in consequence thereof, the complainant limits this appeal to the remaining one of the four patents originally sued on, viz.: patent No. 537,939, issued April 23, 1895, to W. C. Savage.

The questions before this court, therefore, relate solely to the Savage patent No. 537,939, entitled "Apparatus for Racking Liquids." The defenses are, (1) that in view of the prior art, said letters patent are invalid for want of patentable novelty and invention; and (2) noninfringement by defendant.

It is to be noted that, though the explanation of the details of the patent, given in the specifications, is applied to the racking of beer, the title of the patent is, as we have stated, "Apparatus for Racking Liquids," and the opening statement is that the patentee has invented "certain new and useful improvements in apparatus for racking liquids," and all the claims refer to the racking of liquids generally, without specifying beer or other liquid. The conveyance of beer, or other liquids, from the large receptacles or reservoirs containing them, into the smaller packages, such as barrels or kegs or bottles, for distribution and consumption, is called racking, and the art in some form is as old as the necessity for the same. In the case of racking aerated or fermented liquids, the conditions are somewhat peculiar, owing to the opportunity during the process for the escape of portions of the gas contained in the liquid, which it is desirable to retain. This difficulty especially attended the simple transference of beer by a flexible tube from the storage cask to the keg or barrel through its open bung. Various devices existed prior to the "Savage" patent, for handling aerated waters and fermented liquids in this way. The account given by Savage in the specifications of his patent, of the practice in racking beer, as it existed at the date of his patent, is as follows:

"In the racking of beer as usually practiced in breweries the beer is led from the chip-cask through a suitable conducting pipe which terminates in a flexible hose which is inserted by the attendant into the barrel to be filled through the bung-hole thereof. The hose is long enough to reach to the bottom

of the barrel so that the beer shall not be caused to foam by falling in an uninclosed stream. Ordinarily such gas as is set free is allowed to escape through the bung-hole around the hose, but it has been proposed also to return the gas to the chip cask through a return pipe which receives it from a device which fits snugly within the bung-hole around the hose. It is impossible to close the ordinary filling pipe or hose at its very end and the consequence is that when the pipe is withdrawn from the barrel and it is transferred to another barrel, there is a considerable waste of beer due to the escape of that in the filling pipe between the cut-off valve and the extremity. If care is taken to drain the pipe before its removal so much time is consumed in racking as to offset the saving secured by the prevention of waste. Moreover, it is impossible with this apparatus to fill the barrel full without causing more or less waste from time to time by an overflow. I have sought to devise an apparatus whereby the racking shall be conducted rapidly and without waste while the barrels are filled uniformly full, and it is in this apparatus as hereinafter fully set forth, that my invention consists."

This account of the existing practice, does not, as we shall see, correctly set forth the state of the art into which the Savage patent made its entrance. The claims of the patent are as follows:

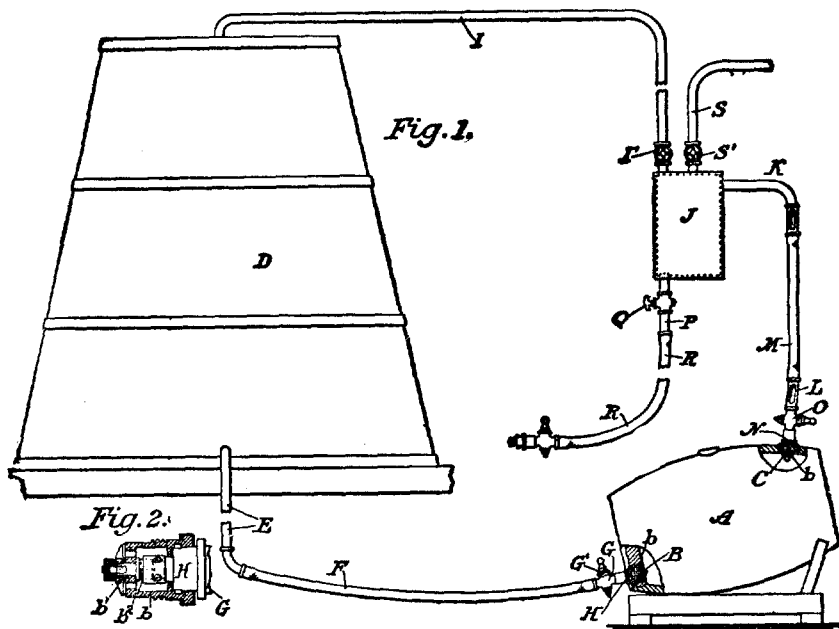
"(1) The combination with a supply vessel for liquid and a barrel or other package having a tap-valve and a vent-valve located at opposite points, and each being a feature of the barrel or package, and each having a gate to be opened or closed by connection therewith of a coupling-piece or other key, of a delivery pipe from said supply vessel, a coupling piece to connect said pipe to said tap-valve, a cut-off for said coupling-piece, a pipe to receive and conduct gas or air from the barrel, a coupling-piece to connect the gas pipe to said vent-valve and a cut-off valve for said last named coupling-piece, substantially as shown as described.

"(2) The combination with a supply vessel for liquid and a barrel or other package having a tap-valve and a vent-valve located at opposite points and each being a feature of the barrel or package, and each having a gate to be opened or closed by connection therewith of a coupling-piece or other key, of a delivery pipe from said supply vessel, a coupling-piece to connect said pipe to said tap-valve, a cut-off for said coupling-piece, a pipe to return gas or air from the barrel to its source of supply, a coupling-piece to connect the return pipe to said vent-valve, and a cut-off valve for said last named coupling-piece, substantially as shown as described.

"(3) The combination with a supply vessel for liquid and a barrel or other package having a tap-valve and a vent-valve located at opposite points, and each being a feature of the barrel or package, and each having a gate to be opened or closed by connection therewith of a coupling-piece or other key, of a delivery pipe from said supply vessel, a coupling-piece to connect said pipe to said tap-valve, a cut-off valve for said coupling-piece, a pipe to return gas or air from the barrel to its source of supply, a coupling-piece to connect the return pipe to the vent-valve, a cut-off valve for said coupling-piece, and a trap tank interposed in said return pipe, substantially as shown and described.

"(4) The combination with a supply vessel for liquid, and a barrel or other package having a tap-valve and a vent-valve located at opposite points and each being a feature of the barrel or package and each having a gate to be opened or closed by connection therewith of a coupling-piece or other key, of a delivery pipe from said supply vessel, a coupling-piece to connect said pipe to said tap-valve, a cut-off valve for said coupling-piece, a pipe to return gas or air from the barrel to its source of supply, a coupling-piece to connect the return pipe, to the vent-valve, a cut-off valve for said coupling-piece, a trap tank interposed in said return pipe, a delivery pipe from said trap tank, a coupling-piece adapted for connection to the tap-valve of a barrel and a cut-off in said last named delivery pipe, substantially as shown and described."

The essential features of the beer racking device of the Savage patent, may be seen by a glance at the copy of the drawing accom-



panying the patent. D is the chip-cask, or receptacle from which the beer is supplied to the barrel represented at A. The beer is delivered through a conducting pipe, E, which terminates in a section of flexible hose, F. The latter has, at its end, a racking faucet, G, with a cut-off, G', and H is the coupling piece or key, adapted to make connection with, and to open and close, the tap-valve, B. The specifications explain:

"At or near the top of the chip-cask, D, or, it might be, in the air or gas tank from which air or gas under pressure is supplied, as hereinafter described, connection is made for a gas or air return pipe I, which returns to its source of supply the gas or air which is displaced through the vent-valve C of the barrel being filled. Preferably the pipe I is connected through a cut-off I' to the upper end of the trap-tank J which is conveniently located near the point where the racking is carried on. A pipe K forms the connection between the vent-valve C and the trap-tank J and has near its lower end an observation tube L. For convenience in operation the pipe K terminates in a flexible section of hose M which has at its extremity a key or coupling-piece N which is adapted to make connection with and to open and close the vent-valve C and is also provided with a cut-off cock O.

"For a purpose presently to be described the trap-tank J is provided at its bottom with a coupling piece P and a cut-off cock Q.

"In the use of the apparatus described above, connection is made between the coupling-piece N and the vent valve C, and gas or air under pressure is allowed to flow into the barrel to be filled until there is established therein the pressure under which the beer should be racked. The source of supply of the compressed air or gas may be the chip-cask itself, in case it is suitably located and a sufficient air or gas pressure is maintained therein above the surface of the beer, or it may be an independent vessel in which the air or gas is compressed, a pipe S provided with a cut-off S' being indicated as con-

nected to the trap-tank J for this purpose. The required pressure having been established in the barrel, connection is also made between the coupling piece H and the tap valve B, the barrel A being supported in such position that the vent-valve C shall be at the highest point and the tap-valve B at substantially the lowest point. The valves B and C are opened when connection is made with the coupling pieces and the cocks G and O are then opened to permit the flow of beer from the chip-cask into the barrel and the return of the gas or air from the barrel to its source of supply. The operation of filling the barrel is thus conducted under whatever pressure there may be in the chip-cask or in the vessel from which the air or gas is supplied, and no disengagement or loss of gas is suffered. As soon as the beer shows itself in the observation glass L the cocks G and O are closed and the coupling pieces H and N disconnected from the valves B and C, the latter being closed in the act of disconnection."

"The learned judge of the court below, in considering the four patents in suit, to wit, the three Mussel patents and the Savage patent, determined that the method patent of Mussel was void, by reason of anticipation, and that the apparatus patents of Mussel, Nos. 331,251 and 333,081, and the patent in suit of Savage, No. 537,939, with which we are here concerned, must be subjected to a narrow construction, by reason of which "it is not shown that the elements set forth in the complainant's patents are embodied in the defendant's device; nor is it shown that the process set forth in complainant's patents is that under which the defendant's device operates." The patents to which the court below refer, as anticipating and rendering invalid the method patent of Mussel, No. 331,252, and in view of which the claims of all the other patents, including the Savage patent, should be so narrowed and limited in their scope, were the English patent, granted to William Russell, bearing date November 19, 1816, and the Matthews patents, one of them a method patent, No. 260,766, of July, 1882, and the other a device patent, No. 260,037, of the same year. We agree with the conclusions of the learned judge, as to the effect of these prior patents upon both the Mussel and the Savage patents. As the Mussel patents, however, have expired, and are no longer in suit, it will not be necessary to more than briefly refer to the discussion of the relation to them of these anticipating patents; especially, as we shall consider the important bearing that the Mussel patents themselves have upon the validity of the Savage patent, to which alone this appeal relates. The learned judge of the court below, in speaking of the Russell patent, says the English patent, granted to William Russell, in 1816, "is in the same art and class and for the same purposes and uses as the Mussel and Savage patents. It covers and contemplates substantially everything involved in the complainant's device patents in suit. * * * But in view of the fact that the same elements are for the same uses in each patent, it follows that whatever invention or novelty may be claimed for the Mussel patent, it must be limited strictly and narrowly to the device that may be found in the detailed construction of the various parts that go to make up the Mussel and Savage devices. * * * Further, we find set out in the Russell patent a conception of what seems to be an alleged novelty idea set out in the Mussel patents, for Russell has provided for opposite openings in the receptacle to be filled, suitable connections therefor that may admit to or lead from

said receptacle both beer and air. He has provided for, and gives evidence in the patent of having conceived, the uses which may be made of back pressure in the receptacle to be filled. He has further provided for a separate pipe leading to or from the similarly located openings in the receptacle."

In regard to the Matthews patent, No. 260,766, the court says an inspection of this patent shows that it describes "a method of bottling liquid or the like under pressure, by which constant and uniform pressure is maintained upon the liquid, as well when passing into the vessel to be filled, as when in the reservoir from which it is taken." He then quotes the one claim of the patent, as follows:

"The method herein described of charging the fountain with aerated beverages by connecting it first with the reservoir that contains only gas under pressure, and then with another reservoir containing water and gas under greater pressure, meanwhile leaving the connection with the first reservoir uninterrupted, so that the fountain will first be charged with gas and then with water under greater pressure than the gas, the water expelling surplus gas into the first reservoir whereupon communication with both reservoirs is closed, substantially as specified."

The contention of complainant is, that this process relates primarily, and was used chiefly, in charging soda-water fountains, and therefore could not be considered as an anticipation of the Mussel method patent, because of the alleged difference between the art of filling casks with beer and charging fountains with soda water. To this the answer of the court is, that "the difference between beer and soda water does not relate to and is not found in the different effects which back pressure will have upon them, in the filling of casks with beer or fountains with soda water; and further, that the United States Patent Office considers them not only as analogous, but classifies them practically as the same art." We agree with this conclusion of the court below. It will thus be seen that, prior to all the patents originally in suit, liquids containing gas or air had been conveyed under pressure from the receptacle thereof into smaller packages, through openings at the lowest point thereof, against a pressure of air or gas introduced by an opening at the highest point thereof, supplied by a pipe or conduit from a pressure reservoir, with the object of filling the cask without the loss in process of the gas or air contained in the liquid.

Let us now look at the devices of the Mussel patents themselves, in their relation to the Savage patent, with which we are dealing. The claims and specifications of the first of these patents, No. 331,251, are taken up largely with the description of the somewhat complicated device of framework, ropes and pulleys, for bringing the openings of the conduits in close contact and connection with the openings for the inflow of the liquid and the inflow and outflow of the gas or air. The fifth claim, however, describes the essential features of the device, as follows:

"A filling and supply head for beer, and a filling and supply head for air, both located to communicate at different points with the vessel to be filled, and both acting simultaneously to supply beer and air to a keg or other receptacle, substantially as and for the purpose specified."

This purpose is thus described in the specifications:

"The object of this invention is to supply beer to kegs, barrels, etc., for filling the same without the formation of foam in the keg or other receptacle as is now the case."

The method patent, No. 331,252, need not now be referred to, as it seeks a monopoly for the method incidentally described in the device patents, and was clearly anticipated, in the opinion of the court below, by the patents referred to. In this opinion, we have already expressed our concurrence.

The other device patent of Mussel, No. 333,081, is for an improved apparatus, for bringing the beer conduits and the air conduits into close connection with the openings in the bottom and top of the keg or barrel to be filled, and providing a relief reservoir, and for an automatic corking of the aperture in the barrel, when the same is filled and the connections are withdrawn. Claim 5, however, of the said patent, No. 331,251, already quoted, discloses the essential features of the devices common to both of these Mussel patents and the Savage patent.

It is not necessary now to further consider the place in the art of the Mussel patents, with reference to former devices, or the discussion of the same by the court below, to which we have already referred. It is sufficient to inquire to what extent the essential features in the claims of the Savage patent are covered by the prior Mussel patents. The essential features of the Mussel patents are well described by complainant's expert, when testifying in support of these patents (which were at that time in suit). In the course of his testimony, he said:

"For the foregoing reasons I do not find in the prior art the inventions of either of the Mussel patents in suit, but, on the contrary, after careful consideration of the deposition of Mr. Pell and the defendant's witnesses, I am confirmed in my opinion that these patents disclose for the first time the essential features of a successful back pressure beer racking system and the features which are fundamental to such a system at the present time,—namely, the employment of separate filling heads adjustable with respect to the package, and their location to communicate at different points, whereby it is made possible for the beer to enter the package at the bottom without foaming, and the pressure to enter at the top. With these features are combined in the Mussel patents Nos. 331,252 and 333,081 the use of a relief vessel, whereby the stoppage of the operation of racking by incidental foaming, such as might arise from abnormal conditions, is prevented, and the system rendered perfect in its entire operation. These features are nowhere found combined in the prior art, and they were, in my opinion, first given to the world in the three Mussel patents in suit."

This testimony, having for its purpose the support of the claim of priority of the Mussel patents, which at that time was a serious matter in dispute, from necessity admits, what we think due consideration will make apparent, namely, the identity of the essential features of the Mussel patents with those of the Savage patent. So also, complainant's counsel, in their brief, refer to the Mussel patents, "because they were necessarily involved more or less with the Savage patent in the depositions of the experts for the complainant and the defendant in the court below." They thus speak of them:

"In the first place, the Mussel patent, No. 331,251, is the first to disclose the idea of racking * * * through the tap valve while the displaced air or gas is permitted to escape through the vent-valve against a counter-pressure."

These statements of the expert witness and counsel for complainant, were not, it is true, intended to strengthen the argument in favor of the novelty and validity of the Savage patent. The contention was necessary in defense and support of the Mussel patents, which were involved in the litigation in the court below. Counsel, however, conclude their statement at this point, as follows:

"The Savage patent, No. 537,939, upon which this appeal is taken, discloses and covers, in a perfected form, that apparatus which, operating upon the general principle disclosed in the first Mussel patent, namely, that of racking through the tap-valve against a counter-pressure, supplies in combination those features which were necessary to overcome the difficulties incident to the use of the crude apparatus of Mussel, and is capable of meeting with the severe requirements of the art."

In another place, counsel say.

"In common with the apparatus of the Mussel patents, the Savage patent has flexible hose connections adjustable to the package, and, therefore, has the filling and supply heads of the Mussel patents. It has also in common with the apparatus of the Mussel patents, a source of supply for beer and a source of supply for air or gas, to which the air or gas is returned from the package, and a trap to prevent the clogging of the air pipe with foam. Having much in common, the apparatus of the Savage patent may be said to be built upon that of the Mussel patents, but it makes a vast step forward in simplicity, convenience and quickness of operation."

What this step forward was, is indicated by counsel a few lines further on in their brief:

"Savage did away with Mussel's system of weights and pulleys, and with the peculiar filling heads that required to be fitted by gaskets to the openings of the packages, and substituted a simple system of key valves [which require the packages to be fitted with special tap and vent-valves as a feature of the same]. * * * No claim of novelty was made by Savage for any particular construction of the valves or gates, or of their operating keys, and indeed such construction is expressly admitted in his specifications to be old."

That is, he "did away with Mussel's system of weights and pulleys, and with the peculiar filling heads that required to be fitted with gaskets to the openings of the packages," by simply confining his racking operation to barrels and kegs furnished with tap and vent valves as a feature thereof, which barrels and kegs were already in use. Packages so furnished had, as a necessary complement, the "gate" to be opened or closed by connection therewith of a "coupling piece or other key," and were old at the date of the Savage patent.

Now let us see what is claimed in the patent that Savage contributed to the art, as illustrated in the Mussel patents. For this purpose, we again quote claim 1 of his patent:

"(1) The combination with a supply vessel for liquid and a barrel or other package having a tap-valve and a vent-valve located at opposite points, and each being a feature of the barrel or package and each having a gate to be opened or closed by connection therewith of a coupling-piece or other key, of a delivery pipe from said supply vessel, a coupling-piece to connect said pipe to said tap-valve, a cut-off for said coupling-piece, a pipe to receive and conduct gas or air from the barrel, a coupling-piece to connect the gas pipe to

said vent-valve and a cut-off valve for said last named coupling-piece, substantially as shown and described."

After what has been said in regard to the Mussel patents, we think it must be evident that there is nothing covered by this claim, that was not found in the devices of those patents, as heretofore described, except that the package to be filled is required to be fitted with a tap-valve and vent-valve, which will open or close by the connecting or disconnecting of the delivery tubes or hose connecting with the beer receptacle or air reservoir respectively. These tap-valves and vent-valves, as a feature of the package to be filled, were admitted to be old, the patentee saying in his specifications, "the valves B and C may be of any ordinary construction which will permit them to be closed or opened when connected with a faucet or filling tap or its equivalent, a valve of this character being described in detail in letters patent No. 449,513, granted to Mark Antony, March 31, 1891." It is in evidence that this particular tap-valve had been in general use as a fixture in, and feature of, beer barrels, the purpose being to furnish a convenient and easily adjusted means by which a barrel of beer could be tapped by the mere act of attaching the faucet through the aperture to the valve seat. It is not necessary to concern ourselves with the minute description of this mechanism, as set forth in the specifications of the patent in suit. It suffices to say, that its principal and useful feature is, that by merely entering the faucet into the aperture of the tap, a quarter turn of it, at the same time makes a tight connection with, and opens, the valve. The beer is then ready to be drawn, by merely opening the cock of the faucet. What Savage did, then, was to rack his beer into packages that were fitted into this admittedly old device of a tap-valve, instead of into packages with an open tap, to which the racking hose and tubes were adjusted by the somewhat cumbersome methods of the Mussel patents. A vent-valve constructed on the same principle as the tap-valve, was of course used for supplying the gas or air pressure, or for relieving the same. The only change that Savage was obliged to make, was the obvious one of so constructing both valves as to allow for an inflow as well as an outflow. A coupling-piece to connect the delivery pipe or hose with a tap-valve, with a cut-off therein, was of course the obvious and necessary complement to this use of kegs with tap and vent valves, to prevent the waste of liquid when uncoupling from the tap-valves. We do not suppose that any ingenuity of argument could ascribe invention to such a device. Any one who had used a garden hose with a stop cock situated in the nozzle, to shut off water without going to the source of supply, would have anticipated such an alleged invention. The essential features of the operation are those for which Mussel's apparatus was adapted, namely, the flowing of liquid into barrels at their lowest point, while gas or air was permitted to flow, first, into the barrels from their highest point, so that a back pressure should be established, and afterwards slowly let out of the barrels, in order that the liquids might enter.

The advantage claimed by Savage over Mussel, is only that in racking, he uses barrels that are furnished with permanent tap and vent valves, as described, instead of barrels with valveless openings.

Barrels with these tap-valves were already in use, and we think that Mussel is as free to use barrels so equipped now, as he was before the Savage patent. These tap-valves described in Savage's specifications, as already in use, involve the keys or couplings and faucets which were necessary to their operation. It did not involve invention to rack beer into a barrel furnished with a tap-valve. All that was required, was the complementary parts, such as the faucet to fit the valve, with its stop-cock and coupling-piece necessary, and, long before the Savage patent, in use, wherever barrels were furnished with such tap-valves.

That we have not mistaken the scope of the Savage patent, is, we think, made clear by the following statement of the complainant's expert witness. In the course of his testimony, he says:

"The fundamental principle upon which the invention is based, is that of racking the liquid under such continuously existing pressures, as shall be between the upper limit, at which no liquid or too little liquid would flow, and the lower limit below which, under the circumstances of temperature employed, foaming would occur. To this extent, I understand that it utilizes principles and apparatus disclosed by the Mussel patents, to which I have already referred, but it aims at the combination therewith of means whereby the connection and disconnection of the packages may be incidentally made with greater certainty, and without the use of auxiliary apparatus."

But this single aim of the Savage patent, to wit, the instantaneous connection and disconnection of the beer supply conduits, characterized the use of all barrels furnished with tap-valves of the general type described in Antony's patent, and referred to as already in use by Savage in his specifications. Given a barrel, with such a tap-valve as a feature thereof, and it was impossible to introduce a liquid into it or draw one from it, except by a connection thus incidentally made. At page 453 of the record, Savage practically admits this when he says:

"We were at that time selling valves to the brewers which they used for the purpose of tapping their kegs, that is to say, that with these valves, which they inserted in the barrels or kegs they were enabled to insert the faucet in the valve and by turning the faucet one-quarter to the right it opened the valve making a tight joint around the collar or key of the faucet and permitted the beer to flow through the valve and faucet. When the keg was empty by turning the faucet back one-quarter it closed the valve and the faucet was liberated."

That is, barrels, before the date of the Savage patent, had been equipped with tap-valves and vent-valves, combined with complementary parts, consisting of faucets and couplings, making it possible to open or close the valves by turning the faucets one quarter of a rotation. We cannot see that any invention was involved in adapting the general features of the Mussel racking device to barrels of this description. That such barrels were more easily and conveniently filled than those that were filled through an open tap, is due to the tap-valve with which they were furnished, and not to any invention disclosed in the Savage patent.

In so concluding, we do not lose sight of the well-established doctrine, that a combination in which all the elements are old, may yet produce a new and useful result and involve patentable invention. Here, however, no new result was achieved, other than what was

achieved by Mussel. Whatever advantage in the way of facility and expedition the Savage device had over that of the Mussel patent, was due, as we have said, to the fact that, while Mussel's device was adapted to the older kind of barrels, having taps and vents closed by bungs, the Savage device operated upon barrels whose taps were furnished with valves as a permanent feature, the necessary complementary parts of which produced the instantaneous coupling, which is the sole advantage claimed by Savage; barrels so furnished being in no wise the invention of Savage, but were already in existence at the date of his patent. In the language of the counsel of appellee:

"Savage had no problem to solve; no modification of any of the parts to make; no skill to provide, but merely had to modify the Mussel apparatus to suit the valved barrels which had come into use, and with only one possible way of doing it. In other words, the valved barrels could only be used with certain parts, and such parts had been already provided and had been used by brewers and by retailers of beer."

For these reasons, we think the decree of the court below, dismissing the bill, should be affirmed.

LOURIE IMPLEMENT CO. v. LENHART et al.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1904.)

No. 1,885.

1. PATENTS FOR INVENTION—WHAT ADDITIONS, OMISSIONS, AND CHANGES OF FORM DO NOT AVOID INFRINGEMENT.

One may not escape infringement by adding to or subtracting from a patented device, by changing its form, or by making it more or less efficient, while he retains its principle and its mode of operation, and attains its result by the use of the same or of equivalent mechanical means.

2. SAME.

Letters patent No. 415,542, to John Lenhart, secure an adjustable sliding plate, attached by means of a bolt and a slot in the plate to the inner side of the moldboard or share of a plow, to regulate its tilting. The plate described in the specification has a thin lower edge turned toward the share, so that as it is depressed it will pass under the edge of the share, and cut the roots of grass under the turf.

Held, an adjustable sliding plate attached by means of a bolt and a slot in the plate to the inner side of the clip on the inner side of the moldboard of a plow, to regulate its tilting, is the mechanical equivalent of the patented device, although its lower edge is flattened in the form of a triangular shoe, so that it will not cut roots, and although it depends by the side of, and not vertically under the edge of, the plowshare.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Eastern Division of the Southern District of Iowa.

The following is the opinion of the court below (McPherson, District Judge):

This is a bill in equity for infringement of Lenhart's patent, No. 415,542, covering an attachment or appliance to breaking plows. The complainant

¶ 1. See Patents, vol. 38, Cent. Dig. §§ 372, 376, 377.

Lenhart is the patentee, and is a citizen of Hamilton county, Iowa. The Morrison Manufacturing Company is a licensee, and is an Iowa corporation, and manufactures plows and other farm implements at Ft. Madison, Iowa. The respondent Lourie Implement Company is a citizen of Iowa, and is engaged in selling plows and other machinery at Keokuk, Iowa. Deere & Co. is an Illinois corporation, and manufactures plows and machinery, at Moline, Ill. The Lourie Implement Company has sold many plows made by Deere & Co., with an attachment or appliance thereto, which attachment or appliance, it is claimed, is an infringement of the Lenhart patent above referred to, by reason of which this action has been brought. The respondents Lourie Implement Company and H. M. Lourie only have been served, and they only have appeared. The Lenhart patent, No. 415,542, was issued November 19, 1889. The answer denies that the invention of Lenhart is of utility. They deny infringement, and they allege that the Lenhart patent was anticipated by many prior patents issued to others.

The Lenhart patent consists of three claims. The first recites: "The combination, with a plow, of an adjustable plate working under the edge of the share to raise or lower the share to keep the plow level and from tilting over, and the share from wear, as and for the purpose set forth." The second claim is: "The combination, with a plow, of an adjustable side plate secured to the inner side of the share by a bolt, said plate conforming to the contour of the share, and adapted for adjustment under its edge to raise or lower the share, to keep the plow level and from tilting over, and the share from wear, as and for the purpose set forth." The third claim sets forth that the plate in question has a slot, so that it can be raised or lowered, bolted to the share, and that this plate is beveled to an edge.

Lenhart is a blacksmith, and as such for many years had sharpened plow-shares, and fashioned the same, for farmers. The plow, down to the date of this patent, for a long period of time—perhaps from the time of its first use—had undergone no material change. It consisted of a share and mold-board, sometimes in one, and generally in two pieces. One great difficulty had never been overcome. If the share and point of the plow were so sharpened and fashioned as to run level, after being in use for a short or longer time the under part of the share would become dull or rounded, thereby tending to throw the edge of the share up and out of the ground, and turning the plow over towards the landside, or it would, if not properly fashioned, wing or turn over towards the plowed soil. Every one who has ever used a plow can appreciate this more easily than it can be described. This could only be overcome by repeated sharpening of the share, and by pounding the point of the share down to give it what is called a "suck." Lenhart's experience as a practical blacksmith led him to believe that this could be overcome by an appliance attached to the plow. And if it could be overcome, it would make the plow much more easily dragged by the team, and much more easily managed by the man, because, if the plow runs level, the only power required from the team is to pull the plow through the ground that is to be turned over. But if the share has a tendency upward or downward all the time, then the man must practically ride the handles, and by rigidity of his arms hold the plow level, thereby all the time using much physical power himself, and require the team to carry or drag the man. The heel plate, the subject of Lenhart's patent, obviates all the above. And especially is this so from the time the share of the plow commences to bevel or dull. The above statement of itself shows that, the heel plate adjusted as it is by the slot, so that it can be raised or lowered, it is of utility. For a time after the patent was issued, it was not generally used. But after a short time the complainants learned of it, and from that time on have put on very large numbers on the plows manufactured by them, until now they are in quite general use, and often demanded by the farmer. So that, both by reason, and the large number in use, the showing is complete that the appliance is of great utility. And if the showing was not as satisfactory as it is, I could give this defense no great consideration, from the fact that defendants themselves are urging the right to manufacture and sell an appliance or heel plate or bar to effect the very same purpose, and

obviate the very same difficulty experienced by every farmer. In other words, the defendants furnish all the requisite proof of utility.

Prior to the Lenhart patent, other patents had been issued. Many of them are in evidence, but most of them were introduced to illustrate the state of the art, and only a few are relied on to defeat the Lenhart patent. More than 50 of the patents are in evidence. Some of them are 50 years old. But it is not seriously contended that more than 3 of them suggest the improvement covered by the Lenhart patent, and these I will notice. One of them is the Welborn patent, No. 263,637. That was with reference to a device for a cultivator which drags through the earth, with no tendency to heave or wing over to the one side or to the other. A cultivator has no tendency to run out of the ground, but must be lifted out, while a breaking plow will turn to the one side or to the other, accordingly as the share is fashioned by the blacksmith, or by use and wear. Another patent relied on is the Reyner patent, No. 336,946. In that case it consisted of certain attachments to the plow; the claim being that the soil could be reached to a greater depth, and the weeds plowed under. The moldboard and share were not separate, but were combined, and were reversible, so that either edge would act as a share. The device is a thin, narrow, and pointed tongue, and is in no respect, in my opinion, like the Lenhart device, nor its equivalent in any way. The remaining patent relied on by defendants to defeat the Lenhart patent is that of Bjorkstrom, No. 397,891. In that case the real improvement intended to be covered by the patent was the knife or cutting plate. One of the plates is at or under the edge of the landside, and the other under the moldboard. But there is, or at least can be, no claim that in the device covered by the Bjorkstrom patent the plow will run level, or that it will not wing over. But if this is not so, and the plow does run level, it is because of two cutting blades, one on either side. A plow can have this appliance, assuming that the appliance could be attached to an ordinary plow, and still the plow would suck down and wing over. So it seems to me after an examination of the patent. And the evidence so shows. No one of the devices covered by these or the other patents urged by defendants have been regarded as useful, or been in use. They have all been regarded as without merit, and, in my judgment, could not have been suggestive to Lenhart. That Lenhart was a pioneer in his invention is absolutely shown by the evidence.

The defendants Deere & Co., named in the bill, but who have not appeared, are very extensive manufacturers of plows, and have been for a great many years. Defendants' expert is, and for years has been, in the employ of that company. There is nothing more than a pretense that the appliance in question, or its equivalent, was used prior to the issuance of the Lenhart patent. And this being so, it is but fair and right that this patent should have a fair and liberal construction. The authorities exact such a holding. His claims Nos. 1 and 2 are to keep the plow level. His correspondence with his Washington solicitor who procured his patent shows that such was in his mind, and all that was in his mind. In one letter he stated, "The object and purpose of which, when in its proper place, is to hold the plow level and from winging over." In another letter: "Will keep the plow level, and will prevent the plow from running on the wing or bar; and it will serve to correct the bearing of the plow, and thereby lighten the draft and make the plow easy to control." In another letter: "It would be better to set forth the purpose fully in the claim, the great object being to keep the plow level." The Washington solicitor, or some one, seemed to be determined to get a cutting function specified in the patent, but the old blacksmith kept pressing the point that it was to keep the plow level, and thereby lighten the draft and make the plow more easily controlled. Complainants rely on claims Nos. 1 and 2 of the Lenhart patent. But defendants say that claim No. 3 and the specifications show that it was also for cutting the soil, and there is some force in this argument. But taking the specifications in their entirety, I do not agree with the contention, and content myself with announcing the conclusion, as my holding, that the Lenhart patent is valid, and that it covers a device of utility. It is one of practicability, and of con-

siderable, and perhaps of great, commercial value. And this being so, it only remains to ascertain whether defendants are guilty of infringement.

I have already stated that the essential feature of the Lenhart patent was not a device for cutting, but was to hold the plow level. The device used on Deere & Co. plows sold by the defendant Lourie Implement Company is by their expert conceded to be for that, and that only. Defendants stoutly deny that their device is for cutting. In other words, their device is a shoe, and nothing else, and performs no other function. This being so, and it is a fact appearing from the evidence aside from their claim, and the essential function of the Lenhart device being the same, and the defendants being engaged in selling the Deere & Co. device, it follows that they are liable as infringers.

I have no purpose of discussing the case further than to show in a general way what my views are, and the reasons therefor.

The complainants are allowed a decree, which will be signed when one has been presented to defendants' counsel, and then given to me for signature, or corrected if need be.

John R. Bennett, for appellant.

Charles K. Offield and Charles C. Linthicum, for appellees.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal by the Lourie Implement Company, a corporation, from a decree that it has infringed the first and second claims of letters patent No. 415,542, to John Lenhart, for a new and useful improvement in plows, and that it must cease its infringement.

The patented device is a slotted slide-plate adjustable to the inner side of the heel of the share or moldboard of an ordinary walking plow to hold the plow level, to regulate its tendency to tilt to the side of the moldboard, and to preserve the outer edge of the share from wearing off while other parts of it are in a better condition. The slide-plate is held in place by a bolt which passes through the moldboard and through the slot in the plate, and is secured by a nut. By loosening the nut the plate may be depressed so that its lower edge will register with, or extend under the edge of, the share, or it may be raised so that its lower edge will be above the edge of the share. The depression of the plate brings it below the plane formed by the lower edges of the landslide and the plowshare, places it in contact with the bottom of the furrow on the moldboard's side of the plow, and in this way it prevents the plow from winging down, or causes it to tilt toward the landslide. By the use of the bolt and slot, the plate may be adjusted to keep the plow level, and to overcome any tendency which it may have to wing down or to wing up.

In his specification the patentee describes a slide-plate, the lower edge of which is thin and is turned out, and which may be adjusted so far above the edge of the plowshare that it will not extend down to the lower plane of the plow, and will not affect its operation, or it may be dropped so low that its lower edge will extend under the edge of the plow, and engage the bottom of the furrow. He states that the objects of his invention are to prevent the plow from winging down, and to preserve the heel of the share from wear. In the latter portion of his specification he states that the lower edge of the plate is also found to be especially useful when it projects under the edge of the

share in cutting the roots under the sod. He describes a plate with a gradual taper from the slot to its lower sharp edge, but declares that he does not confine his invention to any particular form of the lower portion of the plate, and that it may be made of any desired construction, so that it will adjust the required degree of elevation of the moldboard's side of the plow, and protect it from wear, and furnish a cutting adjustable edge projecting beyond the share. The first and second claims of the patent read in this way:

"(1) The combination, with a plow, of an adjustable plate working under the edge of the share to raise or lower the share to keep the plow level and from tilting over, and the share from wear, as and for the purpose set forth.

"(2) The combination, with a plow, of an adjustable slide-plate secured to the inner side of the share by a bolt, said plate conforming to the contour of the share, and adapted for adjustment under its edge to raise or lower the share to keep the plow level and from tilting over, and the share from wear, as and for the purpose set forth."

The appellant calls its device a "shoe." It is a slotted sliding plate attached to the clip or brace on the inner side of the moldboard of the plow by means of a bolt which extends through the moldboard, the clip, and the slot in the slide, and is fastened by a nut. By means of this bolt and slot the appellant's slide is so adjustable that it may be depressed so far that its foot will extend below the plane of the lower edges of the landside and the moldboard of the plow, and will engage the bottom of the furrow. In this position it will counteract the tendency of the plow to wing down, and prevent the wear of the edge of the moldboard to some extent by holding it up from the bottom of the furrow. By means of the bolt and slot the counteracting tendency of the slide may be adjusted to the strength of the tendency of the plow to wing down. While the appellant accomplishes in this way the objects which Lenhart declares in his specification he made his invention to attain, to wit, the regulation of the tilting of the plow, and the prevention of the wear of the share, the appellant gives a different form to the lower part of its device, so that it does not pass under the edge of the plowshare, and does not cut the roots of the grass. Instead of making the lower part of the slide thin, and turning it out, so that, as it is depressed, it will pass under the edge of the plowshare and cut the roots, the appellant thickens, widens, and flattens the lower part of its slide into the form of a triangular shoe, and, by means of clamps extending from the slide to the clip or the moldboard, holds the foot of it about seven-eighths of an inch away from the edge of the plowshare when it is extended below the plane of the bottom of the plow. The appellees make their plows so that when they are new they will run level, or will not wing down, and as the shares wear away they adjust their sliding plates to counteract the tendency of the plows to wing down, and thus keep them level. The appellant makes its plows so that without the sliding plate or shoes they have a strong tendency to wing down when they are new, and puts its sliding plates or shoes at once into operation to counteract this tendency, by extending the feet of them below the planes of the bottoms of the plows when they are first put in operation.

The appellant insists that its device does not infringe upon the claims under consideration, because it does not cut the roots of the sod, and

because when it is depressed it does not pass under the lower edge of the plowshare, although it passes below the plane of that edge upon the side of it. In support of this contention, it insists that the invention of Lenhart is so limited by the prior art that, if its machine infringes, his invention is anticipated and the patent is invalid. The principle of Lenhart's invention is the regulation of the tilting of the ordinary walking plow by means of an adjustable sliding plate attached to the under side of the moldboard or share of the plow. Its mode of operation consists in the adjusting of this plate by sliding it up and down by means of the slot, the bolt, and the nut, so that the plow will run level. The patents which counsel for the appellant cites to show that this principle and mode of operation, which the appellant has clearly embodied in its sliding shoe, were disclosed before Lenhart invented his plate, are No. 226,750, to F. Simonds, April 18, 1882; No. 274,491, to W. K. Harrell, March 27, 1883; No. 397,891, to A. F. Bjorkstrom, February 19, 1889; No. 336,946, to F. Reyner, March 2, 1886; and No. 263,637, to W. J. N. Welborn, August 29, 1882. The patents to Simonds and Harrell do not describe sliding plates upon the moldboards of plows, but shoes beneath the plows, upon which they bear when in operation; and these shoes lack the essential principle of Lenhart's invention—its adjustability to the changing tendency of the plows to tilt toward the side of the moldboards. The patent to Bjorkstrom shows a plow provided with two shoes—one under the heel of the land-side, and the other under the heel of the moldboard. The shoe under the heel of the moldboard consists of a small, tapered plate, pivoted at its front end to the inner side of the moldboard, with its rear end adjustable vertically by means of a slotted ear which operates upon a bolt in the moldboard of the plow. The forward end of the tapered shoe cannot be raised or depressed without removing the entire shoe from the plow. This device therefore lacks the requisite adjustability which the sliding plates of Lenhart and the appellant possess, by means of which the entire plates may be raised or depressed without detaching them from the plows. Bjorkstrom's device was not conceived or constructed to regulate the tilting of the plow toward the side of the moldboard, but to serve the same purpose that the shoe on the landside of his plow was made to serve—the purpose of shoes on a sled. It was made to be what Bjorkstrom calls it—a wear-plate. When the appellant adopts the shoe of Bjorkstrom, it will not infringe the patent to Lenhart, because it will not then accomplish the purpose which his invention was made to attain, and will not avail itself of the principle which Lenhart's device involves. It may be that it is because it seeks to attain that purpose that it has neglected Bjorkstrom's pivoted shoe, and appropriated Lenhart's sliding plate. The patents to Welborn and Reyner have little relevancy to the issue in this case. The former describes a guide, and the latter a stirring attachment to a plow. Neither of the patents discloses an adjustable sliding plate for regulating the tilting of the plow, or any other equivalent means for accomplishing that purpose. This brief review of the patents cited by counsel for the appellant discloses the fact that there is nothing in them which describes or suggests the adjustable sliding plate of Lenhart; no description of any device which will accomplish the purpose of his inven-

tion; nothing that places the adjustable, slotted, sliding plate of the appellant, with its blunted, flattened lower edge, beyond the limits of the grant to Lenhart, or that relieves the Lourie Company of the infringement of which the court below found it to be guilty.

But counsel for the appellant persuasively argues that his client does not infringe upon the grant to Lenhart, because the only device secured by the first and second claims of the patent to him is an adjustable plate which slides under the edge of the share to raise or lower it, and which cuts the roots beneath the turning turf, and that the sliding plate of the appellant never projects under the edge of the share, and never cuts the roots beneath the sod. This construction of the two claims of the appellee which have been quoted, however, does not commend itself to our judgment. It is too narrow, refined, and technical. It permits a nullification of the grant by a mere change of the form of the foot of the device from a sharp, turned edge, to a blunted, straight edge, while the changed machine retains the principle and the mode of operation and performs the function sought and secured by the patented device. Grants of letters patent should receive a fair interpretation—one that vitalizes rather than one that paralyzes them. If the sliding, adjustable plate of the appellant had been disclosed in the prior art, and if the only novelty or patentability of Lenhart's device consisted of the special form of its lower edge, whereby it was adapted to pass under the edge of the plowshare and to cut the roots of the grass, his patent might be limited to a slide of that specific form. *Sandwich Enterprise Co. v. Joliet Mfg. Co.*, 33 C. C. A. 491, 493, 91 Fed. 254, 256; *Campbell v. Richardson*, 76 Fed. 976, 22 C. C. A. 669. This, however, was not the case. No one before Lenhart regulated the tilting of the ordinary walking plow by an adjustable sliding plate on the inner side of the moldboard or share. He discovered the principle and the mode of operation by which he has effected this regulation. He was the original inventor of the slotted sliding plate, by means of which the desideratum he sought was first attained. The purpose of the plate and of the invention was not to cut the roots of the grass beneath the sod, but to regulate the tilting of the plow. The cutting of the roots was but an incident of the particular form of the plate which Lenhart described. But that form was not the essence of his invention, and it is neither mentioned nor claimed in either of the two claims of the patent which are here in litigation.

May the appellant escape liability for infringement because, instead of making the foot of its adjustable plate thin, and bending or turning it toward the plowshare, so that in operation it would pass under it and cut the roots of the grass, it has made it thick and blunt, and extending vertically downward below the plane of the plow seven-eighths of an inch distant from, and on the side of the edge of, the plowshare? Mere changes of the form of a patented device, where the principle or mode of operation is adopted, will not avoid infringement, unless the form of the machine is the distinguishing characteristic of the invention. *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 106 Fed. 693, 711, 45 C. C. A. 544, 562;

Kinloch Tel. Co. v. Western Electric Co., 51 C. C. A. 362, 365, 113 Fed. 652, 655. The distinguishing characteristic of this invention was not the thinness or bend of the sliding plate, but its position and adjustability upon the moldboard.

A copy of the thing described in a patent, either without variation, or with such variations as are consistent with its being in substance the same thing, is for all the purposes of the patent law the same device as that described in the patent. *Burr v. Duryee*, 1 Wall. 531, 573, 17 L. Ed. 650. One who claims and secures a patent for a new machine thereby necessarily claims and secures a patent for every mechanical equivalent for that device, because, within the meaning of the patent law, every mechanical equivalent of a device is the same thing as the device itself. A device which is constructed on the same principle, which has the same mode of operation, and which accomplishes the same result as another by the same means, or by equivalent mechanical means, is the same device, and a claim in a patent of one such device claims and secures the other. *Machine Co. v. Murphy*, 97 U. S. 120, 125, 24 L. Ed. 935. The sliding, slotted, adjustable plate of the appellant, with its thickened, flattened lower edge or foot by the side of, and seven-eighths of an inch distant from, the edge of the share of the plow, involves the same principle, has the same mode of operation, and performs the same function—the regulation of the tilting of the plow—by mechanical means equivalent to the adjustable sliding plate of *Lenhart*, with its thin edge bent against the plowshare so that it may slide under its edge when it is depressed below it. One may not escape infringement by adding to or subtracting from a patented device, by changing its form, or by making it more or less efficient, while he retains its principle and mode of operation, and attains its result by the use of the same or of equivalent mechanical means. *Walker on Patents*, §§ 347, 348; *Sewall v. Jones*, 91 U. S. 171, 183, 23 L. Ed. 275; *Coupe v. Weatherhead* (C. C.) 16 Fed. 673, 675.

The decree below is affirmed.

LETSON et al. v. ALASKA PACKERS' ASS'N.

ALASKA PACKERS' ASS'N v. LETSON et al.

(Circuit Court of Appeals, Ninth Circuit. March 1, 1904.)

No. 944.

1. PATENTS—INFRINGEMENT—CAN-CAPPING MACHINE.

The *Jensen* patent, No. 376,804, for a can-capping machine, was not for a pioneer invention, in the sense that the machine was the very first to accomplish the heading of filled cans, yet such machine was the first to accomplish that result with any practicable degree of speed or efficacy, and the claims of the patent are entitled to a fairly liberal construction. Claims 3, 5, 9, 10, and 11 *held* infringed by the machine of the *Letson & Burpee* patent; No. 629,574, and claim 1 *held* not infringed.

3. SAME—EQUIVALENT DEVICES.

The fact that an alleged infringing mechanical device lacks one of the functions of the patented device does not avoid infringement, where such function is not claimed in the patent.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

For opinion below, see 119 Fed. 599.

These are cross-appeals from the decree of the Circuit Court for the District of Washington rendered in a suit brought by the Alaska Packers' Association, hereinafter designated the appellee, against the firm of Letson & Burpee, hereinafter designated the appellants, for infringement of letters patent No. 376,804, dated January 24, 1888, issued to Matthias Jensen, for an improvement in can-capping machines. Claims 1, 3, 5, 9, 10, and 11 were alleged to be infringed. The trial court found that claims 5, 9, and 10 were infringed, and that the other claims were not infringed. The appellee was the assignee of the patent above referred to, and extensively used and manufactured the machines covered thereby. The appellants obtained on July 25, 1899, 11 years after the issuance of the Jensen patent, a patent for a can-capping machine (patent No. 629,574), and thereunder manufactured the machines which are charged to be infringements of the Jensen patent. The validity of all the claims of the Jensen patent is admitted. The sole defense of the appellants is noninfringement.

The operation of the Jensen machine is best illustrated by the cuts which were admitted in evidence. In cut I, "Jensen's Can-Feeding Mechanism," the endless traveling belt is designated by the letter A. The filled cans are placed upon it in a vertical position. The belt passes around drums at each end, the drums being operated by appropriate mechanism. The device marked, j, j, described in the patent as arms, are used as spacing devices for the cans. They allow them to move forward so as to arrive at the feeder in proper time to be received by it and carried forward. The arms which are connected together by the chain, k, have an intermittent motion back and forth in the direction of the belt. The letter E designates the transverse stop, consisting of a stationary bar, which arrests the forward progress of the can. The next element is the feeding device, which receives the can where it is stopped in its forward movement, and transfers it from the belt to the capping mechanism, which is shown in the cut marked II, "Jensen's Feeder," where it is designated by the letter F. It consists of a transverse bar, with four arms at right angles thereto, the arms being marked by the letter H. The capping mechanism of the feeder consists of three cranks, lettered J, J, J, operated by a mechanism which imparts a circular, sweeping motion to the feeder. The can is first received between the first two arms of the feeder, and is swept off the belt by the circular, sweeping motion of the feeder, and is left on the table to be further moved by the second motion of the feeder, which grasps it between the second two arms, and places it on the lower plunger, beneath the capping mechanism. The cut III, "Jensen's Cap Feeding Mechanism," shows the apparatus for feeding the caps. Caps are placed on an angular chute, designated by the letter Q. At the bottom of the chute is a spring arm, P, which stops the caps and prevents their further movement down the chute until the proper time for releasing them. The letter N designates a trigger placed directly within the line of the travel of the moving cans, and attached to an arm, O, projecting upwardly so that, when the trigger is pressed by the can, the arm, O, pushes back the spring arm, P, and releases the cap which rests against it. By this mechanism each can body releases its own cap. The cap is then grasped by other mechanism and carried into the capping mechanism. The capping mechanism consists of a lower plunger, upon which the can is delivered from the feeder; above it, a conical guide; within which the upper end of the can is forced; two slides, adapted to move towards each other transversely, having their ends shaped in a semicircle, so that when they come together they form a complete circular space. An annular rim is cut in the face of these slides, in which the capping fits and rests. When the can is placed on the lower plunger, the plunger rises by appropriate mechanism,

pushes the upper end of the can through the conical guide which serves to size the upper end of the can in perfect alignment for the caps, and inserts the can in the cap. An upper plunger holds the cap in place, and, after the can is capped, descends on top of the can, holding it steady, while the semi-circular slides recede and allow the capped can to pass through the conical guide and descend to the table where it is grasped between the last two arms of the feeder and carried to the crimping mechanism. In cut IV, "Jensen's Capping Mechanism," the lower plunger is marked S. Directly above it is the conical guide, marked T', T'. Immediately above the conical guide are the transversely moving slides, T, T. The upper plunger is marked U.

The appellants' machine is described as follows: Cut V, "Letson & Burpee Can-Feeding Mechanism," shows that combination of the machine which delivers the cans to the feeder. 59 is the endless traveling belt. B, B, are the cans resting thereon. The devices marked 79, 79, are the spacing devices separating the cans, and regulating their direction to the feeder. The device marked 36 is a recessed wheel on a spindle, and rotating across the surface of the belt. When the can reaches the wheel, it is caught in one of the recesses of the wheel as it rotates, and is thereby removed from the belt into a circular guideway, shown in the drawing, and is carried along the guideway to a disk which is the upper surface of the lower plunger. Cut VI shows the appellants' mechanism for delivering the caps. The caps are carried by an endless horizontal belt. Letter N represents the trigger in the path of the moving cans. The trigger is connected with a stop which restrains the caps on the carrying belt. When the can strikes the trigger the stop releases the cap, and the carrying belt carries the released cap to a device which places it on the capping mechanism. Cut VII shows the appellants' can-capping mechanism. The feeder, 36, is represented as having placed a can on the lower plunger. The plunger represented by the figure 19 consists of a disk on which the can rests, and a spindle passing loosely through a vertical hole in the rotating arm 14a. The bottom of the spindle moves on the stationary cam face, 46, which is an inclined plane. As the spindle moves on the cam, it is pushed upward through the conical guide, 21. Immediately above the conical guide are three transversely moving slides for holding caps. Above these slides is a second plunger, 26, called a "cap presser."

The claims of the appellee's patent which are alleged to be infringed are the following:

"(1) An endless traveling carrying-belt, a stop, E, extending across it to change the direction of the cans, and arms swinging over the belt, whereby the delivery of the cans from the belt to the feeder is rendered exact, substantially as herein described."

"(3) In combination with a transverse belt, the feeder having the projecting arms between which the cans are received from the belt and the actuating devices by which the motions of the feeder are produced, substantially as herein described."

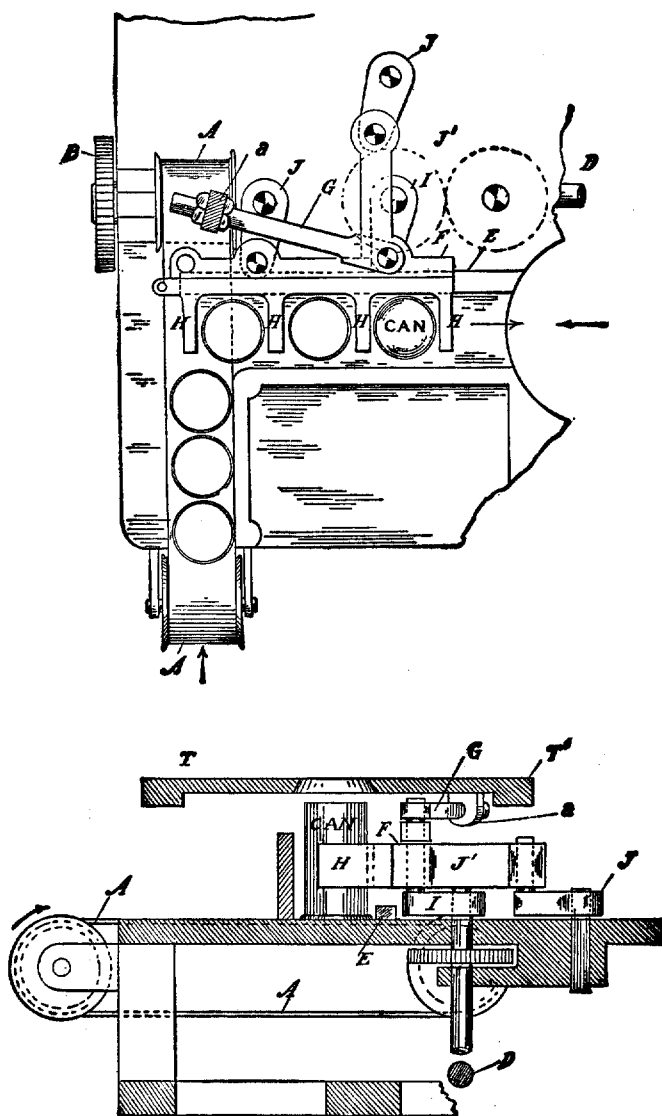
"(5) The inclined chute into which the caps are placed, and a stop extending across said chute, so as to prevent the caps from moving downwards, in combination with a trigger extending across the path of the cans as they are moved toward the capping table, said trigger being connected with the stop, so that, as it is moved backward by the passage of the can, it withdraws the stop to allow a cap to move down the chute, substantially as herein described."

"(9) The vertically moving plunger upon which the cans are delivered by the feeder, in combination with the conical guide situated above the cans, and the transversely moving slides upon which the caps are received and held, with a mechanism by which the slides are withdrawn as the can enters the cap, substantially as herein described."

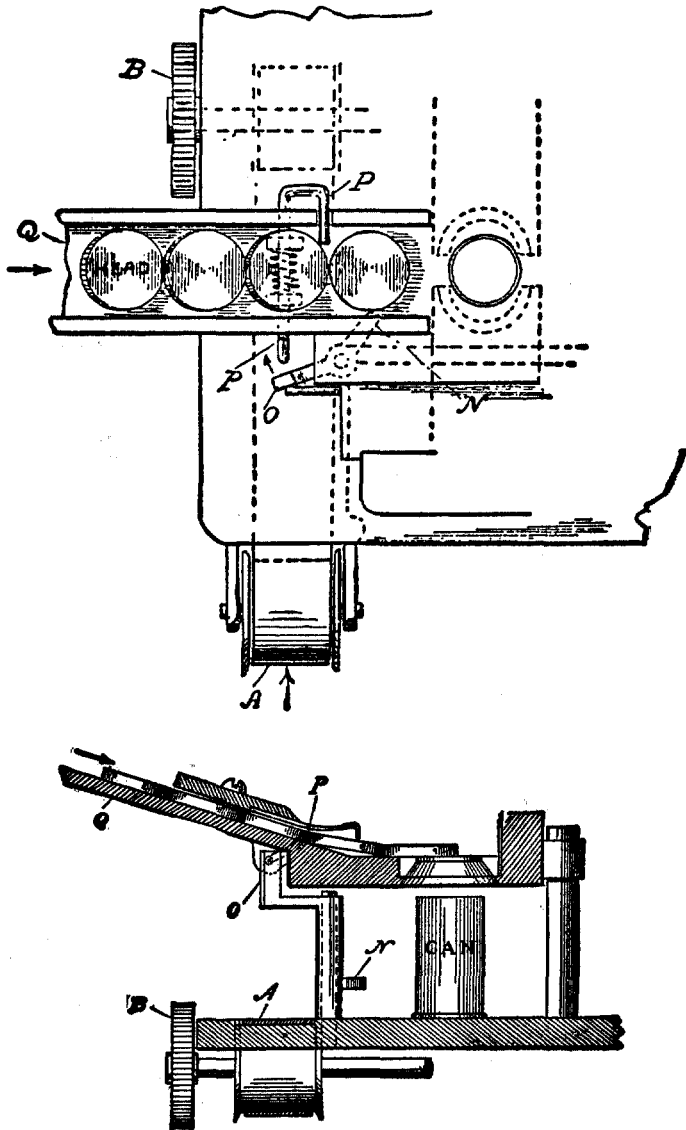
"(10) The vertically moving plunger by which the can is raised to receive the cap, and the guide into which the upper end of the can enters the transversely moving cap-holding slides, in combination with the second plunger moving vertically above the cap, and following it down by gravitation or otherwise, so as to steady the can in its descent after the cap has been applied, substantially as herein described."

"(11) The vertically moving plunger upon which the can is received, a carrier for placing the can upon the plunger, and a mechanism by which this

CUT II.
Jensen's Feeder.

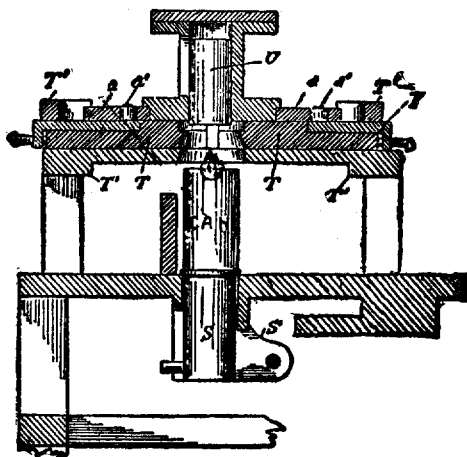
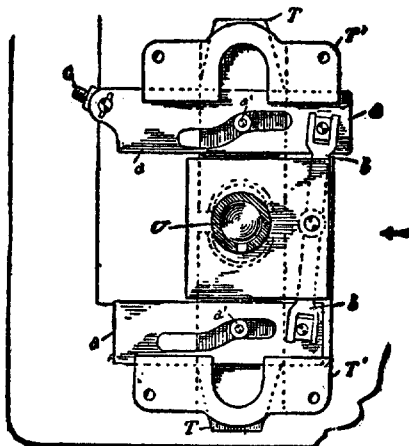


CUT III.
Jensen's Cap-feeding Mechanism.



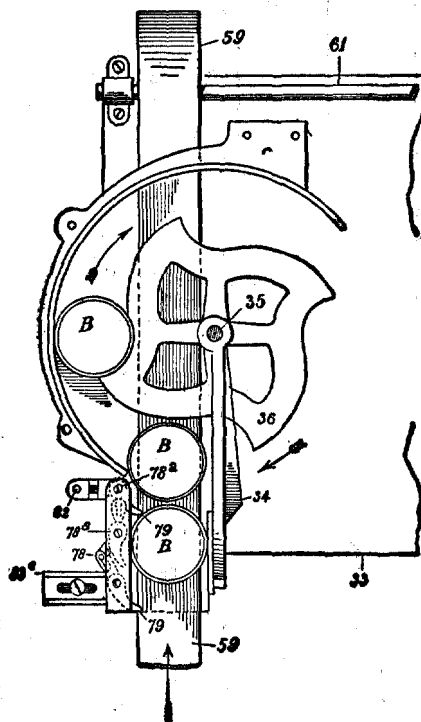
CUT IV.

Jensen's Capping Mechanism.

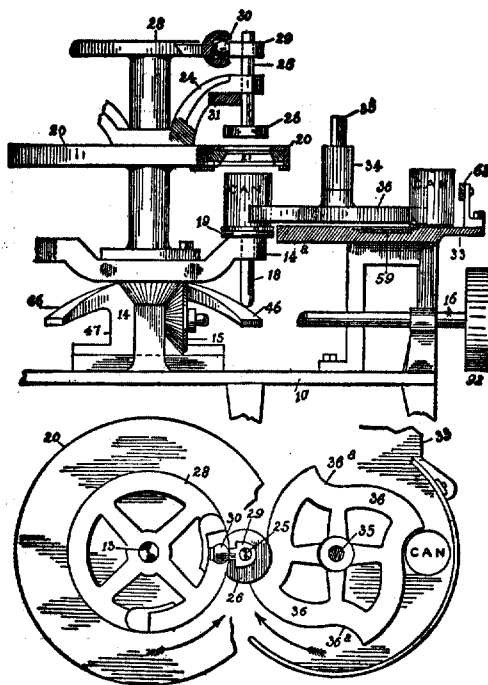


CUT V.

Letson & Burpee's Can-feeding Mechanism.



CUT VII.

Letson & Burpee's Can-capping Mechanism.

M. A. Wheaton, I. M. Kalloch, Jas. A. Kerr, and E. S. McCord, for appellants.

John H. Miller and Dorr & Hadley, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Before discussing the question of infringement, it is important to determine the nature of the Jensen invention, and to ascertain how far the claims thereof are affected by the prior state of the art. The appellee contends that prior to that invention there was no automatic machine known or in existence which would successfully place caps on filled cans, and that, Jensen being the first in the art to devise a machine capable of performing that operation, his invention is pioneer in its character, and entitled to a broad construction. The appellants, on the other hand, contend that Jensen used devices and apparatus which had been in use in well-known prior can-heading machines, and that in his combination he did not produce any new ultimate result, and that his machine is not a pioneer can-heading machine. In that connection the appellants refer to the Edmund Jordan patent, No. 307,197, dated October 28, 1884, and to the George A. Marsh patent, No. 265,617, dated October 10, 1882. The first of these patents describes a machine having a segmental clamp chuck mounted on a vertical shaft controlled by a mechanism which gives it two motions—one horizontal, the other vertical. The chuck is composed of segments operated by a spring; the segments, when brought together, forming a circle, with a beveled mouth below, and an annular space at the top. It has two rotating tables—one for the purpose of feeding the cans; the other, for the purpose of feeding the caps. Cans and caps are placed on these tables by hand. The clamp chuck grasps a cap, swings over the can body, and places the cap thereon. The functions of this machine, as described in the claims, are: "First, to receive and retain a can cap; second, to grasp and hold the body of the can in a proper position; third, to force the cap of the can on the body; fourth, to release the headed can when these operations are completed. The Marsh invention is not automatic. It is a contrivance to be placed on a bench and operated by hand or by a treadle. Caps and cans are placed in position by hand. It contains a conical guide for inserting the upper end of the can into the cap. The Jensen machine contains an endless can-feeding belt for carrying the cans to the machine; arms swinging over the belt to regulate the direction of the cans to the feeder; a stop fixed transversely across the belt to arrest the forward motion of the cans, and change their direction; a feeder, which, by a circular, sweeping motion, transfers the cans from the belt to the capping mechanism; a cap-feeding device, consisting of an inclined chute, and mechanism for supplying the caps one by one; a mechanism whereby each can releases its own cap, consisting of a stop in the cap chute; a trigger in the path of the cans, so arranged that the can operates the trigger and releases its cap; and a can-capping mechanism, consisting of two vertical reciprocating plungers, a conical guide for sizing the upper end of the can body, and transversely moving capping holding slides. The Jensen patent has

been before this court in prior litigation. In the first suit, which was brought against Jensen by Norton Bros., assignees of the Jordan patent, above referred to, it was held that the Jensen machine was an infringement on the Jordan primary patent, No. 267,014; the court holding in that case that the Jordan patent covered an invention of a pioneer character. *Norton et al. v. Jensen et al.*, 49 Fed. 859, 1 C. C. A. 452. But in the suit brought by the Norton Bros. against Milton A. Wheaton, in which the complainants contended that a machine made by the latter infringed the Jordan patent, No. 267,014, it was held by this court, upon a full and complete showing of the state of the art, which had not been made in the case against Jensen, that the Jordan patent was not of a pioneer character, but was merely an improvement on prior devices. *Wheaton v. Norton et al.*, 70 Fed. 833, 17 C. C. A. 447. It seems to be a fact established by the evidence now before us that, while the Jordan machine was slow and cumbersome, and was not adapted to extensive or rapid use in putting heads on unfilled cans, and was not, in practice, used at all for capping filled cans, it might nevertheless to some extent, at least, have been used for that purpose. So that while it cannot be said that the Jensen machine was a pioneer patent, in the sense that it was the very first to accomplish the result of heading filled cans, Jensen nevertheless was the first to successfully head filled cans with any practicable degree of speed or efficacy. He brought to success what prior inventors had essayed, and but very imperfectly accomplished. In so doing he adopted some devices that had been used before, combined them with others that had not been used, and added the necessary elements to make a practical and successful machine. His combination and invention was, we think, more than a mere improvement or perfection of what had preceded it. It was of such novelty and importance as to constitute a distinct step in the progress of the art, and it went into immediate and extensive use. Its claims are therefore entitled to a fairly liberal construction. *Morley Machine Co. v. Lancaster*, 129 U. S. 263, 273, 9 Sup. Ct. 299, 32 L. Ed. 715.

Considering *seriatim* the claims which are alleged to be infringed, we find in the first an endless traveling belt, a stop extending transversely across the belt, and spacing bars or arms swinging over the belt. This is a subcombination which accomplishes the preliminary step in the general operation of the machine by introducing the cans one by one into the heading machine. It is a combination of devices well known in machinery. The appellants contend that in their machine one element of this combination is omitted, namely, the stop, E, extending across the belt to change the direction of the cans. The appellee admits that the appellants' machine does not contain the stop bar, E, but contends that the device referred to in its claim as a stop is not limited to the form of stop specified, but includes and covers any form of stopping device; that any device which performs the function, whether it be called a "stop," or by any other name, is a mechanical equivalent of the stop, E, and consequently within the scope of the claim; and that the claim should be construed to read as follows: "An endless traveling belt, a device extending across it to change the direction of the cans, an arm swinging over the belt," etc. In the appellants' ma-

chine the device which removes the cans from the carrying belt, and places them upon the plunger, is a wheel fixed upon a central axis, rotating in a circle above the carrying belt. Its periphery is cut away so as to form four concave spaces, which, as the wheel rotates, catch the cans upon the carrying belt, and carry them in a direction at right angles thereto, and place them on the plungers. It operates to change the direction of the moving can, and to remove it from the belt, but in the operation there is no perceptible pause in the movement of the can. In the appellee's machine the cans are removed from the belt by the swinging arms, which take the cans after they have been intercepted in their forward movement on the traveling belt by the stop, E, and have been brought to a rest, and deflects them to the plunger. The trial court held that the stop bar, E, is an element of claim 1 which is entirely dispensed with in the appellants' machine, and that thereby infringement of that claim is avoided. Upon a careful consideration of the claim and of the evidence, we are not convinced that this was error. While the wheel which the appellant uses performs the function of the appellee's swinging arms, we think it cannot be construed to perform in addition to that function the office performed by a stop, E, extending across the belt, which in the appellee's patent is described as a rigidly fixed bar, without giving to the combination a more liberal construction than, in our judgment, it is entitled to, in view of the fact that none of the devices used in the combination was original with Jensen.

Claim 3 covers the combination of a transverse belt with the feeder having projecting arms, between which the cans are received from the belt, and the actuating devices by which the motions of the feeder are produced substantially as in the patent described. The feeder in the appellee's patent, designated F, is a straight back, with four arms projecting at right angles forming three pockets. It is attached to three cranks, which rotate, giving it an eccentric, sweeping motion. The cans, having been carried by the traveling belt to the stop, E, remain stationary; the belt continuing its motion beneath them. The feeder, in this sweeping movement, catches the can in the first pocket, between the first pair of arms, and pushes it at right angles to the line of the belt travel, moves it a short distance, and then recedes, leaving the can stationary until the next sweep, when it is received in the middle pocket, and moved upon the plunger, S, which is rigidly fixed in the center of the machine, but which moves vertically so as to push the can upward into its cap, and, to descend after the can is headed. By the next movement of the feeder, the can is received into the third pocket thereof, and moved off the plunger. In the appellants' machine, when the can is carried by the wheel, 36, and is brought into position on the plunger, its function is completed. It does not afterwards attach the can. Now, it is true that in its operation the feeder, F, in the appellee's machine, performs a function not accomplished by the wheel, 36, of the appellant's machine. It does all that is done by the wheel, and more. But what is the scope of the appellee's claim? It covers the transverse belt, the feeder having projecting arms, between which the cans are received from the belt, and the actuating device. No claim is made for the further function of removing the can from the plunger

after it is headed. The question is, do the appellants use a feeder with projecting arms, between which the cans are received from the belt? It is apparent at a glance that the peripheric wheel could be constructed as well with projecting arms as with the curved pockets, and that its operation would not be altered. If the appellee is entitled to be protected in the claim as it is made in his patent—and it is not disputed that he is entitled to such protection—we think infringement cannot be avoided by merely changing the shape of the arms of the feeder. Nor do we think that the fact that the wheel, 36, of the appellants' machine, moves in a true circle, while the feeder of the appellee's moves eccentrically and intermittently, sufficient to constitute a fundamental difference. We are of the opinion, therefore, that claim 3 is infringed by the appellants.

Concerning claim 5, we entertain no doubt of the correctness of the ruling of the trial court that the appellants have infringed. The claim covers the inclined chute into which the caps are placed, a stop extending across the chute to check their movement, in combination with a trigger extending across the path of the cans, and connected with the stop, so that, as the trigger is moved backward by the passage of the can, it withdraws the stop and allows a cap to move down the chute. The essence of this claim is the fact that each can automatically releases its own cap for the capping operation, and it is an important feature of Jensen's invention. Prior to his invention, caps for each can had been supplied by hand. The appellants' device contains a trigger in the path of the cans, a stop in the path of the caps, and a connecting mechanism between the trigger and the stop whereby each can releases its cap. It dispenses with the inclined chute, but in its place substitutes an endless traveling belt, which is the mechanical equivalent of the chute for carrying the caps. This substitution is not sufficient to avoid infringement. A stationary chute, in which the caps move by gravity, and a moving belt carrying the caps, are interchangeable and equivalent; both being old and well-known devices. Counsel for the appellants contend that, in disposing of the question whether the traveling belt is the equivalent of the chute, the inquiry is whether a belt could be substituted for the chute in the appellee's machine. But the test is not whether in the machines, as they are made, a belt could be imported from the appellants' machine so as to work harmoniously without adaptation or change. The true inquiry is whether or not a belt could be adapted to the appellee's machine. Of this the evidence leaves no doubt. In fact, it is so apparent as to require no proof.

The elements of the ninth claim are the vertically moving plunger, upon which the cans are delivered by the feeder; the conical guide above the cans; the transversely moving slides, upon which the caps are received; and mechanism for withdrawing the slides as the can enters the cap. The appellants contend that they dispense with the vertically moving plunger. Their machine has a device, marked 19 in their patent, called a "cap seat." It is a disk resting on a vertical stem, 18, which passes through a vertical hole in the revolving bracket, 14a. It is not denied that this is a plunger, but it is contended that it is not a vertically moving plunger, for the reason that the bracket, 14a, rotates around the central shaft, and in that rotation the dependent

vertical stem of the plunger passes over the inclined face, 46, of the stationary cam, 47, giving to the plunger a resulting circular motion, as well as an upward movement on an inclined plane. It is true that the plunger, while it rises in a vertical line as to its bearings, moves at the same time on an inclined plane by reason of riding over the cam; but at no time does the plunger, or the can which it carries, depart from a perpendicular position. There can be no doubt that it is a vertically moving plunger as to the can cap which is placed above it, or that by that vertical motion it carries the can into the can-capping mechanism, or that by that vertical movement it performs all the functions which are performed by the appellee's can-capping mechanism. Infringement is not avoided by the fact that at the same time a revolutionary movement is imparted to the mechanism, which carries both the cap and the can during the operation. *Ives v. Hamilton*, 92 U. S. 426, 23 L. Ed. 494; *Machine Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935; *Brush v. Condit*, 132 U. S. 39, 10 Sup. Ct. 1, 33 L. Ed. 251; *Hoyt v. Horne*, 145 U. S. 302, 12 Sup. Ct. 922, 36 L. Ed. 713.

Claim 10 adds to claim 9 the second plunger, moving vertically above the can cap, and following it down by gravitation or otherwise so as to steady the can in its descent after the cap has been applied. The appellants use an upper plunger, which they call a "cap presser." They contend, however, that they avoid infringement by reason of the fact that their upper plunger is not required to steady the can—other means being used for that purpose—and that the upper plunger or cap presser is used only for the purpose of pressing the cap on its seat, and holding the same in place while the can body is forced into it. But the evidence indicates that the cap presser of the appellants' machine not only acts as a resisting plate during the can-heading operation, but that it afterwards follows the can and steadies it; the difference being that it does not follow it as far as does the upper plunger in the appellee's mechanism. But it is immaterial whether or not the upper plunger or cap presser of the appellants' machine performs all the functions of the upper plunger of the appellee's. Claim 10 of the latter covers the device itself in the combination, and not the function thereof. It is unimportant that the appellants do not accomplish by their plunger all that is accomplished by the appellee's. The two devices are the same, and the appellants cannot avoid infringement by failing to make use of the upper plunger for all purposes for which it might be used.

The elements of the eleventh claim are the vertically moving plunger on which the can is received, a carrier for placing the can thereon, a mechanism by which the plunger is reciprocated vertically, a second plunger resting upon the can cap, and mechanism for raising this second plunger before the arrival of the next cap. The trial court held that this claim was not infringed, for the reason that among the devices of the combination was included the second feeder, F, which is not reproduced in the appellants' machine. The appellants contend that claim 11 is not infringed for the further reasons that their machine does not use the vertically moving plunger, S, or the upper plunger, U. But from the views above expressed, in which we found that the appellee's feeder, F, is reproduced in the appellants' machine, as well as

the vertically moving plunger, S, and the overhead plunger, U, it follows that the eleventh claim of the appellee's patent is necessarily infringed by the appellants'.

The decree of the Circuit Court will be modified in accordance with the foregoing opinion.

WESTINGHOUSE AIR BRAKE CO. v. CHRISTENSEN ENGINEERING CO.

(Circuit Court of Appeals, Second Circuit. February 25, 1904.)

1. PATENTS — VALIDITY AND INFRINGEMENT — VALVE MECHANISM FOR AIR BRAKES.

The Boyden patent, No. 481,134, for a valve mechanism for automatic air brakes, claim 2, as limited to the elements of the combination described and shown in the specification and drawings other than the graduating valve included in claim 11 is valid; also *held* infringed.

On Rehearing.

For former opinion, see 128 Fed. 437.

See 128 Fed. 749.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Complainant and defendant have each filed a petition for rehearing. That of defendant raises no substantial questions other than those presented in its former brief and on the argument. These questions were not overlooked by the court in its disposition of the case.

The petition of defendant is denied.

The petition of complainant calls our attention to the statement in the opinion that claim 2, if narrowly construed, is identical with claim 11. The court understood complainant's counsel on the hearing to admit this to be the fact. Complainant's counsel now contends that said admission was inadvertent, and that the narrower claims 4 and 11, which were sustained, would not secure to complainant the benefit of the principal invention. We think this contention is correct. Claim 11 does in fact comprise the element of a graduating valve, not included in claim 2. We have never had any doubt as to the meritorious character of the invention in suit, or the validity of the patent therefor, and its infringement by defendant. In these circumstances a construction of the claims should be adopted, if possible, which will uphold the patent and protect the real invention. This may be accomplished in the present case by limiting claim 2 to the elements of the combination described and shown in the specifications and drawings other than the graduating valve. Claim 2, thus limited, is valid, and is sustained.

The decree of the Circuit Court is affirmed, with costs.

AMERICAN SODA FOUNTAIN CO. et al. v. SAMPLE.

(Circuit Court of Appeals, Third Circuit. May 16, 1904.)

No. 20.

1. PATENTS—NOVELTY—SODA FOUNTAIN APPARATUS.

The Sample patent, No. 498,962, for a draft tube for soda fountains, claims 1 and 5, the special feature of which is the subdivision of a tube extending from the valve into branches so as to reduce the pressure when it is desired to use the soft stream in filling a glass, are void for lack of patentable novelty in view of the prior art, and especially of the Clark patent, No. 358,650, issued in 1887, and the Fergus patent of 1872.

2. SAME—PRESUMPTION FROM GRANT.

The fact that the file wrapper discloses that a patent was granted as applied for, without any references, does not add force to the presumption of novelty arising from the grant, but rather the contrary, where there were prior patents for devices in the same art, which are obviously closely analogous to that described in the application.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 126 Fed. 760.

Joshua Pusey, for appellants.

W. G. Henderson, for appellee.

Before ACHESON and GRAY, Circuit Judges, and KIRKPATRICK, District Judge.

GRAY, Circuit Judge. This suit was brought in the Circuit Court of the United States, for the Eastern District of Pennsylvania, by George W. Sample, the appellee and complainant below, for the infringement of letters patent of the United States, No. 498,962, issued to said Sample June 6, 1893, for a draft tube for soda water fountains. The bill of complaint is in the usual form, and charges infringement of said letters patent by the defendants, the American Soda Fountain Company and Alfred H. Lippincott, agent and general manager of said company. The answer is in the usual form, and denies infringement. It avers that, in view of certain prior patents and prior uses by others, the said patent is invalid, and that, in view of the well-known state of the art, at and before the date of the alleged invention of complainant, the same did not involve invention, and was and is without patentable novelty. The court below adjudged the first and fifth claims of the patent in suit (these being the only claims defendants were charged with infringing) to be valid, and that defendants had infringed said claims. From this decree, the present appeal is taken.

The patentee thus describes in the specifications of his patent his alleged invention:

"My invention relates to draft tubes for soda water dispensing apparatus, and has for its object to provide an improved draft tube wherein the valve which controls the discharge of the soda water into the glass or tumbler is provided with one passage or channel for the discharge of the water in a forcible stream or jet for the purpose of mixing the syrup and the water, and with a plurality of passages or channels for the passage of separate streams

or jets of the water to be mixed with the syrup and served to the user, the said plurality of passages or channels other than the channel for the jet to mix the water and syrup being connected with a common inlet port therefor, and the passage or channel for the mixing stream or jet being connected with another port, so that while there will be at least three passages or channels within the body of the valve for the passage of the water there will be only two inlet ports for the series of channels or passages whereby is obtained a better distribution of the soda water with a construction requiring less labor in its operation, and in which loose or leaking joints are not so liable to occur.

It further consists in providing the two channels or passages through which passes the water to mix with the syrup with a series of perforations extending outwardly in an upward direction so that the water will be projected upwardly in a series of small jets and be then directed by a conical nozzle to the glass in a copious but in a quiet or gentle flow so that the glass can be filled in less time than otherwise and the overflow of the glass guarded against.

It further consists in means for readily adjusting the valve against its seat so as to easily and quickly take up any wear as it occurs and thus insure a close joint between the valve and its seat."

The first and fifth claims of the patent (the only ones here involved) are as follows:

"1. In a soda water draft tube having a port for the inlet of the water, a valve formed with separate ports adapted to be alternately brought into communication with said inlet port and formed with a passage or channel leading from one of said ports for delivering the water in a forcible stream or jet and with a plurality of passages or channels leading from said other port adapted to divide the water received through said port and deliver it in independent streams or jets, substantially as and for the purposes described."

"5. In a soda water draft tube, the combination with a valve seat portion formed with an inlet for the water and with a chambered portion to receive the valve, of a valve fitted in said chambered portion and formed with separate ports adapted to be alternately brought into communication with said inlet port, and having a passage or channel leading from one of said ports and a plurality of passages or channels leading from the other port and adapted to divide the water received from said port into separate flows, means for adjusting and for holding said valve against its seat, and means for operating said valve, substantially as and for the purposes described."

According to the evidence, it is desirable, in the class of devices to which the patent in suit relates, to provide a valve mechanism whereby a single "sharp" or forcible stream may be first directed into the tumbler or receptacle, for the purpose of thoroughly mixing the syrup and soda water. When this is done, and before the glass is filled, it is also desirable that a "soft" or diffused stream, or what is known as "flat" soda water, may be drawn into the glass or receptacle in such manner that the danger of splashing or overflowing the glass will be avoided. This is in general accomplished by conveying the air-charged soda water through a straight tube of small diameter, the water being discharged without interruption in a "sharp" strong stream into the receptacle, the "soft" or diffused stream being produced by conveying the water through the port into a tube which immediately branches into two tubes of equal or greater diameter, from which the water is discharged against the sides of the nozzle through which it passes softly into the glass. That this is the main and controlling idea embodied in both claims (1 and 5) of the patent in suit (the fifth claim only differing from the first in that it includes "means for adjusting and for holding said valve against the seat"), is clearly set forth in the testimony of complainant's expert. He says:

"This claim" (referring to claim 1) "covers or describes a valve formed with separate ports either of which is adapted to be brought into communication with an inlet port and one of which valve ports opens into a single passage or channel for delivering a forcible stream of 'sharp' soda, and the other of which valve ports communicates with a plurality of passages which will divide the fluid entering the inlet port of the valve into several independent streams or jets, for the purpose of delivering 'flat' soda. I understand, therefore, the leading or essentially novel feature of the patent in suit to be a valve element having two ports, one of which leads into a single passage or channel and the other of which communicates with a plurality of passages or channels branching out from a single port, and either of which valve ports may be brought into communication with an inlet, at the pleasure of the attendant, by turning a single part."

"This claim" (referring to claim 5) "describes, but in slightly more specific terms, the same invention as is described in claim 1, with the addition to the combination of claim 1 of adjustable means of holding the movable portion of the valve against the valve seat and means for operating the valve."

So the court below, quoting this testimony of complainant's expert, says:

"Indeed, it seems to me, that one might safely declare the distinguishing feature of the invention to be the plurality of passage-ways by which the coarse stream is formed."

This fairly states the question now before us, namely, whether a plurality of passages for the delivery of the coarse stream was new, or possessed patentable novelty in view of the prior art. The court further says:

"If a broad construction is given to the claims in suit, they are probably anticipated by the two patents issued to W. P. Clark, No. 138,615, granted May 6, 1873, and No. 358,650, granted March 1, 1887. Both of these patents show devices for reducing the pressure of the gas upon the 'soft' or 'coarse' stream, that differ from the complainant's device only as an orifice differs from an enclosed passage way or pipe."

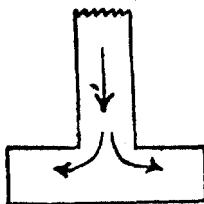
The learned judge, however, notwithstanding the "Clark" patents, felt compelled to sustain the novelty of complainant's devices, saying:

"I am not insensible to the strength of the defendant's argument that the complainant's pipes or passageways are mere extensions, or prolongations, of the orifices of the prior art, and are therefore either anticipated by the Clark patents, or do not disclose patentable invention; but I am bound to save the patent if this be reasonably possible, and I think such a result may fairly be reached by a narrow construction, which restricts the complainant to his particular device, but leaves him with a visible distinction from the prior art, and a distinction that I cannot say is devoid of patentable invention. My principal reasons for holding the invention to be patentable are the presumption of novelty arising from the grant, and the fact that the defendants think so well of the device that they use it themselves, although they control the Clark patents and can, therefore, employ the orifices freely, if these produce as good results."

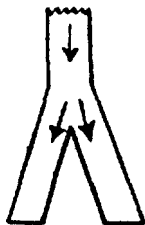
It is precisely upon this point of the relation of the device for producing a "coarse" or a "soft" stream, set forth in the "Clark" patents, to that of the device for the same purpose in the patent in suit, that we are compelled to differ from the learned judge of the court below. The obvious means for diminishing the force of a stream under a given pressure from a given source of supply, is to enlarge the orifice and conduit through which it is delivered. In valve mechanisms of the general character of those of the patent in suit, used for the drawing of soda

water, the size of the ports or orifices through which the water passes into the passageways for delivering the "sharp" and "soft" streams respectively, remains the same. The size or diameter, therefore, of the tube or passageway whose upper open end registers and connects with said orifice, must be the same for both the "sharp" and "soft" streams. To branch the passageway for the "soft" stream, either immediately after it leaves the orifice, or at a greater or less distance therefrom, into two or a plurality of passage ways, each of which is of capacity equal to or greater than the single receiving passageway, would obviously diminish and diffuse the force of the stream ultimately delivered at the end of the nozzle into the receiving vessel. It is to be remarked, however, that the patent in suit contains no such statement or requirement as that the cross sectional area of the two passageways combined shall be greater than that of the inlet port. Whether such an obvious device for diminishing the force of the stream involved patentable invention, or required more than ordinary mechanical skill to contrive it, need not now be passed upon, as we are of opinion that the constructions shown in the "Clark" patents referred to clearly involve the principle of the device of the patent in suit, and accomplish the same purpose by similar means.

In the devices of the "Clark" suit, the "coarse" stream is conveyed from the inlet port of the valve through a single tube until it is intersected by a short tube at right angles thereto, through which the water is discharged on the one side and the other, against the sides of the nozzle, or into or against the sides of some diffusing receptacle not material to be here considered. Thus:



In the device of the patent in suit, as well as in the defendant's device, the "coarse" stream goes through the port into a passageway or conduit, which at a short distance from the port branches into two passageways, which make an acute angle with each other, and from the ends of which the water is delivered. Thus:



It is plain to us, that the principle upon which the force of the stream is diminished and diffused, is the same in both devices, and that the means of accomplishing that purpose are practically identical. If we could conceive the branches of the patent in suit to be raised up until they stood at right angles to the single conduit from which they branch, we would have precisely the form of the "Clark" device, except as regards the length of the branches. The appellee contends, however, and the court below seems to have adopted the contention, that the transverse passageway in the "Clark" device does not constitute two passageways, but two orifices or holes in the end of the single passageway. This conception may be due, however, to the shortness of the intersecting passageway, its ends as portrayed in the "Clark" patents extending but a very short distance from the single passageway, owing probably to the confined space in which they are placed. This difference, however, is not a difference in the essential feature which characterizes both devices.

There is still another patent, of a date earlier than either of the "Clark" patents, to wit, the "Fergus" patent, No. 124,892, issued March 26, 1872, which discloses still more distinctly the principle of the device of the patent in suit, which we have been discussing, to wit, a plurality of passages or channels leading from a port or ports other than that through which the "sharp" stream passes. In this device, there are three ports, one for the "sharp" stream and two connecting with passageways for the "coarse" or "soft" stream. Both of these latter passageways terminate in two transverse conduits, instead of one, as in the "Clark" patents, giving three distinct branches, instead of two. The elements of the first claim of the patent in suit cover exactly the "Fergus" patent. In it, we have a forcible stream or jet branching into a "plurality of passages or channels," "adapted to divide the water received through the port and deliver it in independent streams or jets."

It is true, that the device of the patent in suit was distinguished from all other devices by certain details, such as the closure of the bottom of the two branch pipes or passageways, and their perforation for some distance from the end, by upwardly inclining apertures, which deliver the soda water against the walls of the encasing nozzle. This detail may have contributed to what appellee claims to have been the greater speed and general efficiency with which glasses were filled at the nozzle. That, however, is a matter of degree, which will not of itself render a device patentable. If, however, it were an essential feature of the patent in suit, it nevertheless clearly appears that it is not reproduced in the defendant's construction, the branch pipes in which are open at the ends and deliver their streams against the bottom and sides of a cup or basin, over the rim of which the water flows through the encasing nozzle.

We do not agree with the contention, that the fact that the file wrapper discloses the patent to have been granted as first applied for, without any references, adds any force to the presumption of novelty arising from the grant. On the contrary, we think the force of that presumption is much diminished, if not destroyed, by the lack of any reference by the Examiner to, or consideration of, the "Clark" patents. It does not seem likely that an expert examiner would pass them by,

without notice or consideration, if they had been called to his attention. We feel compelled, therefore, to the conclusion, that the first and fifth claims of the patent in suit are invalid for want of patentable novelty.

The judgment below is therefore reversed, with directions to enter a decree in conformity with this opinion.

YOUNG v. CLIPPER MFG. CO.

(Circuit Court of Appeals, Second Circuit. January 27, 1904.)

No. 52.

1. PATENTS—INFRINGEMENT—PAPER FASTENER.

The McIntosh design patent, No. 27,514, for a design for a clip or fastener, if valid, must be confined to the precise details of the design as described and claimed, and is not infringed by a clip of a different shape.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 121 Fed. 560.

Harold Binney and S. L. Moody, for appellant.

Edmund Wetmore, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Appeal from a decree dismissing bill for infringement of patent No. 27,514, granted to complainant, as assignee of William R. McIntosh, August 10, 1897, for a design for a clip or fastener. The patented design covers "a fastening device made of a single piece of wire bent so as to form a heart-shaped body portion, having depending resilient arms, adapted to impinge upon the body portion." It is unnecessary to discuss the persuasive evidence introduced in support of the defenses of want of invention, prior public use, anticipation, and lack of patentable novelty, which shows that the patent is of doubtful validity. In any event, in view of said evidence, it must be confined to the precise details of the design, as described and claimed. The patented clip is described and shown in the patent drawing as comprising two curved parts, forming separate loops, so arranged as to constitute the heart-shaped body. The defendant's design has no curved loops, but comprises two triangles so contacting at the upper angle as to form a diamond-shaped center. We conclude, therefore, that there is no infringement.

The decree is affirmed, with costs.

STANDARD ELEVATOR INTERLOCK CO. v. RAMSEY et al.

(Circuit Court, E. D. Pennsylvania. May 20, 1904.)

No. 22.

1. PATENTS—SUIT FOR INFRINGEMENT—AMENDMENT OF PLEADING.

Under the authority given the court to permit amendments by equity rule 60, a defendant in a suit for infringement of a patent, who has set up prior invention, knowledge, or use, will be given leave to amend his answer, even after replication filed, by adding the name of another witness, giving his place of residence, as required by Rev. St. § 4920 [U. S. Comp. St. 1901, p. 3394], where satisfied that the application is not made for delay, and that the amendment is in furtherance of justice.

In Equity. On petition for leave to amend answer.

Howson & Howson, for complainant.

Horace Pettit, for defendants.

HOLLAND, District Judge. The defendant has filed a petition asking leave to amend its answer by adding the name of William H. B. Teamer thereto, giving his place of residence, as required by section 4920, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3394], in cases where the defense sets up previous invention, knowledge, or use of the thing patented. The complainant objects to the allowance of this amendment upon the ground that the amendment is desired after filing of the replication, that it introduces new matter of defense, and that sufficient reason is not given for the omission of this name in the original answer.

Rule 60 of the equity rules, upon motion and cause shown, supported by affidavit, after due notice to the adverse parties, authorizes the allowance of amendments by special leave of court, or a judge thereof, in any material matter, as by adding new facts or defenses, or qualifying or altering the original statement. It appears that it has been customary in answers in these cases, as was done in this case, to add a clause praying leave to add additional names of witnesses possessing information of prior knowledge and use, when ascertained, and as the defendants may be advised. The affidavit supporting the motion for amendment does not set forth that the defendant was not in the possession of this information when the original answer was filed. It only avers that one of the counsel was not aware of the fact that Mr. Teamer possessed this knowledge. It was urged that the defendants did not know the requirements of the law as to practice and pleading, and that counsel requested the addition of this name as soon as it was brought to his attention. The court is convinced that the petition is not presented for the purpose of delay, nor is there any indication that the complainant will be put to any extra cost, should this amendment be allowed. It is simply an additional witness in the line of defense indicated in the original answer. The court does not know whether or not this information could

¶ 1. Pleading in infringement suits, see note to *Caldwell v. Powell*, 19 C. A. 595.

See Patents, vol. 38, Cent. Dig. § 527.

have been communicated to counsel prior to filing the answer, if the defendants had been informed as to the requirements of the law as to pleading in this particular; but as the authority to permit amendments is conferred upon the court for the furtherance of justice, and to relieve the parties from the consequence of their unavoidable ignorance or mistake, and this authority may be exercised at any stage of the proceedings when its necessity becomes apparent, we deem it proper in this case to permit the amendment, as requested.

WESTON ELECTRICAL INSTRUMENT CO. v. STEVENS et al.

(Circuit Court, S. D. New York. April 2, 1904.)

1. PATENTS—INFRINGEMENT—ELECTRICAL MEASURING INSTRUMENT.

The Weston patent, No. 392,387, for an electrical measuring apparatus, claims 8, 12, and 13, *held* valid and infringed, on motion for preliminary injunction.

In Equity. Suit for infringement of letters patent No. 392,387, for an electrical measuring apparatus, granted to Edward Weston November 6, 1888. On motion for preliminary injunction.

William H. Kenyon, for the motion.

Joseph C. Fraley, opposed.

LACOMBE, Circuit Judge. So far as the papers show, the only patent in this record which was not before Judge Wheeler in the suit against Jewell ([C. C.] 128 Fed. 939) is the Cauderay patent. It is not at all as near to the invention of the patent in suit as are some of the patents and publications which were before Judge Wheeler. The Despres-d'Arsonville publication, which was principally relied upon on argument of this motion, was considered by him. It is mentioned in his opinion. Upon this application his conclusions as to validity and construction should be followed. Without now making any decision as to the other claims, it is held that 8, 12, and 13 are valid, and infringed by defendant's structure, which certainly is as close, if not closer, to the device of the patent than was the infringing structure in the Jewell Case.

COLUMBIA AVE. SAVINGS FUND, SAFE DEPOSIT, TITLE & TRUST CO. v. CITY OF DAWSON et al.

(Circuit Court, N. D. Georgia, W. D. August 3, 1903.)

1. RES JUDICATA—PERSONS CONCLUDED BY JUDGMENT—MORTGAGEE.

A mortgagee is not privy to or bound by a judgment against the mortgagor rendered in a suit commenced after the mortgage was given, and to which he was not a party.

2. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

A decision of the highest court of a state adjudging void a contract made by a city, as beyond its constitutional powers, is not binding on a

† 2. State laws as rules of decision in federal courts, see notes to *Griffin v. Overman Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

federal court in a suit involving the rights of a citizen of another state under such contract, unless the rule applied in such decision had been so long and firmly established as to have become a rule of property in the state at the time the contract was made.

3. MUNICIPAL CORPORATIONS—CONTRACT WITH WATER COMPANY—RIGHTS OF MORTGAGEE.

Where a contract between a city and a water company provided that the city should, during a term of years, pay an annual hydrant rental to the water company, or such trustee for its bonds as it might select, a trustee in a mortgage securing bonds subsequently issued by the company, which covered all the company's franchises and rights under the contract, has such an interest therein as will support a suit to enjoin its impairment by the city, independently of the water company.

4. SAME—DEBTS—CONTRACT TO PAY WATER RENTALS.

A contract by a city to pay a stated sum semiannually as hydrant rentals during a term of years for water to be furnished by a water company for fire purposes does not create a debt, within the meaning of a constitutional provision prohibiting the incurring of debts beyond a certain limit.

5. SAME—CONTRACT WITH WATER COMPANY—IMPAIRMENT.

The grant by a city to a water company of the right to lay pipes in the streets, and to supply the city and its inhabitants with water for a term of years, after it has been acted on by the company, creates a contract which is protected from impairment by the federal Constitution, and the city may not during the term directly revoke the grant, or indirectly destroy or impair its value by itself entering into competition with the grantee.

6. SAME—SUIT FOR ENFORCEMENT OF CONTRACT—DEFENSES.

A city which paid hydrant rentals for a number of years to a water company under a contract, and then repudiated the contract and refused to make further payment, but continued to use water from the hydrants in case of fires, at no time making any complaint of the service, cannot invoke a forfeiture of the contract because of defective or inefficient service as a defense to a suit for its enforcement.

7. SAME—POWER TO COMMUTE TAXES—GEORGIA CONSTITUTION.

Under the Constitution of Georgia, as uniformly construed by the Supreme Court of the state, which construction is binding on the federal courts, a city has no power to exempt a water company from the payment of an ad valorem tax on its property for municipal purposes, either directly or by commuting such taxes in consideration of certain service to be supplied by the company.

8. CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACT—INJUNCTION.

A city granted a franchise to a water company, and also entered into a valid contract for water to be supplied by the company for city purposes during a term of years. It subsequently repudiated such contract, refusing to pay further rentals, in which action it was sustained by the Supreme Court of the state. At an election afterward held, the issuance of bonds was authorized for the purpose of constructing city waterworks. *Held*, that such action constituted an impairment by the state of the obligation of the contract, which entitled a mortgage trustee of the company which was by the contract made the alternative payee of the water rentals, and to which they were assigned by the company, to maintain a suit in equity in a federal court for the specific enforcement of the contract, and to enjoin the city from the issuance of bonds or the construction of a competing system of waterworks during the term of the contract.

¶ 4. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1834.

In Equity. On report of master and exceptions thereto, and motion for final decree.

The following is the report of the master:

Statement.

The original bill was filed on May 1, 1899, by the complainant, as trustee for the bondholders, against the city of Dawson, certain individuals in their representative capacity as officers of said city, and against the Dawson Waterworks Company. The bill alleged, in substance, as follows:

The Dawson Waterworks Company on September 1, 1891, created the complainant as trustee for 80 of its first mortgage bonds, in the denomination of \$500 each, and executed to complainant its mortgage or deed of trust conveying, as security for the payment of its said bonds, all of its real and personal property, corporate rights, franchises, privileges, and appurtenances, together with all incomes, rents, earnings, issues, and profits then or thereafter payable to the company, and in particular the income payable to the said company, or to the trustee for its bondholders, in virtue of the contract with the city of Dawson in that regard. Said bonds, aggregating \$40,000 in amount, dated September 1, 1891, and payable September 1, 1916, with interest at the rate of 6 per centum per annum, payable semiannually, were duly issued and sold in open market to bona fide purchasers for value. The bonds were issued and sold in order to procure the money necessary to construct and equip a system of waterworks, as contemplated in a certain contract between the city of Dawson and the waterworks company. This contract is contained in an ordinance of the city of Dawson, acting in its corporate capacity, of February 21, 1890, whereby R. L. Bennett, his associates, successors, and assigns, were to become incorporated under the laws of the state of Georgia under the name of Dawson Waterworks Company, which company, within the time limited, was to construct, complete, and have in operation a thorough system of waterworks in accordance with the specifications and the plans of the contract, and was from time to time to extend its mains and pipes and enlarge its system to meet increasing demands consequent upon the growth of the city; and, in consideration of the company's agreeing to furnish a free and unrestricted use of its water for fire protection for the period of 20 years, the city of Dawson undertook and agreed to pay to the company, or to such trust company as might be chosen as trustee for the bonds to be issued, the sum of \$2,000 annually for the period of 20 years; such payments to be made on the 1st days of January and July in each year. The ordinance provided that a tax sufficient to pay such rentals should be annually levied, specified the number of fire plugs to be established, and limited the price to be charged to private consumers.

The city of Dawson, on June 11, 1886, submitted to the qualified voters of the city, after publication of notice thereof for four weeks in the newspaper in which legal notices were published, the question whether the city should incur the expense of waterworks. The election was held, and more than two-thirds of the qualified voters cast their ballots in favor of incurring the expense of waterworks. The result of the election was declared to be in favor of waterworks. The contract entered into between the city of Dawson and R. L. Bennett, as above referred to, was published in full in the public gazette, and was acquiesced in by all of the citizens. The Dawson Waterworks Company was duly incorporated, and proceeded to construct a complete and thorough system of waterworks in accordance with the specifications and requirements of the said contract. The system was fairly and fully tested by the city, and was found to satisfactorily comply with all of the requirements of the contract. The city council of Dawson on August 12, 1891, adopted a resolution declaring that, after fully testing said system, it was accepted by the city as fully complying with the contract. The waterworks company has continued to maintain and operate its system in full compliance with the requirements of said contract continuously from that time, and the city has continuously enjoyed the fire protection contracted for, and for that purpose has continuously used the water so often as required.

It was understood and contemplated by the city of Dawson at the time

of entering into the contract that the money required to construct the system of waterworks was to be procured in whole or in part by the issuance and sale of the bonds of the water company; and, in order to render the bonds more salable, the city, by said contract, agreed and promised to pay to the trustee for the bondholders the annual rental stipulated in the contract, thus inviting investors to become purchasers of the bonds upon the faith that the city would observe its obligations as therein contained. The bonds were negotiated and sold upon the faith that the city of Dawson would pay said rentals, to be applied to the liquidation of the principal and interest of said bonds, and the proceeds of said bonds were used in the construction of the waterworks system.

After using the water without objection or complaint for several years, the city council on June 27, 1894, adopted a resolution declining to further carry out its contract with the waterworks company; assigning as the reason therefor that the contract created such an indebtedness as was forbidden by the Constitution of the state of Georgia, and was therefore not binding upon the city. The waterworks company had in no way failed to comply with its contract, nor had any complaint been made as to the character of the service, the pressure, or the quantity of the water furnished. At the time of the passage of the resolution, the city of Dawson was considering the question of purchasing the waterworks, and it is charged that the purpose of the city in repudiating the contract was to destroy the value of the property, by withdrawing the revenues necessary to its existence, and forcing the company to sell at such price as would be satisfactory to the city. In pursuance of this scheme on the part of the city, an equitable petition was on June 29, 1894, brought in the state court, in the name of certain taxpayers, against the city and the waterworks company, seeking to enjoin the city from paying the rentals accruing to the waterworks company, on the ground that the contract in that regard was void under the Constitution and laws of Georgia. It is charged that this suit was instituted at the instance of the city for the purpose of having its contract with the waterworks company declared void. Upon the hearing the injunction prayed for was denied, and the suit was subsequently dismissed. Prior to that time the city had recognized said contract as valid and subsisting, and had levied and collected the taxes required to meet the annual rentals. The rental accruing for the year 1894 was paid, less a deduction on account of taxes which it was claimed were due the city by the waterworks company as an ad valorem tax on its property therein. Since December 31, 1894, the city has refused to pay or make provision for the payment of the annual rentals due the water company under the contract. In December, 1894, the city, through its mayor, notified the waterworks company that a resolution had been adopted declaring that the city would not be liable on the contract after January 1, 1895, notwithstanding which the city has continuously, since January 1, 1895, availed itself of the fire protection afforded by the waterworks company; thereby intending to take the benefit, though declining to carry out the obligations, of the contract. The public ordinances of the city providing for the use of the water by the fire department were never repealed, the fire companies were not forbidden to further use the water, and no other means of fire protection was provided by the city. Apparatus was furnished by the city to its fire department for the use of the water, and members of the fire companies were given tax exemptions by the city in consideration of their services as firemen. The mayor and members of council, as well as other citizens, subsequently assisted in the use of the water on the occasion of various fires. The waterworks company declined to acquiesce in the repudiation of the contract by the city, and gave notice that it would continue to furnish water with the required pressure for the use of the city for fire protection. The waterworks company has observed the requirements of the contract, has maintained the pressure called for, and has furnished the city at all times with the free and unrestricted use of its water in cases of fire. The waterworks company has at all times held itself in readiness to furnish the water contracted to be supplied in lieu of city taxes to all municipal buildings and for the fountains as specified, notwithstanding which the city of Dawson has assessed, levied, and attempted to collect municipal taxes against the company for the year

1895. An execution for such taxes has been issued and placed in the hands of the city marshal for collection by seizure and sale of the waterworks property.

The city of Dawson called an election for December 12, 1894, to determine whether the city should issue bonds in the sum of \$35,000 to erect or buy waterworks and electric lights for the city. The result of the election was declared by council to be in favor of issuing the bonds. Bonds in the amount of \$10,000 have been, pursuant to said election, issued and sold, and with the proceeds the city has erected an electric light plant. The remainder of said bonds, amounting to \$25,000, have not been sold, but it is charged to be the purpose of the city to invoke a ruling of the court whether its contract with the waterworks company is binding, and, if the decision should be favorable to the city, thereafter to sell the bonds, and with the proceeds erect its own system of waterworks, and dispense with the water supply and fire protection which the city enjoys under its existing contract. It is charged that it was the plan and purpose of the city, while intending to repudiate the contract, nevertheless to continue to use the water, and enjoy the fire protection thereby afforded, until such time as it could sell its bonds and erect its own waterworks. The Supreme Court of Georgia having decided that the contract in question created a debt, and, as such, was forbidden by the state Constitution, the city of Dawson has determined to sell its said bonds, and is now engaged in an effort to procure a sale thereof for the purpose of erecting a system of waterworks, in violation of its contract, and in total destruction of the rights of the waterworks company and the holders of its bonds.

The waterworks company has no property save its waterworks plant and the value of its contract with the city of Dawson. Other than from these sources, it has no means with which to pay operating expenses and the interest and principal of the bonds. The abrogation of its contract with the city would result in the almost complete destruction of the value of the property of the company. If the city of Dawson should be permitted to erect and operate its own system of waterworks, the company would be in no position to compete successfully for the patronage of private consumers.

The waterworks company, recognizing the right of the complainant to pay the rental due and to become due under its contract with the city, in order to protect the rights of the bondholders, has yielded to complainant's demand that it shall in future have the exclusive right to collect from the city of Dawson all rentals accruing under the contract for the year 1896, and subsequent thereto, of which the city has been duly notified, and payment of rentals has been demanded.

The bonds issued by the waterworks company were in the first instance sold to the American Pipe Manufacturing Company, a New Jersey corporation. The latter company sold all of its bonds in open market for value, and the same are now owned by a number of different persons. The American Pipe Manufacturing Company is largely engaged in the construction of waterworks, and frequently receives in payment bonds of the companies for whom the works are constructed, and consequently has frequent occasion to negotiate and sell such bonds, and is interested in seeing that the obligations thereof are duly protected. At the request of the waterworks company, the pipe manufacturing company, in order to save the waterworks plant from foreclosure and sale, has paid the interest falling due on the bonds, up to and including that due on March 1, 1899. These payments were made under an agreement that the pipe manufacturing company should be subrogated to the rights and remedies of the original holders of the interest coupons. Complainant asks leave to repay the pipe manufacturing company the moneys thus expended, if there should come into its hands a surplus sufficient for the purpose over and above the payment of accruing interest on the bonds, and the creation of a sinking fund to be used in discharge of the principal of the bonds.

The bill prays for an injunction against the city of Dawson, restraining the erection, installation, or operation of any system of waterworks in and for said city, or from entering into any contract with any other person for the construction, operation, or use of any system of waterworks, or for the supply of water for fire protection in violation of the contract of the Daw-

son Waterworks Company with the city, or from issuing and disposing of bonds, or from paying out any money, or incurring any obligation, or entering into or carrying out any contract for the creation of a system of waterworks, other than that existing with the Dawson Waterworks Company. It is further prayed that the court will, by injunction, preserve the sanctity and integrity of the contract between the city of Dawson and the waterworks company, and that said contract be decreed to be valid and mutually binding upon the parties thereto; that the said contract be required to be specifically enforced; that the complainant may recover from the city, in trust for the benefit and use of the bondholders, the rentals due by the city for the use of the water for the year 1896 and succeeding years; and for general relief. Attached to the bill, as exhibits, are the mortgage or deed of trust referred to, and the ordinances of the city creating the contract between the parties. Upon this bill a rule nisi was duly issued and served, and a temporary restraining order was granted.

On June 26, 1899, prior to the hearing of the rule, the complainant, by leave of the court, amended its bill of complaint, alleging that the ordinance of the city of Dawson repudiating its contract was an attempt to impair the obligation of the contract and destroy the value of the property of the waterworks company, in violation of the Constitution of the United States; that the ordinance of said city of October 4, 1894, ordering an election for the purpose of determining whether the city should issue bonds for the purchase or erection of a system of waterworks and an electric light plant, and the ordinance of November 5, 1894, declaring the result of the election held under the prior ordinances, and the refusal of the city to levy a tax for the purpose of paying the rentals due the water company, are likewise in impairment of the obligations of its contract with the waterworks company, and in violation of the Constitution of the United States. It is further alleged that such ordinances and conduct on the part of the city, if given effect, will deprive the holders of the bonds of the waterworks company, as well as the waterworks company itself, of their property without due process of law, in violation of the federal Constitution. The other matters contained in the amendment are not material to be now referred to.

In answer to the rule, the city of Dawson objected to the jurisdiction on the ground that, after arranging the parties according to interest, the requisite diversity of citizenship did not exist. The city further answered, denying the material allegations of the bill, and contending that the alleged contract between the city and the waterworks company was utterly void, under the Constitution and laws of the state of Georgia, and had been so declared by the Supreme Court of the state of Georgia in the case of *City of Dawson v. Dawson Waterworks Company*, 106 Ga. 696, 32 S. E. 907. The answer of the city is hereinafter more fully referred to.

The cause came on to be heard under the rule before Circuit Judge PARDEE, whereupon the court, after considering the evidence and the argument of counsel, granted on September 16, 1899, an order for injunction *pendente lite*, as prayed in the bill, and further ordered that the defendants might apply to the court at any time after 30 days from the date of the order for a test of the ability of the Dawson Waterworks Company to perform its obligations in regard to the furnishing of the water to the city of Dawson for municipal purposes and fire protection, according to the letter and spirit of its contract, and upon such application the court would order a test and trial of the same by experts, under the direction of a master, and take such action upon the master's report as equity might require. The injunction as ordered was duly issued. From this order granting an interlocutory injunction an appeal was duly prosecuted to the Circuit Court of Appeals. That court dismissed the appeal without considering the merits of the controversy, upon the ground that an appeal will not lie to a Circuit Court from an order granting an interlocutory injunction in a case involving the construction and application of the Constitution of the United States. *City of Dawson v. Columbia Avenue, etc., Company*, 102 Fed. 200, 42 C. C. A. 258.

To the original bill the defendant city of Dawson demurred for want of jurisdiction in the court, on the ground that, after arranging the parties according to interest, the requisite diversity of citizenship did not exist, and

on the further ground that no federal question was involved. The defendant also demurred to the bill for want of equity, on the ground of an adequate remedy at law. After argument of counsel, the demurrer was overruled on July 8, 1901; "the court considering the law and equity to be with the complainant, and the demurrer to said bill not well taken." Thereafter, on the 3d day of August, 1901, the city of Dawson and the defendants, who were being sued in their representative capacity as officers of said city, filed their answer to the bill as amended. The answer is, in substance, as follows:

The Dawson Waterworks Company, a Georgia corporation, is the real complainant in the litigation, and the bill has been brought in the name of Columbia Avenue Trust Company as complainant, with the waterworks company as defendant, collusively, and for the purpose of conferring jurisdiction upon the federal court, and for the further purpose of avoiding the judgment of the Supreme Court of Georgia declaring the contract involved to be invalid. Wherefore it was prayed that the court dismiss the bill for want of jurisdiction.

Further answering, the defendants say that, under the Constitution and laws of Georgia, the alleged contract between the waterworks company and the city is absolutely void ab initio, because expressly prohibited. On the 14th day of March, 1899, the Supreme Court of Georgia, in the case of *City of Dawson v. Dawson Waterworks Company*, adjudged that, under the Constitution and laws of Georgia, and its settled public policy, the said contract was void ab initio, and that complete performance on the part of the waterworks company did not estop or prevent the city from pleading the illegality of the contract. The complainant, Columbia Avenue, etc., Trust Company, is a mere privy and assignee of the cause of action involved in the decision by the Supreme Court of the state, and has become such since said decision. The defendants plead that all of the questions and issues now made in the bill as amended are res judicata, and they pray the court to follow the judgment of the Supreme Court of the state. The answer contains a general denial of the material allegations of the bill.

The election held by the city in 1886 to determine whether the city should incur the expense of waterworks was void for uncertainty, and has been so declared by the Supreme Court of Georgia, and was insufficient to predicate the contract in question, or any legal contract. It is admitted that in June, 1894, the city repudiated and renounced the alleged contract with the waterworks company. Since the year 1894 the city has not, in its public capacity, used or authorized the use of any of the water of the waterworks company. If any of the city officials have used the water on occasions of fire, it was in their capacity as private citizens acting in an emergency.

It is denied that the complainant sustains any contractual relation to the city with reference to the subject-matter of the suit, or, if such relation did exist, the contract, being totally void, could not be valid for the benefit of any party thereto, or of third persons whose rights depended upon those of the parties. Defendants deny any improper motive in repudiating the contract, and deny any effort or intention to impair the value of the property of the water company, or force the company to sell to the city for less than its value.

Refusal to pay water rentals for the year 1895 and succeeding years is admitted. It is averred that during these years the system of waterworks has been defective, insufficient, unreliable, and almost unserviceable as a means of protecting the city from fire. The required amount of pressure did not exist. The system was not kept in proper condition for prompt and effectual use, and was so unsatisfactory that, on nearly every occasion when the citizens endeavored to use the water to extinguish fires, there was a failure to obtain sufficient water under the required pressure. During these years the water company had notice and knowledge of the inadequacy and inefficiency of the system, and on one occasion, in June, 1897, on a test made by the superintendent of the company under the conditions laid down in the contract, the system failed to measure up to the standard, in that the water was thrown vertically not more than 30 feet, instead of 50, as required. The inefficiency of the system as then demonstrated had continuously existed since 1894 up to the date of the filing of the bill.

The remission of municipal taxes, as contained in the said contract, is utterly void under the laws of the state. Since the renunciation of the contract by the city, it has not used or received the water of the water company under the terms of the contract or otherwise, and taxes upon the water company's property for the year 1895 and succeeding years are due and unpaid.

It is not denied that the city proposes to erect its own system of waterworks, but it is contended that, under the decision of the highest court of the state, it has the right to do so. It is denied that the complainant, as trustee, has any right to maintain this suit for the benefit of the bondholders. In reality, the suit is at the instance and for the benefit of the water company, which had been allowed to collect all rentals from the city until after the litigation in the state court. The water company has no exclusive franchise for completing, equipping, and operating waterworks in the city, and, under the Constitution and laws of the state, can have none; nor is the city prevented from constructing and maintaining its own system, after complying with the requirements of the law in that regard. The city and its inhabitants have suffered damage and injury by reason of the inadequacy of the present system, and, the water company being insolvent, it became the right and duty of the city to provide an adequate and satisfactory system for fire protection, and for the health, safety, and welfare of the inhabitants of the city. It is true that the city has never complained to the Columbia Avenue Company as to the inefficiency of the waterworks or the character of the service, because the city did not know that the complainant was entitled to such notice, and for the further reason that the city, having declined to carry out the alleged contract and to pay the water rental accruing thereunder, considered that it had no right thereafter to complain to any one touching the inefficiency of the service.

Not only was the water furnished by the water company insufficient to afford the fire protection contemplated in the contract, but it was impure, unwholesome, and unfit for domestic use and sanitary purposes. At times the water was so muddy it was unfit for drinking or bathing purposes, and on several occasions was so thick with mud that a flow could not be obtained for use in extinguishing fires. The sources of water supply were designated by resolution of the city council of March 14, 1891. The water company has not derived its supply solely from these sources, or either of them, but has furnished water mingled with surface and branch waters, and from the waters washing from the adjacent hills and fields. This water it has allowed to accumulate in swampy places, covered with undergrowth and woods. The water so obtained was furnished without being filtered, and was loaded with mud and filth.

To this answer, replication was duly filed, and at this stage of the cause reference was made to the master.

Findings of Fact.

(1) The city council of Dawson, by ordinance of May 10, 1886, directed an election to be held on June 11th following, at which the question of incurring the expense of waterworks should be submitted to the qualified voters of the city. At this election the ballots cast were for "waterworks" or "no waterworks." The result of the election was in favor of waterworks, and this result was declared by the city council on July 18, 1886. Following this election, the officials of the city made some effort to secure a system of waterworks, but no substantial results were accomplished. No definite plans for a system of waterworks had been developed, nor were any negotiations looking to a particular contract either pending or in contemplation at the time. Nearly four years thereafter, the city entered into the contract with R. L. Bennett which forms the subject of this suit. Neither in the negotiations leading up to the contract, so far as the evidence discloses, nor in the contract itself, is there any mention of or reference to this election as furnishing authority for the contract, or as an inducement thereto. I therefore find, as a matter of fact, that at the time of the contract the result of the election of June 11, 1886, was not in contemplation of the parties, and that the said election constituted no authority for entering into the contract on the part of the city.

(2) The contract entered into between R. L. Bennett and the city of Dawson is in the form of an ordinance adopted February 21, 1890, and is, in substance,

as follows: Section 1 grants to R. L. Bennett, his associates, successors, and assigns, who are to become incorporated as the Dawson Waterworks Company, the exclusive right and privilege, for the period of 99 years, of constructing, maintaining, and operating a system of waterworks for the purpose of supplying the city and its inhabitants with water for protection against fire, and for domestic, sanitary, and other useful purposes. Section 2 confers upon the company the exclusive right and privilege of excavating and laying water pipes and mains along the streets and avenues of the city, as then open or as thereafter extended. Section 3 gives the right to erect buildings, tanks, and other structures, and make necessary improvements, on lands owned or controlled by the city, excepting its public squares. Section 4 requires the company to complete and have in operation within 18 months a complete and thorough system of waterworks, to consist of 4.8 miles of pipe, of 4, 6, and 8 inches in diameter, with a reservoir of not less than 40,000 gallons capacity, "and of sufficient height to produce a pressure on the mains such that from any hydrant located on the principal streets a stream of water will be projected fifty (50) feet vertically in still air through one hundred feet of fire hose with a one-inch nozzle attached." The company is required to continue during its existence to furnish a sufficient supply of water for the purposes named, unless prevented by unavoidable and providential cause, in which event it should be allowed a reasonable time within which to make repairs, after which, should it fail to furnish such supply of water, its franchise, from that fact, should be forfeited. Section 5 provides that the company shall from time to time extend its mains and enlarge its system to meet the increasing demands consequent upon the growth of the city. Section 6 recites that in consideration of the company guarantying to the city for the period of 20 years, and as long thereafter as the company should operate the waterworks, a free and unrestricted use of the water for fire protection, and agreeing to establish at convenient places, not exceeding 50, fire plugs of approved pattern, to be increased in number as the city grows in population, and to furnish, for fire protection only, water to fill the public cisterns, the city obligated itself "to pay to the said Company or to such trust company as the Dawson Waterworks may elect or decide upon as their trustee for their bonds the sum of two thousand (\$2,000) dollars annually for twenty years," in semiannual payments of \$1,000 each, on the 1st day of January and July in each year, and in case the city should, from lack of funds or other cause, fail to make such payments on the days named, it agreed that warrants should be issued on the city treasurer in favor of the company for the amount due. Section 7 required the city council to make provision each year for the payment of the stipulated rental by levying a tax sufficient for the purpose upon the taxable property in the city. Section 8 limited the charges to private consumers of the water, and prescribed a schedule of maximum charges for various uses. Section 9 contains the agreement that, in consideration of water to be furnished the public municipal buildings and two public fountains, "the City of Dawson hereby obligates itself to remit to said Company, its successors and assigns, any and all license fees, taxes, dues and charges which may at any time hereafter be levied or assessed by said City against said company or upon the plant to be used in said waterworks system." Section 10 gives the assent of the city to the charter that may be obtained by the waterworks company; conferring upon it the exclusive franchise to construct, maintain, and operate a system of waterworks in the city. Section 11 declares "that the provisions of this ordinance shall be mutually binding upon the City of Dawson and R. L. Bennett and associates, and the company to be organized by them in pursuance of the provisions thereof, and it shall have the force and effect of a contract between the respective parties as fully and completely as if it were drawn in that form and signed by the contracting parties." I find that the ordinance as above recited and referred to was accepted by R. L. Bennett, and constituted the contract as between him and the city of Dawson. This contract and the franchises therein granted were subsequently, on March 17, 1891, transferred and assigned by R. L. Bennett to the American Pipe Manufacturing Company, and by that company were on August 20, 1891, transferred and assigned to the Dawson Waterworks Company, which company had become incorporated under the laws of the state of Georgia.

(3) I find that the city of Dawson had express notice that bonds were to be issued and sold for the purpose of procuring the money with which to construct the waterworks plant, and that the city acquiesced in this arrangement. In the original ordinance of February 21, 1890, creating the contract between the parties, the city agreed to pay the water rental to the waterworks company, or to such trust company as the waterworks company might elect or decide upon as trustee for their bonds. At a meeting of the city council held on March 23, 1891, a communication was received from the American Pipe Manufacturing Company stating that it had purchased the franchises of R. L. Bennett to build waterworks in the city, and asking for an extension of 60 days to begin the work, in order to have an opportunity to market bonds. The council adopted a resolution granting an extension of 60 days as and for the purpose requested.

(4) The city designated the source from which water was to be taken by the waterworks company, and declared by resolution of March 14, 1891, that either or all of the sources therein specified should be accepted as supply for water to fill the contract and franchises granted R. L. Bennett and his associates. Samples of water from each of these sources had been taken by the mayor of the city and forwarded to the state chemist for analysis. After analysis the chemist reported that each of these waters were pure and safe, and one (taken from a source subsequently adopted) was reported to be "clear and odorless, with a faint yellowish brown color, due to vegetable matter in solution. On standing, traces of organic sediment are deposited. Organic impurity very slight and mainly vegetable. A perfectly pure and safe water." On March 14, 1891, the mayor wrote the American Pipe Manufacturing Company, inclosing copies of these analyses, together with copy of the resolution of the city council designating the source of supply. An official of the pipe company visited Dawson, inspected the sources of supply pointed out, and selected those which were deemed sufficient for supplying the requisite quantity of water.

(5) The system of waterworks as contemplated was constructed by the American Pipe Manufacturing Company. After its completion the system was tested by the city, in order to ascertain if it came up to the requirements of the contract. After making this test, the city, on August 12, 1891, executed a formal acceptance in writing, and caused to be entered upon the minutes of the council a declaration accepting the system of waterworks as fully complying with the contract in all particulars.

(6) The Dawson Waterworks Company on September 1, 1891, caused to be issued 80 first mortgage bonds, in the denomination of \$500 each, aggregating the sum of \$40,000, payable on the 1st day of September, 1916, with interest at the rate of 6 per cent. per annum, payable semiannually. Payment of these bonds was secured by a mortgage to the complainant, Columbia Avenue Company, as trustee, of even date, conveying all the real and personal property of the water company, including its corporate rights, franchises, and privileges, then owned or thereafter to be acquired, together with any and all income then or thereafter payable to the water company under any agreement made between the company and the city of Dawson, or payable under any ordinance of the said city. Before accepting this trust the president of the Columbia Avenue Company visited Dawson in person, inspected the system, examined into the contract with the city, and satisfied himself that proper support existed to enable the waterworks to be successfully operated. The entire issue of bonds was accepted by the American Pipe Company in payment for its work and material in the construction of the waterworks system. All of the bonds were subsequently sold to bona fide purchasers for value at prices varying from 92½ to 100, the aggregate derived from the sale of the bonds amounting to \$37,927.23. These bonds are now owned and held by various persons, whom I find to be bona fide purchasers for value.

After the installation of the system, and its acceptance by the city as fully complying with the requirements of the contract, the waterworks were for several years operated to the mutual satisfaction of the parties. During this time the city promptly paid the rentals as they fell due, and appears to have made no complaint of any kind, either with reference to the quality or quantity of water, or the efficiency of the service. In May, 1894, the city instituted

negotiations looking to a purchase of the waterworks system. These negotiations resulted in a failure to agree. Early in July the proposition of the water company was formally declined by the city, and all negotiations were terminated. In the meantime certain taxpayers of the city filed an equitable petition against the city to restrain it from paying water rentals, on the ground that the contract with the waterworks company was ultra vires of the city and void. The injunction prayed for was denied, and the bill was dismissed. On June 27, 1894, the city council adopted a resolution declining to carry out the contract with the Dawson Waterworks Company, and providing for the appointment of a committee to make such arrangements as would be satisfactory to the council and to the waterworks company. This resolution was duly communicated to the Dawson Waterworks Company, which declined to acquiesce in the abrogation of the contract. The city paid for the use of the water for the remainder of the year 1894, less a deduction claimed to be due the city on account of taxes, and on December 14, 1894, notified the water company that unless a new agreement could be reached between them as to the subsequent use of the water for one year from January 1, 1895, the city would not be liable under the contract after the date named. The water company declined to enter into a new agreement, insisting upon the validity of its existing contract, and notifying the city that it would continue to supply the water and maintain the service as in the contract required.

During the year 1895 the water company continued to maintain and operate its system, and furnish water for the uses of the city. Only one fire occurred during the year 1895. At this fire, water from the mains and plugs of the water company was used. After the expiration of the year, the city declining to pay the water rentals, the water company brought an action at law for recovery in the superior court of Terrell county. The superior court directed a verdict for the water company. On writ of error, the Supreme Court of the state reversed judgment of the court below, and declared that, while the city might be liable from year to year for the water used under the contract for the particular year, the contract as to future years created an indebtedness such as is forbidden by the Constitution of the state, and was for that reason invalid and not binding upon the city. This decision and its effect are herein-after more fully discussed. The water has since been continuously used on the occasions of numerous fires, and whenever so required. The city claims that, notwithstanding that its officials participated in this use of the water, their action was that of any citizen in an emergency, and was not authorized by the city in its corporate capacity.

I find that the city fire organization was maintained during the years following 1894 as it was in preceding years. While at times this organization was not in an efficient state, it was never disbanded. The city continued to furnish hose and fire apparatus, and to grant to the members of fire companies exemption from municipal street taxation. No other means for fire protection was afforded by the city, so that it must have been recognized that, in any emergency of fire, resort to the use of the water of the waterworks company was necessary and inevitable. The city did not forbid the use of this water by its fire department, and must have known that it was being continuously so used. In 1898, prior to the filing of this bill, the city brought its fire department up to a higher state of efficiency, with a paid chief at its head. I accordingly find that, notwithstanding the city had repudiated the contract, it has continued to enjoy the fire protection afforded by the waterworks company, and to use the water for that purpose on every occasion in the same manner and to the same extent that it did prior to its repudiation of the contract.

(8) The source of water supply adopted by the water company from among those designated by the city consisted of a running stream, into which directly flowed the water of what is known as Dunn's Spring, some 400 yards above the take-in of the water company. These waters were among those analyzed by the state chemist, and by him pronounced safe and pure. The watershed does not cover an extended area. The stream above flows through land which is more or less marshy, and upon which there is considerable vegetable growth. The surface water from adjoining hills on one side of the stream flows in above the point of supply. On the crest of these hills are several small residences, the washings from whose premises flow into the stream. There is

also on the watershed a scaffold, which has been used from time to time for the slaughtering of cattle in a small way. The stream from which the water supply is derived is not protected from these surface washings by means of dikes or other devices. The condition of the watershed is substantially the same now as it was at the time of the selection, and as it has been since. The evidence does not disclose when the slaughtering of cattle began, or how extended it has been. The water is not filtered, but is taken directly from the stream, and pumped to a standpipe or reservoir in the city, from which it is distributed by gravitation through mains and pipes to consumers.

I find from the evidence that at certain seasons of the year the water is safe and pure, as shown by the analysis of the state chemist. At other seasons, during periods of continuous rainfall, the water is muddy, and must to some extent be contaminated by reason of the surface washings from the watershed as described. It was disclosed in the evidence that an analysis of the water had been made at the instance of the city or some of its citizens, but this analysis was not offered in evidence, nor was any expert evidence as to the quality of the water introduced, excepting the analysis of the state chemist, as above referred to.

The General Assembly of the state of Georgia passed an act, approved September 7, 1891, for the protection of the water supply of the waterworks for the city of Dawson. By this act it was made unlawful to obstruct or interfere with the flow of the stream, or pollute or contaminate in any way or by any means the water of the stream or watershed, so as to affect in any degree the quality or purity of the water. It was made unlawful to place or deposit any dead animal or vegetable matter in the swamp bordering on and surrounding the stream, its springs and branches, so as to affect the purity and quality of the water. The violation of these provisions was declared to be a misdemeanor. The police supervision of the marshal and policemen of the city of Dawson was extended over the watershed, and the officers were empowered to make arrests therein for violation of the provisions of the act. The ordinance of the city of Dawson made it the duty of the mayor to appoint three members of the council, whose duty it should be to superintend the waterworks and water supply of the city, and to see that the owners of the waterworks company complied with their obligations in furnishing water to said city and private individuals. City Code, par. 242.

(9) The water company erected a reservoir exceeding in capacity that required by the contract. The height of this reservoir from its bottom to the surface of the earth below was 65 feet. Upon a test by the city it was ascertained and declared that the system met with the requirements of the contract, and I therefore find that the reservoir was of the prescribed height and capacity. Much evidence was introduced and offered to show that sufficient pressure had not constantly been maintained. It appears that on one occasion the reservoir was found to be empty, but this occurred shortly after the construction of the waterworks, and before the repudiation of the contract by the city, and is therefore not material to be considered in the present case. At times the reservoir leaked. On one occasion the local superintendent of the water company tested the pressure from a point on what is known as an "end pipe." The water failed to reach a height of 50 feet vertically. It was shown that this test was a voluntary act of the local superintendent, without notice to the officers and owners of the waterworks company or to the city. Gauges indicating the height of the water in the standpipe, and the consequent pressure, were placed at the pumping station of the water company, and also in the engine house of the city fire department. Excepting on rare occasions, the reservoir was kept supplied with water sufficient to produce the required pressure. No complaint concerning the character of the service or the amount of the pressure was made to the water company until after the institution of the present suit. The water company has since erected a new reservoir of more than double the capacity required in the contract, and of a greater height than the first reservoir. Since the erection of this new reservoir, there has been no complaint or question as to the pressure.

(10) In repudiating its contract with the waterworks company, the city did not base its claim of right upon any inadequacy of supply, inefficiency of service, or quality of water furnished by the water company. The system

had been in operation for 3½ years, its water supply being derived then as now from the sources designated and approved by the city. During these years the surface washings from adjoining hills flowed into the stream during times of rain, and on such occasions the water was muddy. There was no request on the part of the city for the waterworks company to supply protection to the watershed, other than as existed then and now; nor was any request made that the water be filtered, or that the water tower be increased in either height or capacity. The city predicated its right to renounce the contract upon the ground of a want of authority in the preceding administration to bind the city by such a contract, for that it created an indebtedness forbidden by the Constitution of the state. The evidence makes it clear that the city was moved to this action, not only because it considered that it had the right so to do, but also because the contract was regarded as unfair and exorbitant. The facts and surrounding circumstances disclosed the evident purpose on the part of the city to either purchase the waterworks at a price satisfactory to it, or to make new agreements on more favorable terms for the use of the water from year to year, or to construct and operate its own system of waterworks. Failing to succeed in purchasing the waterworks, or in obtaining satisfactory agreements for the use of the water from year to year, the city submitted to its qualified voters a proposition authorizing it to issue bonds for the construction of an electric light plant, and also for the construction of a system of waterworks. Of the bonds so authorized, \$10,000 have been issued, and the proceeds used in the construction of an electric light plant. The remaining \$25,000 have not been issued or sold, but the city does not deny that its purpose is to use the proceeds of these bonds for the construction of a system of waterworks, unless it is prohibited by the court from doing so.

(11) During the years succeeding 1895 the only water furnished by the water company for municipal public buildings was through one opening at the engine house of the fire department. The fountains mentioned in the contract to be supplied with water have not been maintained by the city.

(12) The city levied an ad valorem tax on the property of the waterworks company for the year 1895. The amount of the tax so assessed not having been paid, the city caused a tax execution to be issued therefor, and caused the same to be placed in the hands of its city marshal for collection by process of law. Further proceedings on this execution have been temporarily enjoined by this court.

(13) I find that no application has been made on the part of the city to test the system of waterworks, as provided in the order of this court of September 16, 1899.

(14) Subsequent to the decision of the Supreme Court in the case of *City of Dawson v. Dawson Waterworks Company*, the waterworks company assigned to complainant the exclusive right to demand, collect, and receive the water rentals to be paid by the city of Dawson, as provided in the contract.

(15) I find that the revenues of the waterworks company from and including the year 1895, exclusive of the rentals claimed to be due by the city, have been insufficient to pay the operating expenses and fixed charges.

(16) I find that the American Pipe Manufacturing Company loaned to the waterworks company, from time to time, funds sufficient to meet the accruing interest on the outstanding bonds of the water company from September 1, 1895, up to and including March 1, 1899, amounting in the aggregate to \$8,560. For these loans, checks were drawn payable to Dawson Waterworks Company, and the proceeds deposited to its credit. The coupons, as they fell due, were paid by the waterworks company to the trustee. No other notice was given the trustee that these payments were made other than from the ordinary revenues of the waterworks company. The coupons thus paid and taken up by the waterworks company were not assigned or delivered to the pipe company. I therefore find that the transaction constituted merely a loan by the pipe company to the waterworks company, with no express agreement, so far as the evidence discloses, that the coupons should be assigned to the pipe company, or that it should be subrogated to the rights of the bondholders therein.

(17) The Columbia Avenue Company was without notice of the litigation between the city of Dawson and the waterworks company until after the decision of the Supreme Court of the state, of March 18, 1899.

Conclusions of Law.

1. To the Jurisdiction. The answer sets up an objection to the jurisdiction on the ground that the suit is collusively brought by the complainant at the instance and for the benefit of the waterworks company, for the purpose of conferring jurisdiction on this court, and of avoiding the judgment of the Supreme Court of Georgia. It is contended that the waterworks company is the real complainant, and that its transfer to the Columbia Avenue Company of the exclusive right to collect the water rentals from the city of Dawson was merely colorable, and was intended to predicate a suit in this forum. The only effect of such a transfer, in so far as concerns the jurisdiction, would be to create the diversity of citizenship necessary to suit in the federal court. If the jurisdiction rests upon an independent ground, the diversity of citizenship is immaterial. The court, in overruling the demurrer in this case, decided that a federal question sufficient to sustain the jurisdiction was presented. It is therefore immaterial to inquire what motive prompted the waterworks company to make the assignment.

One of the grounds of the demurrer was for want of equity. The overruling of the demurrer on this ground adjudicated the right of the complainant to institute and maintain this suit. That the waterworks company will be benefited, and that the suit was instituted at its instance, are questions that do not concern or affect the jurisdiction of the court, and I therefore conclude that the objection to the jurisdiction is not well taken.

2. On the Merits. The leading question presented in this controversy concerns the effect of the decision of the Supreme Court of Georgia in holding the contract to be void, as between the city, and the waterworks company, on the ground that it created an indebtedness such as is forbidden to cities by the Constitution of the state.

(1) The city contends that the question so involved and decided in that case is *res judicata* as against the complainant in this case. The matter is properly the subject of a plea, rather than an answer; but, no objection having been taken, the question will be considered as if properly pleaded. This suit is upon a different cause of action from that in the state court. If it be treated as being between the same parties or their privies, it is well established that a right, question, or fact distinctly put in issue and directly determined in the first suit cannot be disputed in a subsequent suit. Such right, question, or fact is to be taken as conclusively established. The judgment, however, in another suit upon a different cause of action, operates as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined. *Southern Pac. R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; *Nesbit v. Independent District of Riverside*, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195; *Wilmington & Weldon R. Co. v. Alsbrook*, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. Ed. 972; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450; *Roberts v. Nor. Pac. R. Co.*, 158 U. S. 1-30, 15 Sup. Ct. 756, 39 L. Ed. 873; *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859. If, therefore, the question of the validity of the contract was distinctly put in issue, and directly determined by the Supreme Court of Georgia, its decision would be conclusive upon the parties to that suit and their privies. The complainant here was not a party to the state court litigation, but it is contended that it is a privy in right and estate to the waterworks company, which was a party. A mortgagee is privy in estate to the mortgagor as to actions begun before the mortgage was given. As to suits subsequently begun, he is not a privy, nor is he bound by judgments or decrees therein against the mortgagor, unless he, or some one authorized to represent him, is made a party to the litigation. *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450; *Hassall v. Wilcox*, 130 U. S. 493, 9 Sup. Ct. 590, 32 L. Ed. 1001; *Louisville Trust Company v.*

Cincinnati, 76 Fed. 296, 22 C. C. A. 334; *Larison v. Hager* (C. C.) 44 Fed. 49; *Southern Bank & Trust Co. v. Folsom*, 75 Fed. 929, 21 C. C. A. 568; *Central Trust Company v. Hennen*, 90 Fed. 593, 33 C. C. A. 189. *Louisville Trust Company v. City of Cincinnati*, 76 Fed. 296, 22 C. C. A. 334, is closely in point. The Louisville Trust Company was the trustee under the mortgage to secure an issue of bonds by the Inclined Railway Company. The mortgage included franchises, rights of way, and easements. Subsequently the city of Cincinnati brought suit against the railway company in the state court, in which it was decided that certain street franchises enjoyed by the railway company had expired by limitation, while certain others were void. This judgment was affirmed by the Supreme Court of the state. The trust company brought suit against the city in the federal court, in which suit these questions were involved. The court, after declaring the franchise to occupy a public street created such a property right as was subject to assignment or mortgage, further said that the mortgagee could not be deprived of this security by a proceeding directly impeaching its validity and duration, without being made a party thereto. Hence I conclude that the complainant in this case was not a privy of the waterworks company as to the suit in the state court, so as to be conclusively bound thereby, and that the doctrine of res judicata does not apply to it.

(2) It is insisted that the decision of the Supreme Court of Georgia declaring the invalidity of the contract will be regarded as conclusive in this forum, in deference to the rule that the federal courts will follow the construction given constitutions and statutes by the highest court of the state. The general rule is as stated, but it is subject to important limitations and exceptions. The federal court, in construing the meaning of a state statute as to what contract is contained therein, and whether the state has passed any law impairing its obligation, is not bound by previous decisions in state courts, except when they have been so long and so firmly established as to constitute a rule of property, but will decide independently whether there is a contract, and whether its obligation has been impaired. *County of Shelby v. Union & Planters' Bank*, 161 U. S. 149, 16 Sup. Ct. 558, 40 L. Ed. 650; *L. & N. R. Co. v. Palmes*, 109 U. S. 244, 3 Sup. Ct. 193, 27 L. Ed. 922; *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665, 6 Sup. Ct. 625, 29 L. Ed. 770; *Mobile & Ohio R. Co. v. Tennessee*, 153 U. S. 486, 14 Sup. Ct. 968, 38 L. Ed. 793.

In the leading case of *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359, the Supreme Court of the United States, on special consideration, distinctly stated the rule and its limitation as follows: "The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient, but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt." The case on this point has been followed and approved in a great

number of cases, which need not be cited. See *Bartholomew v. City of Austin*, 85 Fed. 359, 29 C. C. A. 568.

In *Speer v. Board of County Commissioners*, 88 Fed. 749, 32 C. C. A. 101, the question presented related to the validity of certain county warrants. The Supreme Court of the state declared these warrants invalid. The holder of other warrants brought suit in the Circuit Court of the United States. The Circuit Court of Appeals for the Eighth Circuit declined to follow the decision of the state court, upon the ground that "decisions of state courts as to their statutes, which affect the validity of contracts between citizens of different states which were made, or under which rights were acquired, before there was a judicial construction of the statute which seemed to authorize the contracts, are not obligatory upon the courts of the United States." The same Court of Appeals considered *Clapp v. Oteo County*, 104 Fed. 473, 45 C. C. A. 579, in which case an action upon county bonds had been instituted. The bonds had been declared void by the Supreme Court of the state. The court declared the rule that "national courts uniformly follow the construction of the Constitution and statutes of a state given by its highest tribunal in all cases that involve no question of general or commercial law, and no question of right under the Constitution and laws of the nation." It was pointed out that the plaintiff in that case had purchased the bonds prior to the decision of the state court, without notice of any defect in their execution; that upon this purchase he entered into a contract relation with the county, and by such purchase he acquired the right, under the Constitution and laws of the United States, to have his contract interpreted and his rights enforced in a court of the United States, and to invoke the independent judgment of that court upon the legal questions involved. The court, speaking through Circuit Judge Sanborn, said: "No decision of a state court, rendered after his rights under these contracts had vested, could forestall the judgment of a national court upon these questions, or deprive him of the right to invoke or relieve a federal court of the duty to accord its independent consideration and decision of his case. Much less could the decision of a state court, which studiously ignored the rights of innocent purchasers of these bonds, and which was not rendered until 10 years after they were bought, deprive the purchaser of the right to the independent opinion of the federal court to which he presents them."

In *Louisville Trust Company v. City of Cincinnati*, 76 Fed. 296, 22 C. C. A. 334, Circuit Judge Lurton, speaking for the Circuit Court of Appeals, forcibly declared that if the decision of the state Supreme Court constituted a conclusive interpretation of the contracts or ordinances under which the mortgage, easements, and franchises originated, "the constitutional right of the complainant, as a citizen of a state other than Ohio, to have its right as a mortgagee defined and adjudged by a court of the United States, is of no real value. If this court cannot for itself examine these street contracts, and determine their validity, effect, and duration, and must follow the interpretation and construction placed on them by another court in a suit begun after its rights as mortgagee had accrued, and to which it was not a party, then the right of such a mortgagee to have a hearing before judgment, and a trial before execution, is a matter of form, without substance." It was further said that the courts of the United States will not regard themselves as under any duty to conform to later state court decisions where contracts and obligations have been entered into before there has been any judicial construction, or as to which there have been conflicting decisions. In such a case the federal court will exercise its independent judgment, and will not be bound to follow the opinions of the state court construing such statute rendered after the rights involved in the controversy originated.

Whether the decision of the Supreme Court of Georgia be regarded as in construction of the state Constitution, or as relating to a question of general commercial law in defining the meaning of the word "debt," such decision is not binding upon this court unless it is in harmony with the plain language of the Constitution, or the settled judicial construction thereof existing at the time the contract was entered into, or the bonds issued and sold. The Columbia Avenue Company has a sufficient interest in this controversy to raise these questions and invoke the decision of this court thereon. In the ordi-

nance creating the contract, it is expressly recognized that the water rental should be payable to the waterworks, or to such trustee for its bonds as it might select. The Columbia Avenue Company, having been selected as such trustee, became the alternate payee, and occupied a contractual relation with the city. The mortgage given to secure the bonds conveyed and assigned to the trustee all of the rights and franchises of the water company, including the benefit of its contract with the city. Under this conveyance the trustee is interested in protecting and preserving the security, and to that end may institute and maintain its suit independently of the water company. *Louisville Trust Company v. Cincinnati*, 76 Fed. 296, 22 C. C. A. 334; *Consolidated Water Company v. San Diego* (C. C.) 84 Fed. 369; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Schmidt v. Louisville C. & L. R. Co.* (Ky.) 41 S. W. 1015. It therefore becomes of the first importance to ascertain the state of the law and the judicial construction thereof at the time the contract was entered into.

The provisions of the Constitution of 1877, in force at the time, which bear upon the question under consideration, are as follows:

"Debt of Counties and Cities not to Exceed Seven Per Cent. The debt hereafter incurred by any county, municipal corporation, or political division of this state, except as in this Constitution provided for, shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county, municipality or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law; but any city, the debt of which does not exceed seven per centum of the assessed value of the taxable property at the time of the adoption of this Constitution, may be authorized by law to increase, at any time, the amount of said debt, three per centum upon such assessed valuation." Paragraph 1, § 7, art. 7, Const. 1877 (Code 1895, § 5893).

"City Debts—How Incurred. Municipal corporations shall not incur any debt until provision therefor shall have been made by the municipal government." Paragraph 1, § 10, art. 7, Const. 1877 (Code 1895, § 5897).

The question as to what created a debt, within the meaning of this Constitution, first came before the Supreme Court of Georgia in the case of *Hudson v. City of Marietta* (Sept. term, 1879) 64 Ga. 286. In that case the city of Marietta exchanged an old for a new fire engine, incurring an indebtedness of \$3,000 on account of the exchange. The court, by two justices, declared that such a transaction created a debt, within the meaning of the Constitution.

The next case was that of *Spann v. Webster County* (Feb. term, 1880) 64 Ga. 498. Webster county purchased a safe, incurring an indebtedness therefor. The court, following *Hudson v. Marietta*, declared such an indebtedness was forbidden by the Constitution.

The question next came before the court in the case of *Mayor of Rome v. McWilliams* (Sept. term, 1881) 67 Ga. 106. The city levied a tax to cover an anticipated expenditure for the fitting up of municipal offices. It was alleged to be the purpose of the city to contract an indebtedness on this account. The court, speaking through Mr. Justice Speer, used the following language: "An obligation arising under a contract on the part of a municipal corporation to pay for work when and as it shall be performed in the future does not constitute or ripen into an indebtedness, within the meaning of the Constitution, till at least the performance of the work. [*Dively v. City of Cedar Falls*] 27 Iowa, 228; [*Weston v. City of Syracuse*] 17 N. Y. 110. If this were not so, then it would be impossible, in a majority of instances, to even contract for the most necessary public building without a prior levy and deposit of money in the treasury. The obligation to pay so far as the time of its inception as between the parties is concerned, is one thing, and an actual indebtedness, within the meaning of the Constitution, is another. I may enter into a contract for an architect to build me a house, but, if he never does the work, I owe him nothing. So, if I pay him as he progresses, I will not be his debtor. So, if I contract to pay him when the work is done,

I owe him nothing till the contract is fulfilled, and if, on its fulfillment, I discharge it, I cannot be said to have incurred a debt, in the sense the Constitution prohibits corporations from incurring." Chief Justice Jackson concurred in the opinion and the reasons given therefor, and distinguished the case from those of *Hudson v. Marietta* and *Spann* against Webster County. Mr. Justice Crawford dissented, principally for the reason stated by him as follows: "But over and above all this comes the Constitution, and declares, among other things, that no county, municipal corporation, or political division of the state shall incur any new debt, except for a temporary loan to supply casual deficiencies of revenue, without the assent of two-thirds of the qualified voters thereof. It is admitted that a new debt could not be incurred except as above provided. Then the question is whether a city can levy a tax with which to pay a future liability that it could not legally incur. If the right exists to make the contract, the time when the payment is to be made is wholly immaterial. It neither enlarges the power, nor changes the nature of the liability. It is the incurring a new debt, whether paid when the work is done, or five years thereafter. It is a debt from the making of the bargain until paid, be that when it may. To say that for a new debt to be incurred, with which to build a town hall, without first submitting it to the people, would be unconstitutional, and to say that the levy of a tax to build a town hall without submitting that to the people would be constitutional, does not seem to me to be either law or logic. This provision in the Constitution was to give the taxpayers the right to say whether the expenditure should be made, and to require their assent before the taxes should be laid for such expenditure." In this dissenting opinion Mr. Justice Crawford makes no reference to the cases of *Hudson v. Marietta* and *Spann v. Webster County*, nor does he appear to predicate his opinion thereon.

In *City of Conyers v. Kirk & Co.* (March term, 1887) 78 Ga. 480, 3 S. E. 442, it appears that the city had contracted to purchase lamps and gasoline for lighting the streets, intending to pay cash therefor. The lamps were used by the city for a limited time, and the gasoline purchase was consumed. The city declined to make payment for several reasons. In discussing the case, Mr. Chief Justice Bleckley uses the following language, citing *Mayor of Rome v. McWilliams*, 67 Ga. 106, as being in point: "The debt resulted from a breach of the contract, not from the making of it. Against paying a debt so originating there is no constitutional impediment. When a cash purchase is made, there is no expectation that any debt will exist, and there was no such contemplation in this case. If we take the evidence, as we do, most favorably for the plaintiffs, there was no intention that any debt should arise. It was contemplated that payment should be made as soon as the articles were delivered, and the reason indicated in the record why payment was not then in fact made was the accidental absence of the city treasurer from his office. So that this debt (and it is a debt now) became such not by virtue of making the contract, but by virtue of breaking the contract; and surely there never can be and never will be any law against paying a debt which arises from default in making a cash payment at the time the debtor ought to have made it, the cash sufficient for the purpose being then in the debtor's treasury."

Butts v. Little, 68 Ga. 272, was decided in 1881. It was there held that a contract by a county for the erection of a building at a specified price, payable as the work progresses, and to be completed within a given time, where the amount to be paid was more than could be lawfully raised by taxation, was invalid, as creating an indebtedness without complying with the constitutional requirements. The court said, however, that if the parties to the contract could so modify it that the cost of the building could, as it fell due, be met annually thereafter by a levy of lawful taxes, the contract would be valid. The court does not refer to the former case of *Mayor of Rome v. McWilliams*, with which case the doctrine first declared hardly seems to be consistent.

At the time that the contract under consideration was entered into, the case of *Lott v. Mayor of Waycross*, 84 Ga. 681, 11 S. E. 558, had been decided by the superior court of the state, and was then pending upon writ of error in the Supreme Court. In this case it appeared that the city had en-

tered into a written contract with one Albertson whereby it was agreed that he should erect a plant and furnish a given number of electric lights for the city for the term of 10 years, in consideration whereof the city was to pay the sum of \$2,000 a year, payable monthly. The plaintiff filed a petition for injunction against the further carrying out of the contract on the part of the city, upon the ground that the contract was the incurring of a debt, under the Constitution of the state, without complying with the prerequisite submission to the legally qualified voters of the city. The court refused the injunction, and the plaintiff excepted. The opinion of the Supreme Court is brief and direct. It was delivered by Mr. Justice Blandford, and is as follows: "It is clear to our mind that the mayor and council of Waycross have a right to contract an annual indebtedness for the purpose of supplying lights to the town, and we do not think such a contract would be an indebtedness such as is required by the Constitution to be submitted to the vote of the people of the town. Whether this contract incurs an indebtedness which is required to be submitted to the voters of the town, under the Constitution, it is not necessary for us now to decide. It may be that the question may never arise, even under this contract, if the sum stipulated to be paid annually for the supply of lights is paid as it becomes due; and if this is a reasonable expense to be incurred by the city—and we do not see why it is not—then the question will never arise. Should the city make default of payment, then the question might arise, and it would have to be decided whether this was such a contract as imposed upon the city an indebtedness such as is contemplated by the Constitution to be submitted to the people. 'Sufficient unto the day is the evil thereof.' Let the light shine in Waycross." It is true that the court in this case does not decide whether the contract created an indebtedness such as is required under the Constitution to be submitted to the qualified voters of the town. Taking this case, however, in connection with that of *Mayor of Rome v. McWilliams* and *Butts v. Little*, it appears to sustain the proposition that a contract for supplies or service to be paid for at stated times, as delivered or performed, does not create an indebtedness within the constitutional sense. If this be true, then, upon authority of *Conyers v. Kirk*, 78 Ga. 480, 3 S. E. 442, no indebtedness would arise under this contract, except from a breach thereof, and against paying a debt so originating there is no constitutional impediment. That *Lott v. Waycross* is susceptible of this construction is evidenced by the fact that it is cited by the Supreme Court of the United States, in the case of *Walla Walla v. Walla Walla Water Company*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, to sustain the proposition that such a contract did not create an indebtedness.

Such was the state of the Georgia decisions at the time this contract was entered into. The contract provided that the city should annually meet the water rentals as they accrued, by the levy of an annual tax. If these water rentals should be paid as they accrued, there would never be any indebtedness, although the obligation to take the water and pay therefor would extend from year to year. As in *City of Conyers v. Kirk & Co.*, 78 Ga. 480, 3 S. E. 442, it was contemplated that payment should be made as the service was rendered, "and there never can be and never will be any law against paying a debt which arises from default in making a cash payment at the time the debtor ought to have made it." So, in *Lott v. Waycross*, 84 Ga. 681, 11 S. E. 558, the court said that, if the sum stipulated to be paid annually for lights should be paid as it became due, the question whether the contract created a debt would never arise, inasmuch as the expense was a reasonable one to be incurred by the city. The principle in these cases was consistent with that declared in *Rome v. McWilliams*, 67 Ga. 106, and *Butts v. Little*, 68 Ga. 272, that the obligation to pay for work when and as it shall be performed in future, by an annual levy of taxes sufficient to meet the accruing installments, does not create an indebtedness, within the meaning of the Georgia Constitution. These cases certainly warrant the conclusion that, at the time the contract was entered into with the water company, contracts of that character had not been declared invalid by the Supreme Court of Georgia. Indeed, that court has deemed it necessary to overrule *Butts v. Little* (*Lewis v. Lofley*, 92 Ga. 804, 19 S. E. 57; *Dawson v. Waterworks Co.*, 106 Ga. 727, 32 S. E. 907), and to overrule, qualify, or distinguish several of

the other cases referred to in this report. It cannot, therefore, fairly be said that there was such a settled course of judicial decisions in Georgia on this question, at the time of the making of the contract, as to constrain the courts of the United States to follow later decisions of the state court, especially in a case where the rights of innocent third persons are concerned. Subsequent to the making of this contract, and after the rights of the complainant and the bondholders had been acquired, the Supreme Court of Georgia unequivocally held that contracts of this character constituted the creation of an indebtedness, within the inhibition of the state Constitution. *Cartersville Imp. Co. v. Cartersville*, 89 Ga. 683, 16 S. E. 25; *Cartersville Water Co. v. Cartersville*, 89 Ga. 689, 16 S. E. 70; *City of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696, 32 S. E. 907. I therefore conclude that this court is not bound to follow the later decisions of the state court as to the validity of the contract in question, but should exercise its independent judgment with reference thereto.

(3) The contract between the city and the water company contemplated that the company should maintain and perform the water service therein specified from year to year for a period of 20 years. As this service should be performed, the city obligated itself to pay therefor the sum of \$2,000 each year, payable semiannually. If the water company should fail to perform the service, the city would be under no obligation to pay. In no event was it liable to pay any installment until the service for which the payment was due had been rendered. The idea of credit did not enter into the transaction. The city did not assume to pay a present indebtedness in future installments, as would have been the case, had it issued bonds payable in future. The whole purpose of the contract was to encourage the construction of a system of waterworks by a private corporation, and to provide for supplying the city and its inhabitants with a water service in accordance with certain specifications. To this end the city gave the right to the use of its streets for the laying of mains and pipes, and agreed to pay semiannually in each year for 20 years a stipulated sum for the free and unrestricted use of the water for fire protection. Upon the faith of these obligations on the part of the city, the water company expended a large amount of money in the construction of a system, which was tested and accepted by the city as satisfactorily complying with the requirements of the contract. That such a contract does not create a debt is not an open question in this forum. Upon this point the case of *Walla Walla v. Walla Walla Water Company*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, is conclusive. In that case the city obligated itself to pay the water company \$1,500 annually in quarterly installments, for 25 years, for the use of the water for fire protection. The charter of the city limited the amount of indebtedness it could incur. The sum of the installments agreed to be paid for the period named would, if treated as a debt, cause the indebtedness of the city to exceed the charter limitations. The court, after declaring that the weight of authority, as well as of reason, favors the construction that a municipal corporation may contract for a supply of water or gas, or like necessity, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the city's authorized indebtedness, says: "There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of a public improvement—though such debt be payable in the future by installments. In the one case the indebtedness is not created until the consideration has been furnished. In the other the debt is created at once, the time of payment being only postponed. In the case under consideration the annual rental did not become an indebtedness, within the meaning of the charter, until the water appropriate to that year had been furnished. If the company had failed to furnish it, the rental would not have been payable at all, and, while the original contract provided for the creation of an indebtedness, it was only upon condition that the company performed its own obligation." To this proposition the court cites a number of authorities, and continues:

"The obvious purpose of limitations of this kind in municipal charters is to prevent the improvident contracting of debts for other than the ordinary current expenses of the municipality. It certainly has no reference to debts incurred for the salaries of municipal officers, members of the fire and police departments, school-teachers, or other salaried employes to whom the city necessarily becomes indebted in the ordinary conduct of municipal affairs, and for the discharge of which money is annually raised by taxation. For all purposes necessary to the exercise of their corporate powers they are at liberty to make contracts regardless of the statutory limitation, provided, at least, that the amount to be raised each year does not exceed the indebtedness allowed by the charter. Among these purposes is the prevention of fires, the purchase of fire engines, the pay of firemen, and the supply of water by the payment of annual rental therefor."

The Dawson Waterworks Case, 106 Ga. 696, 32 S. E. 907, in which the Supreme Court of Georgia reached a different conclusion in construing the identical contract, has been carefully considered. The court recognized that its ruling on this point was "in direct conflict with a decision of the highest court in the land (the Walla Walla Case), as well as with the current of American authority on the subject." Its decision was based upon the public policy of the state, as read in the light of its past history. Chief Justice Simmons concurred specially, considering himself bound by a former decision in the case (*Mayor and Council of Dawson v. Dawson Waterworks Co.*, 102 Ga. 594, 29 S. E. 755). He says: "If it were an original question, I should hold, in accordance with nearly all the other courts of the Union, including the Supreme Court of the United States, when construing similar provisions of constitutions or statutes, that the making of a contract or agreement by municipal authorities for the supply of gas or water for a term of years, for a certain sum, to be paid annually, is not a debt, within the meaning of the Constitution. It is difficult for me to understand now, after full argument and reflection, how the making of the same contract by the same authority for one year, when there is no money in the treasury to pay it, and taxes are to be levied to meet the obligation, is not a debt, when, if the same authority makes a contract for the same purpose for two years or five years, it is a debt."

It is interesting to note that the Supreme Court of Georgia has quite recently handed down an elaborate opinion in construction of what constitutes a debt of a city, under the constitutional provision under consideration in the instant case. In these cases (*Epping v. City of Columbus*, 43 S. E. 803, and *Roff v. Mayor of Calhoun*, 43 S. E. 803, decided March 12, 1903) the respective cities had issued coupon bonds for the purpose of erecting waterworks. The future interest, represented by coupons, if added to the amount of the principal, would exceed the indebtedness that could be legally incurred. The court said: "The debt of a municipal corporation, within the meaning of that provision of the Constitution which prohibits such a corporation from incurring a debt that exceeds 7 per centum of the assessed valuation of all the taxable property within the municipality, is to be ascertained by adding to the principal of all outstanding indebtedness the amount of all accrued interest that may be past due and payable on the day the amount of the debt is to be fixed. In ascertaining the amount of such debt, future interest that is not due on the day it becomes necessary to fix the sum of indebtedness is not to be counted. Unearned interest is not, within the true intent and meaning of the Constitution, a part of the debt of the municipality." The court referred to the Dawson Waterworks Case, 106 Ga. 696, 32 S. E. 907, and drew a distinction predicated upon the statement that "the contract sought to be enforced in that case related to a principal liability payable in annual installments." This distinction is not apparent to the mind of the master, who finds it difficult to understand how an obligation to pay future water rentals as they accrue can differ in principle from a promise to pay future interest as it may be earned.

I conclude on this branch of the case that the contract in question did not create a "debt," within the meaning of the Georgia Constitution.

(4) It is contended on the part of the city that no exclusive franchise to occupy the streets and maintain a water system could be lawfully granted,

and from this it is argued that the franchise may be revoked, and the city may use its streets for its own system. The grant of a right to supply water to a city and its inhabitants, through pipes and mains laid in the streets, upon the condition of the performance of its service by the grantee, is the grant of a franchise in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the Constitution of the United States. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, and cases there cited. The right of a city to do those things necessary to supply its inhabitants with water for domestic use, or to provide the city with protection against fire, is the settled law of Georgia. *Dawson v. Dawson Waterworks Co.*, 106 Ga. 709, 32 S. E. 907; *Frederick v. Augusta*, 5 Ga. 561; *Rome v. Cabot*, 28 Ga. 50; *Wells v. Atlanta*, 43 Ga. 67. As an incident to the principal undertaking, the city possesses the power to grant the use of its streets, and to contract with a private company for an exclusive supply of water for fire protection. It is unnecessary to decide whether the city may grant an exclusive franchise for a long number of years in excess of the contractual period between the city and the water company. Should a third person in good faith seek a franchise for the use of the streets for a similar purpose, the point would be properly involved. The question now presented is whether the city can directly revoke the grant, or itself use the streets in competition with the water company, in the face of its contract with the water company. The contract does not in terms express an agreement that the city will not, during the life of the contract, erect its own system for the purpose of supplying its inhabitants with water, but it can hardly be doubted that such is the fair implication and reasonable intentment of the contract. The city, having induced the expenditure of money on faith of the promise that it would grant the exclusive use of the streets for the laying of pipes and mains by the water company, and having contracted to pay for the use of water for fire protection for a term of years, will not be permitted, in equity, to disregard its agreements by itself entering into ruinous competition with the other party before the expiration of the contractual term. *Southwest Missouri Light Co. v. City of Joplin (C. C.)* 101 Fed. 23; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. I conclude that the city may not, prior to the expiration of the term for which it contracted for a supply of water for fire protection, directly revoke the grant of the franchise for the use of its streets by the water company, or indirectly impair or destroy the value of the franchise by itself entering into competition with its grantee. To this extent the right is protected by the obligation of the contract entered into. *St. Tammany Water Co. v. New Orleans Water Co.*, 120 U. S. 64, 7 Sup. Ct. 405, 30 L. Ed. 563; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510; *Bartholomew v. City of Austin*, 85 Fed. 359, 29 C. C. A. 568.

(5) I have found that during periods of continuous rainfall the water supplied is muddy, and to some extent contaminated by reason of the surface washings from the watershed. I have also found that at times the reservoir leaked, and that the required pressure was not at all times maintained. The quality of the water is the same as it was during the years the city accepted it as satisfactory. The watershed and its condition were substantially the same then as now. There is no requirement in the contract that the quality of the water should be other than that furnished in its natural state from the sources of supply designated and accepted by the city. It was not required that the water should be filtered, or otherwise rendered more fit for domestic use. An act of the General Assembly made it a misdemeanor to contaminate the watershed so as to affect the quality and purity of the water, and the police supervision of the city was extended over this territory. An ordinance of the city directed the mayor to appoint a committee, whose duty it should be to superintend the waterworks and water supply of the city, and see that the water company complied with their obligations in furnishing water to the city and private consumers. Prior to the repudiation of the contract by the city, no complaint as to pressure or quality of water had been made. No objection of any kind had been presented, and the city seems to have been satisfied with the service and the quality of the water. At no

time since has any complaint been made, until the filing of the answer in this case. Within a reasonable time thereafter the water company erected a new standpipe, of larger capacity and greater pressure, which completely remedied the occasional lack of pressure complained of. At no time has the city filed formal complaint, specifying the grounds of complaint, or called for a test, or given the water company an opportunity of remedying defects, if such existed. It repudiated the contract, and refused to pay the water rentals as they fell due, thus depriving the water company of a large part of its revenue. Nevertheless it continued to receive the benefits of the contract. In circumstances such as these, the city cannot invoke a forfeiture, nor can it plead the facts as a defense to the right of the complainant to relief. *Pike's Peak Power Co. v. City of Colorado Springs*, 105 Fed. 1, 15, 44 C. C. A. 333; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341.

(6) The contract, among other things, provided that, in consideration of water to be furnished the public municipal buildings and two public fountains, the city obligated itself to remit to the water company any and all license fees, taxes, dues and charges which might any time be levied or assessed by the city against the company or its plant. The city levied an ad valorem tax on the property of the water company for the year 1895, caused execution to be issued therefor, and placed the same in the hands of its marshal for collection. Further proceedings on this execution have been temporarily enjoined by this court. The complainant contends that this agreement is not to be construed as an exemption from taxation, but that it stipulates for a service that should be received in lieu of taxes, and as a full and fair equivalent therefor. It is urged on the part of the city that the stipulation is an exemption from municipal taxation, or at least a commutation of taxes, and, as such, void under the Constitution and laws of Georgia. I think it clear that the agreement is to be construed as in commutation of city taxes. *Cooley on Taxation* (2d Ed.) 234. License or occupation taxes may be commuted by a city, but, under the Constitution and laws of Georgia, as uniformly construed by the Supreme Court of the state, there can be neither exemption from, nor commutation of, taxes on property. The language of the Constitution (paragraph 1, § 2, art. 7; Code 1895, § 5883) is as follows: "All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." Paragraph 4 (section 5886) declares that all laws exempting property from taxation, other than certain enumerated property, shall be void. Under these constitutional requirements, it has been held by the courts that property cannot be classified for the purposes of taxation, nor can taxes on property be commuted, nor any rule of taxation applied excepting that laid down; that is to say, a strict ad valorem tax on all property subject to be taxed within the taxing district. These cases are so numerous and uniform, it is deemed unnecessary to cite them. At the time the contract under consideration was entered into, there was no case qualifying the rigid doctrine as above expressed. In 1892, however, the Supreme Court of the state, in the case of *Cartersville Gas Company v. Mayor of Cartersville*, 89 Ga. 683, 16 S. E. 25, held as follows: "While a city cannot exempt a gas company from municipal taxation, it can contract to pay for gas a stipulated sum per lamp, and in addition thereto a sum for all the lamps supplied, equivalent to the amount of taxes imposed upon the company, provided this additional sum is a fair and just allowance to compensate for the actual value of the light service, and the stipulation is bona fide, and not in the nature of an evasion of the law prohibiting exemption from taxes." At the same term the court held in the case of *Cartersville Waterworks Company v. Mayor of Cartersville*, 89 Ga. 689, 16 S. E. 70, that a city had no power to exempt the property of the water company from municipal taxation by contract, and the attempt to grant such exemption was not effectual. The company could neither take the exemption by way of gratuity, nor purchase it by way of commutation. In that case the contract entered into between the city and the water company provided that the water company should erect a system of waterworks, and supply with water for fire purposes a certain number of hy-

drants at a given price; also to supply with water for the payment of city license and taxes for the first 10 years of this contract two drinking fountains, with quarter inch openings of continual flow for man and beast, at such places on the mains as designated by the council. Subsequently the city levied an ad valorem tax on the property of the water company. The agreement above recited was pleaded as against this tax levy. The court held the agreement void, as being an exemption or commutation of taxes. The facts in that case are very similar to those in the instant case. In subsequent cases the court has uniformly held that no escape can be had from the burden of an ad valorem tax on property, whether by contract or under legislative sanction. *Atlanta National Building & Loan Association v. Stewart*, 109 Ga. 80, 35 S. E. 73. The construction thus given by the highest court of the state to its Constitution with respect to taxation will be followed by the federal courts. *Games v. Dunn*, 14 Pet. 322, 10 L. Ed. 476; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663. I conclude on this branch of the case that the agreement between the city and the water company provided for a commutation of city taxes, and is therefore void under the Constitution and laws of the state of Georgia. The water company, however, upon an accounting, will be entitled to be paid or have credit for the value of the water actually supplied the city under this agreement. The Circuit Court of Appeals for this circuit, in the case of *Bartholomew v. City of Austin*, 85 Fed. 359, 29 C. C. A. 568, held that, where a city undertakes to exempt from taxation the property of a water company in consideration of water furnished the city for certain purposes, if such exemption proves to be void, the company can recover for water furnished under the arrangement.

(7) I have found that in point of fact the maturing interest coupons upon the bonds from September 1, 1895, to March 1, 1899, was paid by the water company from funds loaned to it for that purpose by the American Pipe Company, and that the transaction was merely a loan by the pipe company to the water company, with no agreement that the paid coupons should be assigned, or that the pipe company should become subrogated to the rights of the bondholders. Upon these facts, I conclude that the complainant is not entitled to recover in behalf of the pipe company the interest so paid. When the interest was paid to the trustee by the water company, without notice or reservation, such payment was general, and the indebtedness represented by the coupons was extinguished. The trustee, having once received payment, cannot again enforce it, especially in the interest of one who is not a party to this proceeding, and between whom and the trustee there is no privity of contract. If the pipe company has any legal or equitable rights arising out of the transaction, it must enforce them in its own behalf in a proper suit brought for that purpose.

(8) The right of the complainant to maintain this suit, in so far as concerns the jurisdiction of this court both as a court of equity and as a court of the United States, has been adjudicated on demurrer. The relief to which the complainant is entitled under the facts of the case remains to be considered.

The obligation of a contract may be impaired by subsequent judicial decisions as well as by subsequent legislation. *Butz v. City of Muscatine*, 8 Wall. 575, 19 L. Ed. 490. An ordinance of a city denying liability on a contract with a waterworks company is legislation affecting the obligation of the contract, under the Constitution and laws of the United States; and, where the city has held an election to authorize an issue of bonds to buy or construct waterworks of its own, the water company is entitled to maintain a suit for equitable relief in advance of actual proceedings by the city to impair the company's rights under the contract. *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 22 Sup. Ct. 585, 46 L. Ed. 808; *Los Angeles v. Los Angeles City Water Company*, 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 886.

The defendant city of Dawson has renounced and repudiated the contract with the water company, as being void, and in this it has been sustained by the Supreme Court of the state. The qualified voters of the city have, at an election held for that purpose, authorized the city to issue bonds for the construction of waterworks to be operated by the city. These bonds have been issued, and would have been sold but for this litigation. I conclude that these facts, as well as the other facts found, entitle the trustee to equitable relief,

and bring the case within the rule of law expressed. This suit is proceeding in the name of the trustee as complainant, for the benefit of bondholders, and in order to protect the security for the bonds. An essential part of this security consists in the contract by the city for payment of water rentals as the service should be performed by the water company. The trustee was, under the contract, made an alternate payee. Its right to collect the water rentals upon default of payment of interest by the water company was confirmed in the mortgage given to secure the bonds, and the exclusive right to make such collection has been assigned by the water company, after default, to the trustee. It follows that the trustee has the right to enforce the performance of these obligations in this suit. A court of equity, having obtained jurisdiction of the parties and of the subject-matter, will make its jurisdiction effectual for complete relief, and in such suit will enforce a contract between the city and the water company made prior to the issuance of the bonds, under which contract the city agreed to pay hydrant rentals to the mortgage trustee for the benefit of the bondholders. *Fidelity Trust & Guaranty Company v. Fowler Water Company (C. C.)* 113 Fed. 560, and cases there cited on pages 571 and 572.

The trustee is entitled to an injunction against the city, forbidding it to construct, maintain, or operate a system of waterworks of its own in competition with the water company, or for the purpose of supplying the city with water for fire protection and municipal use; and the injunction heretofore granted, temporarily restraining the city from issuing bonds for this purpose, should be made perpetual. It would seem that the complainant is further entitled to a mandatory injunction against both the city and the water company, requiring them, and each of them, to specifically perform the contract, as essential to the protection of the security for the bonds. In *Union Pacific R. Co. v. Chicago, R. I. & P. R. Co.*, 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265, the Supreme Court decreed specific performance of a continuing agreement for trackage rights as between railway companies, basing its opinion on this point on the former case of *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843. The court also cites, upon this point, *Franklin Telegraph Company v. Harrison*, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776; *Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co.*, 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610; and *Denver & R. G. R. Co. v. Alling*, 99 U. S. 463, 25 L. Ed. 438. In the *Union Pacific* case the court said: "But it is objected that equity will not decree specific performance of a contract requiring continuous acts involving skill, judgment, and technical knowledge, nor enforce agreements to arbitrate, and that this case occupies that attitude. We do not think so. The decree is complete in itself, is self-operating and self-executing, and the provision for referees in certain contingencies is a mere matter of detail, and not of the essence of the contract. It must not be forgotten that, in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has contrived its remedies 'so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated,' and 'has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed.' Pom. Eq. Jur. § 111." The cause of action arising upon a failure to pay water rentals due under a contract after the service has been performed by the water company is a legal cause of action, and the legal remedy is ordinarily adequate. *Raton Waterworks Co. v. Raton*, 174 U. S. 360, 19 Sup. Ct. 719, 43 L. Ed. 1005.

In the case under consideration, however, a court of equity has taken jurisdiction of the whole controversy at the suit of the trustee, who has an equitable right to enforce the contract for the benefit of the security of the bonds. If I am correct in my findings of fact and conclusions of law as contained in this report, it follows that the complainant is entitled to full and complete relief during the entire life of the contract. A breach of this con-

tract on the part of either the water company or the city would materially affect the security. Should the city refuse to pay future water rentals after they had accrued, the remedy of the trustee would be either in an action at law in the state court, inasmuch as the annual rental does not exceed the sum or value of \$2,000, or by supplemental and ancillary bill in this cause and in this court. This court, having assumed jurisdiction of the entire controversy, will not remit the complainant for further relief to the courts of another sovereignty. The remedy by supplemental bill in this court would be allowed only in the exercise of the equitable jurisdiction of the court. The complainant would thus appear to be without a plain, complete, and adequate remedy at law for future breaches of the contract as against the city. Should the water company fail or refuse to comply with its obligations under the contract, the complainant would have an action for damages for such breach; but it appears that the water company owns no property other than that covered by the mortgage to the trustee, so that a suit for damages against it would not measure up to the standard of an adequate legal remedy. Hence I conclude that the complainant is entitled to a decree as against both the city and the water company, requiring them, and each of them, to specifically perform the contract between them.

General Conclusions.

Upon the whole case I find and conclude as follows:

(1) That the objection to the jurisdiction is not well founded, inasmuch as the jurisdiction rests upon the federal question presented, without regard to the citizenship of the parties.

(2) That the doctrine of *res judicata* is not applicable to the complainant in this case, for the reason that the complainant was not a party or privy to the state court suit.

(3) That this court is under no obligation to follow the decisions of the highest court of the state, rendered after the contract in question had been entered into, and the rights of the complainant and those it represents had been acquired thereunder; that the decisions of the state courts prior to the execution of the contract were not so long and so firmly established as to constitute a rule of property; and that this court will decide independently whether there is a contract, and whether its obligation has been impaired.

(4) That the contract between the city and the water company did not create a debt, within the meaning of the Constitution and the laws of the state of Georgia, but that such contract is valid and enforceable.

(5) That the exclusive franchise granted by the city to the water company to use the streets and maintain its system of waterworks cannot be revoked by the city in its own interest, nor can its value be impaired by competition on the part of the city itself within the term of twenty years, during which the city obligated itself to take and pay for the water for fire protection.

(6) That the city cannot, under the facts of this case, forfeit the rights and franchises of the water company for inefficient service, or for a failure to supply water of a higher quality of purity, nor can it plead such facts in bar of the equitable relief sought.

(7) That the agreement to accept water for municipal use in commutation of city taxes is inoperative and void under the Constitution and laws of the state of Georgia.

(8) That the complainant is not entitled to set up and enforce in this suit any rights, legal or equitable, that the American Pipe Company may have acquired by reason of furnishing the water company with funds to pay maturing interest coupons on its bonds.

Hall & Wimberly and J. G. Parks, for complainant.

Guerry & Hall and J. A. Laing, for city of Dawson.

PARDEE, Circuit Judge. This cause came on to be heard upon the report of W. A. Wimbish, master in chancery, filed herein on April 27, 1903, and upon the exceptions filed by the defendant the city of Dawson to the report of said master, and upon the motion of

complainant to confirm said report and for final decree; and same was argued by counsel for complainant and defendants, respectively, and the said exceptions to said report were duly heard and considered. Whereupon, upon consideration thereof, it is ordered, adjudged, and decreed by the court:

First. That the exceptions to said report be, and the same are, all and severally, overruled.

Second. Whereupon it is ordered, adjudged, considered, and decreed that said report of said master in chancery, W. A. Wimbish, Esq., be, and the same is, in all respects, confirmed, and it is ordered that a decree in favor of the said complainant against the defendants, in accordance with the findings made by said master in said report, be made and entered herein.

Third. In accordance with the findings made by the said master in said report, it is ordered, adjudged, and decreed by the court that the contract entered into between the city of Dawson and the Dawson Waterworks Company, which constitutes the subject-matter of this suit, and a copy of which is annexed to the complainant's bill of complaint, marked "Exhibit B," and by reference made a part of said bill of complaint, is, and it is hereby declared and decreed to be, valid, binding, and enforceable, and that the ordinances, action, and conduct of the city of Dawson, the mayor and council and other officers of said city, whereby it is sought to invalidate the said contract, are unconstitutional and void, as seeking to impair the obligation of said contract. And it is further ordered, adjudged, and decreed that a perpetual injunction be granted to complainant, prohibiting, restraining, and forbidding the city of Dawson, the mayor and aldermen of the said city of Dawson, and the other officers and agents, and their confederates and abettors, from negotiating, selling, or disposing of any of the bonds of the city of Dawson mentioned in complainant's said bill of complaint, authorized by the said city of Dawson to be used in the construction of a system of waterworks by the said city of Dawson, and from constructing, maintaining, or operating any system of waterworks in the city of Dawson for the purpose of supplying either the said city of Dawson or its inhabitants with water for fire protection or domestic use, or from entering into any contract or arrangement with any person, firm, or corporation for the construction, lease, operation, or use of any system of waterworks, or any supply of water for fire protection or other municipal purpose, or from laying mains or pipes, or permitting the laying of pipes or mains, for the construction of waterworks, or from paying out any moneys for waterworks, or from incurring any obligation for waterworks, or from entering into or carrying out any contract for waterworks, save and except the contract referred to in complainant's bill of complaint, or from forbidding or preventing any person, organization, fire company, or agency from carrying out said contract with the Dawson Waterworks Company, or from placing any obstacle in the way of the due carrying out of the provisions and specifications thereof according to its terms, for and during the term of the aforesaid contract, and while said contract shall remain in force.

Fourth. And it is further ordered, adjudged, and decreed by the

court that the said complainant do recover of the said city of Dawson, and that the said city of Dawson do pay to the said complainant, the sum of the water rentals due and unpaid from January 1, 1896, with interest on each installment thereof as the same matured at the rate of 7 per cent. per annum after maturity; that is to say, that the said complainant do have and recover of the said city of Dawson the sum of \$16,000, principal debt, together with interest thereon at the rate of 7 per cent. per annum, as follows: \$1,000 from January 1, 1896; \$1,000 from July 1, 1896; \$1,000 from January 1, 1897; \$1,000 from July 1, 1897; \$1,000 from January 1, 1898; \$1,000 from July 1, 1898; \$1,000 from January 1, 1899; \$1,000 from July 1, 1899; \$1,000 from January 1, 1900; \$1,000 from July 1, 1900; \$1,000 from January 1, 1901; \$1,000 from July 1, 1901; \$1,000 from January 1, 1902; \$1,000 from July 1, 1902; \$1,000 from January 1, 1903; \$1,000 from July 1, 1903—together with future installments as the same accrue, to wit, \$1,000 on the 1st days of January and July in each year hereafter during the continuance of said contract; that is to say, during the term of 20 years that said contract remains of force. And it is ordered, adjudged, and decreed by the court that a writ of fieri facias issue in favor of the complainant against the said defendant for the collection of said rentals, and that such writs may be hereafter applied for as may be necessary to fully carry this decree into effect. And it is further ordered, adjudged, and decreed by the court that an accounting be had before W. A. Wimbish, Esq., special master, between the said Columbia Avenue Savings Fund, Safe Deposit, Title & Trust Company, trustee, and the said Dawson Waterworks Company, and the said city of Dawson, in order that it may be ascertained what, if anything, is due by the said city of Dawson for water furnished by the said Dawson Waterworks Company under the agreement made in commutation of city taxes, and that the value of the water so supplied be allowed as a credit against the demand of the said city of Dawson for the amount due by the said Dawson Waterworks Company as ad valorem taxes on its property; and until said accounting shall be had, and the said city of Dawson shall credit on the proper tax bills the amount due and unpaid by it on account of water rentals, the temporary injunction heretofore granted against the said city of Dawson from proceeding with the collection of tax executions issued by it be continued in force. And it is further ordered, adjudged, and decreed by the court that the city of Dawson and the Dawson Waterworks Company, and each of them, be decreed, directed, and required to specifically perform the aforesaid contract forming the subject of this suit, and to severally comply with their respective obligations arising and to arise thereunder, and, to this end, that an injunction issue, requiring such specific performance. And it is further ordered, adjudged, and decreed that complainant do recover of said defendant the city of Dawson the costs of this proceeding, to be taxed by the clerk, including the compensation of the special master heretofore allowed, for which execution as at law may issue.

Notice having been given of an appeal in this case, a stay of 60 days from date is allowed.

**MERCANTILE TRUST & DEPOSIT CO. OF BALTIMORE v.
COLUMBUS WATERWORKS CO. et al.**

(Circuit Court, N. D. Georgia, W. D. November 20, 1903.)

No. 57.

1. FEDERAL COURTS—FOLLOWING STATE DECISIONS—CONTRACT CREATING MUNICIPAL INDEBTEDNESS.

A federal court will follow the law as established by the Supreme Court of the United States, that a contract by a city to pay an annual rental to a water company does not create an indebtedness of the city, within the meaning of a provision of the state Constitution which would render such an indebtedness illegal, where at the time of the making of the contract in dispute the law of the state had not been settled otherwise by its Supreme Court, although that court may have subsequently declared such contracts invalid.

2. MUNICIPAL CORPORATIONS—CONTRACT WITH WATER COMPANY—IMPAIRMENT.

A city, having power under the law of the state to provide for a supply of water for its inhabitants and for fire protection, may grant a franchise to a water company to use its streets, and may make a valid contract with such company for a supply of water for fire purposes for a term of years; and where it has made such grant and contract, and the company has acted thereon by constructing a system of waterworks, it cannot impair the same by directly revoking the grant, or indirectly by constructing works of its own and entering into competition with the company during the term; nor are the rights of the city in that respect enlarged by the fact that it undertook to grant an exclusive franchise, which it had no power to do.

3. SAME—PRELIMINARY INJUNCTION.

Although it appears that a water company has not in all respects met the requirements of its contract with a city, a preliminary injunction will be granted, at suit of its bondholders, to restrain the city from proceeding with the construction of waterworks to be operated in competition with those of the company until the rights of the parties can be determined on a final hearing, where such action by the city would be in violation of its contract with the company, and would, to a large extent, destroy the value of complainant's bonds, and where they have expended a large amount in improvements, and offer to expend sufficient in addition to render the service in all respects such as is required by the contract.

In Equity. On motion for preliminary injunction.

On July 30, 1903, the Mercantile Trust & Deposit Company of Baltimore filed a bill in the Circuit Court against the city of Columbus, L. H. Chappell, mayor of said city, and the board of aldermen thereof, for the purpose of enjoining the city from constructing a waterworks system, and from disposing of an issue of \$250,000 of municipal bonds authorized to be issued for that purpose under an ordinance of said city adopted September 14, 1902, and ratified by a vote of the qualified voters of the city at an election held on the 4th of December, 1902. The Columbus Waterworks Company was made a party defendant. A temporary restraining order was prayed for. The bill also asked for a decree declaring the validity of a contract between the city of Columbus and the Columbus Waterworks Company, and an enforcement of the same. The averments in the bill, as far as necessary to be herein stated, were that the complainant had on the 1st day of January, 1901, been constituted by the Columbus Waterworks Company as trustee for the holders of its bonds to the amount of \$500,000, which had been issued to construct

¶ 1. State laws as rules of decision in federal courts, see notes to *Griffin v. Overman Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

a system of waterworks in the city of Columbus under the then existing contract with said city; that the contract had been entered into on the 7th day of October, 1881, by the city of Columbus and Thomas R. White and his associates, who afterwards constituted the Columbus Waterworks Company; that on the 5th day of April, 1882, the city of Columbus was notified of the organization of said company, and by formal resolution assented to the transfer of said contract by White and his associates to the company, and under said contract the company had constructed the waterworks to completion; that on the 6th day of November, 1882, on the completion of said waterworks, and notice thereof to the city by the company, said city had accepted said works by formal action; that the contract had been entered into by the city with full knowledge and free assent of its inhabitants, and that public sentiment in favor thereof had been unanimous, and the question had not been submitted to the qualified voters of the city because the same was deemed unnecessary; that, from time to time since the completion of the work, additions and enlargements to the system had been made without protest on the part of the city or any of its citizens; that it was known at the time of the execution of said contract that the funds required to be expended for said system were to be raised by the issue of bonds on the part of the waterworks company, and that the rentals which the city of Columbus was to pay under the terms of the contract for water for its use would constitute the source from which the bondholders were to be paid interest on their bonds, and that the value of the bonds was based upon the validity of the contract, and that the same were issued on the faith thereof; that the mayor and council under said contract had granted to the waterworks company the exclusive privilege of operating waterworks in said city for a period of 30 years, or until a time when they might be purchased by the city. The bill charges that the city is estopped during said period from building or operating any waterworks system, and that the existing contract is of force; that the action of the city in its proposal to issue bonds and construct a waterworks system of its own was in effect to repudiate the existing contract, and destroy the value of the waterworks property, and thereby force the sale thereof to the city. The bill then charges that, by reason of the conduct of the city in the premises, the waterworks company had defaulted or was about to default upon the interest on its bonds, and on the 22d of December, 1902, complainant had been forced to file a bill for foreclosure of the mortgage which it held as trustee for the bondholders of the waterworks company to secure the said bonds, and that William S. Greene had been appointed receiver of said company, and is now in charge, under the order of the court, of all the property of the waterworks company in the city of Columbus, and had applied for permission to issue receiver's certificates for improvement of the same; that the act of the city in attempting a violation of its contract is a deprivation of the rights and property of the complainant, and of the bondholders represented by it, impairs the obligation of the contract, and is contrary to law.

On October 15, 1903, an amendment was filed wherein the complainant made certain offers as to the improvement of the waterworks system. A rule nisi was issued, requiring the defendant to show cause why an injunction pendente lite should not issue. The defendant answered and demurred. The answer admits the notice to the city from the waterworks company that the system had been completed in accordance with the contract, but objections were raised by the city that all the terms of the contract had not been complied with, and that only upon assurance on the part of the company that the system would be completed was the resolution of the city adopted, accepting the system, and it denies that the system was subsequently completed. It alleges a violation of the contract in many particulars, and denies that the works were constructed in accordance with the specifications and requirements thereof. It avers that the service of the waterworks company was inadequate, inefficient, and unsatisfactory. It admits the passage of the ordinance of 1902, and the election of December 4, 1902, authorizing the issuance of bonds for the purpose of constructing and operating a waterworks plant on the part of the city, but avers that the ordinance was predicated on the express declaration that the waterworks company had failed to comply with

its contract. It claims that the contract is executory, and that the waterworks company has failed to perform the conditions therein set out, and that by reason of this failure the city has been compelled to take steps to provide a water supply from some other source than that of the Columbus Waterworks Company for the city, and for that reason the ordinance referred to in complainant's bill was passed, and the election had. It admits that the waterworks company was placed in the hands of a receiver, and it is not controverted that at the time of this hearing the receiver was in control and management of the works, and, acting under the order of the court of March 7, 1903, had issued receiver's certificates for the improvement of the present system.

Joseph Packard, Louis F. Garrard, and Hall & Wimperly, for complainant.

T. T. Miller, J. H. Martin, and Ellis, Wimbish & Ellis, for defendant city of Columbus.

NEWMAN, District Judge. The present hearing of this case is on an application for injunction pendente lite. The matter has been fully and ably argued by counsel for the respective parties, and submitted.

The case should first be considered upon the legal questions involved. The most important of these questions is as to whether the contract between the city and the waterworks company created an indebtedness in violation of the Constitution of the state of Georgia, and in determining this, whether this court will follow the decisions of the Supreme Court of the state, or those of the Supreme Court of the United States. A recent case decided in this court (*Trust Co. v. City of Dawson et al.*, 130 Fed. 152) is controlling, and should be followed so far as applicable. Certainly a contrary ruling will not be made until the final determination of that case by the Supreme Court of the United States, where it is now pending on appeal.

In the Dawson Case the report of the master stated this question in this way:

"It is insisted that the decision of the Supreme Court of Georgia declaring the invalidity of the contract will be regarded as conclusive in this forum, in deference to the rule that the federal courts will follow the construction given constitutions and statutes by the highest court of the state. The general rule is as stated, but it is subject to important limitation and exceptions. The federal court, in construing the meaning of a state statute as to what contract is contained therein, and whether the state has passed any law impairing its obligation, is not bound by previous decisions in state courts, except when they have been so long and so firmly established as to constitute a rule of property, but will decide independently whether there is a contract, and whether its obligation has been impaired."

After citing a number of authorities, and discussing them at some length, the special master, taking up the question of the state of the law in the courts of the United States, says:

"That such a contract does not create a debt is not an open question in this forum. Upon this point the case of *Walla Walla v. Walla Walla Water Company*, 172 U. S. 1 [19 Sup. Ct. 77], 43 L. Ed. 341, is conclusive. In that case the city obligated itself to pay the water company \$1,500 annually in quarterly installments, for twenty-five years, for the use of water for fire purposes. The charter of the city limited the amount of indebtedness it could incur. The sum of the installments agreed to be paid for the period named would, if treated as a debt, cause the indebtedness of the city to exceed the

charter limitations. The court, after declaring that the weight of authority, as well as of reason, favors the construction that a municipal corporation may contract for a supply of water or gas, or like necessity, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the city's authorized indebtedness, says: "There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds or for the erection of a public improvement, though such debt be payable in the future by installments. In the one case the indebtedness is not created until the consideration has been furnished. In the other, the debt is created at once, the time of payment being only postponed. In the case under consideration the annual rental did not become an indebtedness, within the meaning of the charter, until the water appropriate to that year had been furnished. If the company had failed to furnish it, the rental would not have been payable at all; and, while the original contract provided for the creation of an indebtedness, it was only upon condition that the company performed its own obligation."

After some further discussion of the matter, the special master says:

"I conclude on this branch of the case that the contract in question did not create a debt, within the meaning of the Georgia Constitution."

The master discusses the effect and state of the decisions of the Supreme Court of the state at the time the Dawson contract was entered into, and cites among other cases that of *Mayor of Rome v. McWilliams*, 67 Ga. 106, decided at the September term, 1881, and also the case of *Butts v. Little*, 68 Ga. 272, also decided in 1881. He also cites some cases subsequent to the two cases named, decided prior to the making of the Dawson contract, in 1890, which were pertinent, probably, to the Dawson Case, but which are not pertinent here. The report of the special master then proceeds:

"The principle in these cases [from 1881 to 1890] was consistent with that declared in *Rome v. McWilliams*, 67 Ga. 106, and *Butts v. Little*, 68 Ga. 272, that the obligation to pay for work when and as it shall be performed in future, by an annual levy of taxes sufficient to meet the accruing installments, does not create an indebtedness, within the meaning of the Georgia Constitution. These cases certainly warrant the conclusion that, at the time the contract was entered into with the water company, contracts of that character had not been declared invalid by the Supreme Court of Georgia. Indeed, that court has deemed it necessary to overrule *Butts v. Little* (*Lewis v. Lodley*, 92 Ga. 804, [19 S. E. 57]; *Dawson v. Waterworks Co.*, 106 Ga. 727, [32 S. E. 907]), and to overrule, qualify, or distinguish several of the other cases referred to in this report. It cannot, therefore, fairly be said that there was such a settled course of judicial decisions in Georgia on this question at the time of the making of the contract as to constrain the courts of the United States to follow later decisions of the state court, especially in a case where the rights of innocent third persons are concerned. Subsequent to the making of this contract, and after the rights of the complainant and the bondholders had been acquired, the Supreme Court of Georgia unequivocally held that contracts of this character constituted the creation of an indebtedness within the inhibition of the state Constitution. *Cartersville Imp. Co. v. Cartersville*, 89 Ga. 683 [16 S. E. 25]; *Cartersville Water Co. v. Cartersville*, 89 Ga. 689 [16 S. E. 70]; *City of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696 [32 S. E. 907]. I therefore conclude that this court is not bound to follow the later decisions of the state court as to the validity of the contract in question, but should exercise its independent judgment with reference thereto."

From these citations it will be seen that the decisions of the Supreme Court of the state were quite as favorable to the validity of the contract in this case as they were at the time of the contract in the Dawson Case. If in that respect there is any distinction in the two cases, it is favorable to the complainants here.

Another question involved here on the law of the case is as to the power of the city to make this contract, and also as to the effect against the city when made. On this question in the report of the master in the Dawson Case the following is said:

"It is contended on the part of the city that no exclusive franchise to occupy the streets and maintain a water system could be lawfully granted, and from this it is argued that the franchise may be revoked and the city may use its streets for its own system. The grant of a right to supply water to a city and its inhabitants through pipes and mains laid in the streets, upon the condition of the performance of its service by the grantee, is a grant of a franchise in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the Constitution of the United States. *Walla Walla v. Walla Walla Water Company*, 172 U. S. 1 [19 Sup. Ct. 77], 43 L. Ed. 341, and cases there cited. The right of a city to do those things necessary to supply its inhabitants with water for domestic use, or to provide the city with protection against fire, is the settled law of Georgia. *Dawson v. Dawson Waterworks*, 106 Ga. 709 [32 S. E. 907]; *Frederick v. Augusta*, 5 Ga. 561; *Rome v. Cabot*, 28 Ga. 50; *Wells v. Atlanta*, 43 Ga. 67. As incident to the principal undertaking, the city possesses the power to grant the use of its streets, and to contract with a private company for an exclusive supply of water for fire protection. It is unnecessary to decide whether the city may grant an exclusive franchise for a long number of years in excess of the contractual period between the city and the water company. Should a third person in good faith seek a franchise for the use of the streets for a similar purpose, the point would be properly involved. The question now presented is whether the city can directly revoke the grant, or itself use the streets in competition with the water company, in the face of its contract with the water company. The contract does not in terms express an agreement that the city will not, during the life of the contract, erect its own system for the purpose of supplying its inhabitants with water, but it can hardly be doubted that such is the fair implication and reasonable intendment of the contract. The city, having induced the expenditure of money on faith of the promise that it would grant the exclusive use of the streets for the laying of pipes and mains by the water company, and having contracted to pay for the use of water for fire protection for a term of years, will not be permitted in equity to disregard its agreements by itself entering into ruinous competition with the other party before the expiration of the contractual term. *Southwest Missouri Light Co. v. City of Joplin* (C. C.) 101 Fed. 23; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1 [19 Sup. Ct. 77], 43 L. Ed. 341. I conclude that the city may not, prior to the expiration of the term for which it contracted for a supply of water for fire protection, directly revoke the grant of the franchise for the use of its streets by the water company, or indirectly impair or destroy the value of the franchise by itself entering into competition with its grantee. To this extent the right is protected by the obligation of the contract entered into. *St. Tammany Water Co. v. New Orleans Water Co.*, 120 U. S. 64 [7 Sup. Ct. 405], 30 L. Ed. 563; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683 [6 Sup. Ct. 265], 29 L. Ed. 510; *Bartholomew v. City of Austin*, 85 Fed. 359 [29 C. C. A. 568]."

The applicability of the language used by the master to the facts of this case is so apparent that it need not be discussed.

As the report of the master in the Dawson Case was in all things approved and confirmed in the Circuit Court, it follows, of course, that the conclusion of law reached was satisfactory and met the full

approval of the court, and was, in effect, adopted as the law of that case. For that reason the quotations from the able report of the master have been given above.

On the facts of this case much evidence has been submitted by affidavits and by documents. This evidence has gone mainly to the issue made in the case as to whether there has been a compliance on the part of the waterworks company with the terms of its contract, and this relates to the original construction of the waterworks, and as to the character and quantity of water furnished the city and its inhabitants since its construction. It cannot be doubted that there was a very serious condition in Columbus, as to water supply, during part of the year 1902; and this condition, probably more than anything else, led to the action of the city which gave rise to the present controversy. There has been an earnest attempt on the part of the bondholders, acting through the trust company, complainant in this case, to remedy this condition, and it is not denied that its efforts have resulted in very great improvement in the quality of the water furnished. In an amendment to the bill on October 15, 1903, complainant submitted:

"That it is the purpose and desire of complainant and the bondholders of the Columbus Water Company, represented by complainant as trustee, to see that all proper and necessary steps are taken to furnish to the city of Columbus and its citizens an ample supply of pure and wholesome water and pressure in accordance with the contract, and, with the aid of this honorable court, to perform and cause to be performed all of the obligations assumed by the Columbus Waterworks under the contract mentioned and exhibited in the above-stated bill of complaint. Complainant shows the court that the bondholders, acting through their duly authorized bondholders' committee, have consented and authorized this complainant to offer on their behalf to the court to have the present and future income of the said waterworks applied, so far as may be necessary, to the betterment of said system, and to have such further receiver's certificates made and sold, as in the opinion of the court will be adequate to furnish to the city and its citizens an ample supply of pure and wholesome water, and adequate pressure for fire protection, in accordance with the terms and requirements of the contract, and to postpone the lien of the bonds to such receiver's certificates as the court may deem adequate and sufficient for the purpose; and complainant prays that a suitable reference be had, to ascertain the probable cost of such improvements as to the court may seem adequate and proper, and complainant prays that the court, through proper orders, will direct and require a specific performance both by the city of Columbus and the Columbus Waterworks Company of the mutual agreements, covenants, and obligations of the same contract. * * * If, upon reference being had, the court should determine that further improvements are requisite and necessary, complainant is ready and willing, and the bondholders of the said Columbus Waterworks Company consent and agree, that such additional improvements be made and paid for."

This is a very broad offer on behalf of the bondholders on whose behalf the trustee brings this bill. Their ability to comply with this offer has not been questioned. They have already expended in the filtration system, and otherwise improving the waterworks, an amount said to be \$50,000. The amount of the bonded indebtedness is nearly \$400,000. That this amount of indebtedness should be wiped out without careful investigation will hardly be claimed by any one. It is certainly due the bondholders, in view of their efforts to take up this contract with the waterworks company and comply with it, that

they should have a full and fair investigation before the property upon which they must rely as security for their debt is destroyed. That the erection of another system of waterworks in the city of Columbus will go very far towards destroying the property is manifest. It is also due the city of Columbus that it should be allowed to show in the fullest manner its contention. The great importance of the matter to the city and its inhabitants requires this.

The contract between Thos. R. White and the city of Columbus, which subsequently became, by agreement of the mayor and council of the city of Columbus, a contract between the Columbus Waterworks Company and the city, provided that:

"The source of water supply shall be determined by Thomas R. White, he guaranteeing, however, that the supply of water both in quality and amount shall be wholesome, constant and amply sufficient to meet the wants of the City and private consumers for future and present requirements."

The city and its inhabitants are entitled under this contract to an abundant supply of wholesome water; and this, sufficient to meet the wants of the city as it increases in population and area. It is contended that this cannot be obtained from the present source of supply. The complainant proposes, as I understand it, to change this source of supply to one which is abundant and undoubted, and to do that immediately.

All the questions involved are serious and of the gravest importance, and they should not be disposed of on a preliminary hearing and ex parte affidavits. It is due both parties that testimony should be carefully taken by examination and cross-examination of witnesses. The case will be referred to a master for the purpose of a full investigation and report upon the questions of law and fact involved. In the meantime an injunction will be granted, restraining the city of Columbus from taking further steps towards the sale of its bonds for the erection of a system of waterworks of its own.

DODD et al. v. LOUISVILLE BRIDGE CO. et al.

(Circuit Court, W. D. Kentucky. April 15, 1904.)

1. REMOVAL OF CAUSES—MOTION TO REMAND—PRESUMPTION OF REGULARITY OF PROCEDURE IN STATE COURT.

Where, in a suit by stockholders of a corporation, brought in a state court, relief was granted to the plaintiffs, their right to which was affirmed on appeal by the highest court of the state, on a subsequent removal of the cause, after the filing of supplemental pleadings, it will be assumed by the federal court, *prima facie*, at least, and for the purposes of a motion to remand, that, under the laws of the state, plaintiffs had the right to maintain the suit in their own names to enforce the rights asserted in their pleadings, and that the pleadings they were permitted to file in the state court were appropriate under the state practice.

2. SAME—CITIZENSHIP OF PARTIES.

Where plaintiffs sued as individuals, and the courts of the state in which the suit was brought sustained their right to maintain their suit

¶ 2. Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.

in such capacity, their individual citizenship must determine the right of a defendant to remove the cause, notwithstanding an averment in the petition for removal that they sued as stockholders of a corporation, and that the recovery they sought was in the sole right and for the benefit of such corporation.

3. SAME—CORPORATION OF SEVERAL STATES.

A petition for removal filed by a defendant railroad company stated that it was a corporation incorporated under the laws of a number of different states, among which were the states of Indiana and Illinois; that it was formed by the consolidation of corporations of said several states; that the cause of action sued on arose out of a contract for the use of a bridge across the Ohio river owned by a Kentucky corporation of which complainants were stockholders, which contract was made by an Indiana railroad company subsequently consolidating with others to form the defendant. It further averred, as a conclusion from such facts, that, in respect of the obligation sued on, defendant was a corporation of the state of Indiana, and no other state. It did not appear in what state defendant was first incorporated, where its general offices were, where the cause of action arose, nor whether its assumption of the contract and its use of the bridge for which complainants sought to recover were in its capacity of an Indiana corporation or generally. *Held* that, in the absence of any statement in complainant's pleadings to show that defendant was sued as a citizen of Indiana alone, the facts alleged in the petition did not warrant such a finding, and, it being shown that one of the complainants was a citizen of Illinois, the cause was not removable on the ground of diversity of citizenship.

4. SAME.

The general rule is that jurisdiction on removal must be clear, in order to justify the federal court in retaining the case.

W. O. Harris, Kohn, Baird & Spindle, and Dodd & Dodd, for plaintiffs.

Lawrence Maxwell and Helm, Bruce & Helm, for defendants.

EVANS, District Judge. This suit was brought in the state court in 1897 by certain individual holders of the capital stock of the Louisville Bridge Company against that company and various railroads that for many years had used its bridge. Without going into details, it will suffice to say, in general terms, that the defendant railroads had used the bridge under an arrangement probably first made in 1877, by the terms of which they were to pay tolls sufficient to accomplish several objects—such, for example, as paying for maintenance and repairs, operating expenses, and semiannual dividends to the stockholders of the bridge company of 6 per cent. Stipulations were made by which a plan was devised for ascertaining at certain periods the tolls to be collected. In process of time the directors of the bridge company lowered the dividends to 4 per cent. semiannually. The plaintiffs alleged that the Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. (hereinafter called the "P., C., C. & St. L. Ry. Co.") owned the majority of the stock of the bridge company, elected all its directors, and had, by virtue of these and other circumstances, wrongfully lowered the dividends, withheld the payment of its own tolls, and in other ways had injured the individual stockholders of the bridge company, which would not and could not remedy the troubles, because it was dominated by the P., C., C. & St. L. Ry. Co. The plaintiffs claimed that the bridge company was entitled to over \$2,000,000 in this way, which it would not collect, and hence the in-

dividual plaintiffs brought the suit. The action went to trial in the state circuit court some years ago, and in the main the judgment of that court was favorable to the plaintiffs, but on appeal to the Court of Appeals the amount recovered was reduced perhaps to one-tenth of what the circuit court had adjudged; the Court of Appeals, among other things, holding that the directors of the bridge company had a right to lower the dividends to its stockholders. Meantime the Louisville & Nashville Railroad Company had brought a suit against the bridge company for large sums alleged to have been charged to it in excess of what it would have had to pay if the other railroad companies had paid in full. Judgment was ultimately rendered in this case in favor of the plaintiff for many thousands of dollars. After the return of the case now before us to the state circuit court, amended and supplemental petitions were filed, to which reference will be made as we proceed, and by which it was sought to compel the P., C., C. & St. L. Ry. Co. to pay in this case a large part, if not all, of what had been recovered by the L. & N. R. R. in its suit, and certainly as much as \$144,000. After the filing of the last of these amended and supplemental petitions, the case was removed to this court, and the plaintiffs have moved to remand it.

I have quite laboriously examined both the exceedingly voluminous record brought here by the removal of this action from the state court and the very interesting and important questions involved in the motion to remand. The suit was brought and prosecuted under the modes of procedure prescribed or allowed under the Kentucky Code of Practice. That procedure, while different from the practice in equity causes originally brought in the federal courts, is nevertheless to be entirely respected by this court, as to steps taken in the state courts up to the time of the removal. It follows as a result of this general proposition that it must be assumed that the plaintiffs had the indubitable right to sue in their own names in the state court to enforce the various equitable rights asserted in their numerous pleadings filed in the cause. Some of those pleadings were filed as matter of right, and some of them by the express leave of the state court. We must assume that this was all proper, and, *prima facie*, at least, that the plaintiffs have a right of action in their own individual names in seeking an enforcement of the demands they have asserted in their pleadings. The Kentucky Code of Practice prescribes when and how amended and supplemental pleadings may be filed, and upon the pending motion this case comes to us with those pleadings properly in the case, and properly presenting a claim by the individual plaintiffs against the P., C., C. & St. L. Ry. Co. The plaintiffs were, I think, required by the Kentucky practice to make the Louisville Bridge Company a party defendant. It was made such in the original petition, and appears to have taken up and to have continued the fight against the plaintiffs with considerable vigor. The supplemental and amended petitions, filed respectively July 16, 1903, October 15, 1903, and February 25, 1904, were each entitled in the cause, and no one of them made any change of parties. No parties, as such, were newly named in them, though relief was mostly, if not altogether, sought against the P., C., C. & St. L. Ry. Co. Op-

position to the filing of one or more of the three last-named supplemental pleadings was made, and this fact, under the Kentucky practice, was equivalent to appearance thereto; and, indeed, under that practice, if no new cause of action was set up, no additional appearance was necessary, the original appearance being sufficient.

Strong arguments were made on either side of the question of whether the last amended petition covered a new cause of action then for the first time asserted in the case against the P., C., C. & St. L. Ry. Co., and thus presenting a separable controversy in such time and form as to make the case removable, or whether the cause of action asserted in the amended petition filed October 15, 1903, which cause of action may possibly have been asserted, or at least foreshadowed, in earlier pleadings, though in all of them in a vague and general way, was only made definite and specific by the amendment of February 25, 1904. If the last amendment was only a better and more definite presentation of the cause of action theretofore attempted to be set up in the pleading of October 15, 1903, and possibly at various other times, by other pleadings filed in the cause, then the petition for removal came too late, because the time for answering the amended petition of October 15th was nearly or quite exhausted when the defendant answered that pleading in the state court on the 29th day of October, 1903, and the petition for removal was not presented until the succeeding March.

There may be much room for discussion upon all the questions thus indicated, and possibly the motion to remand might be decided by solving those questions; but, without at present attempting to solve them, I have, with some hesitation and doubt, reached the conclusion that the motion to remand can be determined upon another and possibly clearer ground.

Referring again to the very important factor that the plaintiffs had the right, as has been determined in this case by the Kentucky Court of Appeals, as well as by the chancery branch of the circuit court, to bring the action in their own names for the assertion and enforcement of their rights against the P., C., C. & St. L. Ry. Co., regardless of whether the bridge company joined with them as a plaintiff or not, it is found to be the fact that one of the plaintiffs, to wit, Mrs. Blakemore, is a citizen of Illinois, and that the defendant the P., C., C. & St. L. Ry. Co. is also a citizen of that state. The original petition for removal asserts that the P., C., C. & St. L. Ry. Co. is "a resident and citizen of the states of West Virginia, Ohio, Indiana, and Illinois, being a corporation chartered and organized under the laws of said states, and not under the laws of the state of Kentucky." The petition for removal makes a statement respecting the citizenship of the various plaintiffs, but, as the evidence shows that one of them is a citizen of Illinois, the grounds for removal are fatally defective for that reason, unless saved either by an amendment to the removal petition presently to be referred to, or by the legal effect of the following statement in the original petition, viz.:

"All of the plaintiffs in said suit, except the Louisville Bridge Company, are stockholders of said bridge company, and they brought their said suit in the right of and for the benefit of the said Louisville Bridge Company, and

any recovery which they sought was a recovery by and in the sole interest of said Louisville Bridge Company. The Louisville Bridge Company is a corporation chartered and organized under the laws of the state of Kentucky, and not elsewhere, and is a resident and citizen of said state, and was so at the beginning of the said suit, and has continuously been so since, and is now, and is not a resident or citizen of any other state."

Do those statements, even in the light of cases like *Southern Ry. Co. v. Allison*, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078, remedy or obviate the defect referred to, in view of the facts already noted as to the adjudicated right of the plaintiffs to sue individually, and especially as the importance of that right in this case has been illustrated and emphasized by the defense against their suit actually made on the merits by the bridge company? Can the determination of this question be affected by the answer of the bridge company filed in the case in this court since the removal, even though it might be apparent therefrom that its attitude to the plaintiffs had in fact been radically changed? Answers to these questions may depend upon what importance should be attached to the averments of the amendment to the petition for removal, which, without passing on its sufficiency, I have allowed to be filed in this court under what appeared to be the principles announced by the Supreme Court in *Kinney v. Columbia Savings Association*, 191 U. S. 80, 24 Sup. Ct. 30, 48 L. Ed. 103. The averments of the amended petition are as follows:

"Your petitioner, the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, by leave of the court, for amendment of its petition for removal of this suit filed on March 3, 1904, in the Jefferson circuit court, chancery branch, first division, says that in 1890 the Jeffersonville, Madison & Indianapolis Railroad Company, a corporation organized and existing under the laws of the state of Indiana, and of no other state, being the corporation which executed the contract of June 5, 1872, sued on by the plaintiffs, was consolidated, under the laws of the state of Indiana, with other railroad companies, into your petitioner, the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, and that the present suit is based wholly upon the obligation of your petitioner as an Indiana corporation, and as successor of said Jeffersonville, Madison & Indianapolis Railroad Company, and on account of having by virtue of said consolidation assumed the obligation of said Jeffersonville, Madison & Indianapolis Railroad Company, under the said contract of June 5, 1872, which is the basis of the present suit. Your petitioner therefore avers that, in respect of the obligation sought to be enforced by this suit, your petitioner is, and at the commencement of this suit was, and ever since has been, a citizen of the state of Indiana, and of no other state. Other corporations entering into said consolidation were citizens of the states of West Virginia, Ohio, and Illinois, and were permitted by the laws of their respective states to enter into said consolidation, and said consolidation, in respect of them, was made under the laws of their respective states."

It may be remarked that I can find nowhere in the plaintiffs' pleadings any averment of any kind respecting the incorporation of the P., C., & St. L. Ry. Co. All that I find in the defendants' pleadings on that subject is a denial by that company that it had purchased a majority of the capital stock of the Jeffersonville, Madison & Indianapolis Railroad Company, and an averment that the P., C., & St. L. Ry. Co. was made up of several railroad companies which had been merged and consolidated into it. In the record, however, we find an exhibit to the deposition of plaintiff John L. Dodd, consisting of a copy of the articles of incorporation entered into in In-

diana under the laws of that state, by which the P., C., C. & St. L. Ry. Co. was made a corporation of that state. This exhibit also shows that several Indiana railroad companies were thus merged and consolidated, among them the J., M. & I. Ry. Co. The articles of incorporation on their face also show that the P., C., C. & St. L. Ry. Co. had previously been incorporated in various states—such as Pennsylvania, West Virginia, Ohio, Indiana, and Illinois. What state was the original parent, so to speak, of the corporate body, is nowhere shown, or attempted to be shown. It is obvious enough that none of the parties to the suit regarded it as at all important to disclose in their pleadings the citizenship of the defendant the P., C., C. & St. L. Ry. Co. until the petition for the removal of the cause was filed, on March 3, 1904. If the plaintiffs had thought it important to proceed against the P., C., C. & St. L. Ry. Co. as an association of corporations, or as a citizen either of Illinois or Ohio or West Virginia, rather than against it as a citizen of Indiana, they would have determined that question for themselves in their pleadings, and would not have attempted it merely at this stage in their argument only. If the defendant had at an earlier date regarded it as important to settle the question of the citizenship of the corporation proceeded against upon the claims described in the plaintiffs' pleadings, by a motion to require the plaintiffs to make their pleading specific and definite in that respect, it might have compelled the plaintiffs to differentiate in the premises, and to plainly state which of the several distinct corporations created by the various states, and all of which had the same name, they were suing. But nothing of either sort was done, nor was it at all necessary, so far as the litigation on the merits was concerned. Now, however, it has become important, and each side has hurried to that conclusion which its interest in the question of removal seemed to dictate. It need not be pointed out that their conclusions differ.

It is not asserted that the P., C., C. & St. L. Ry. Co. is not a citizen of Illinois, nor of each of the other states under whose laws it was incorporated. On the contrary, it is shown to be a citizen of that state, also, and a copy of the articles of incorporation was read as evidence on the hearing of the motion to remand. It is not shown which state first incorporated it, nor is it claimed that the contract with the J., M. & I. R. Co., which was sued on by the plaintiffs, was executed in Indiana, nor that the cause of action described in the amended and supplemental petition filed February 25, 1904, arose in Indiana; nor, indeed, is it claimed, unless as a mere inference of law, that the Indiana corporation is the P., C., C. & St. L. Ry. Co., and certainly not that it is the only P., C., C. & St. L. Ry. Co. which used the bridge company's bridge, and became indebted to it for tolls. It is not shown where the books of the P., C., C. & St. L. Ry. Co. were kept, nor whether there were separate accounts with the bridge company kept by or on behalf of the Indiana corporation respecting traffic which might have originated, for example, at Chicago or Pittsburg; nor has it been shown how the P., C., C. & St. L. Ry. Co., or any of its component parts, complied with section 571 of the Kentucky Statutes of 1903, although each and all of these things might

have aided in ascertaining which P., C., C. & St. L. Ry. Co. is the litigant defendant in this case. The section referred to requires every nonresident corporation doing business in Kentucky to file a certificate designating a person on whom process may be served.

One disadvantage of being incorporated under the same name in several states is not that it leaves mere citizenship doubtful, for the corporation is a citizen of each state which incorporates it, but, as here, the disadvantage is that it leaves doubtful the question of whether one citizen individually owes and is sued for a debt, or whether all of several citizens owe and are sued upon it. It might in this case help us if we knew from the pleadings or the evidence that the cause of action, even if it is transitory, arose in Indiana, as, if it did, that fact might make it presumably true that the plaintiffs' right is against the Indiana corporation; but, as the cause of action apparently must have arisen in Kentucky, where the services were rendered by a Kentucky corporation—possibly to some extent to each one of the P., C., C. & St. L. Ry. Cos.—we cannot, in view of all the facts disclosed by the record, assume that the Illinois corporation, the Ohio corporation, the West Virginia corporation, and the Indiana corporation are not co-contractors, or otherwise jointly liable for that demand of the bridge company for tolls, the remedy to enforce which is being worked out through certain of the bridge company's individual stockholders in their own names, one of whom is a citizen of Illinois, of which state, also, one of the associated corporations is a citizen. At all events, there is no presumption growing out of the facts disclosed that the plaintiffs did not sue the Illinois corporation as much and as well as the others, inasmuch as no one of said P., C., C. & St. L. Ry. Cos. was a citizen of Kentucky. When we carefully analyze the amended removal petition, and assume its statements of fact to be true, we find that it avers that the J., M. & I. R. Co. was consolidated under the laws of Indiana with other railroad companies into the defendant the P., C., C. & St. L. Ry. Co., which was made up of a consolidation of corporations created under various states, and, further, that the present suit is based wholly upon the obligation of said defendant "as an Indiana corporation," and as successor of the J., M. & I. R. Co., and on account of the said defendants having, "by virtue of the consolidation," assumed the obligations of the J., M. & I. R. Co. existing under the contract which is the basis of the present suit. The amended petition does so recite, but it does not aver that in fact that corporation only which is a citizen of Indiana assumed, by contract, the obligations of the J., M. & I. R. Co., though it may be that it assumes, as a legal inference, that the P., C., C. & St. L. Ry. Co. did so assume those obligations as an Indiana corporation. The amendment goes on to aver further that other corporations entering into the consolidation were citizens of West Virginia, Ohio, and Illinois; and this appears to me to make it essential that the petition for removal, as amended, in order to be sufficient to accomplish the result desired, should leave nothing for inference, especially in the absence of any averment as to the original incorporation of the P., C., C. & St. L. Ry. Co., and as to the state in which the cause of action actually arose, and as to the other matters, the

absence of which has been noticed. The facts upon which a right to remove a case to this court is demanded should be specifically and clearly manifested by the petitioner who seeks that relief. The presumption that the federal court is without jurisdiction must be overcome. *Robertson v. Cease*, 97 U. S., at page 648, 24 L. Ed. 1057; *Grace v. American Central Ins. Co.*, 109 U. S. 283, 3 Sup. Ct. 207, 27 L. Ed. 932; *Bors v. Preston*, 111 U. S. 255, 4 Sup. Ct. 407, 28 L. Ed. 419.

Where corporations of exactly the same name are incorporated under the laws of several states, and are in fact operated by one set of officers, and under one management alone, and which management is shown by the record to have its principal office and place of business outside of a named state, any claim of adverse citizenship which is evidently based upon an inference, instead of a clear statement of facts, should not be regarded as sufficient, especially when the exact facts might be, but are not, shown in proper fullness of detail. The conclusion which the pleader has drawn in constructing the amended removal petition is thus stated:

"Your petitioner therefore avers that, in respect to the obligations sought to be enforced by this suit, your petitioner is * * * a citizen of the state of Indiana, and no other state."

Is the court, also, in the concrete case before us, authorized or required to concede the force of the "therefore," and to draw the same conclusion? In the absence of a statement of the essential facts referred to, we do not think so. If we assume, without proof, that the averments of the removal petition, as amended, are true, so far as it positively states facts, and not mere recitals or conclusions of the pleader, we find that, while the P., C., C. & St. L. Ry. Co. is a citizen of Illinois as well as of Indiana, yet that it consolidated with an Indiana corporation which had outstanding obligations which the P., C., C. & St. L. Ry. Co., "by virtue of the consolidation," assumed. This is about the sum of facts distinctly stated. For purposes of removal to this court, the pleader from that spare statement of facts draws the inference of law that the assumption of the obligations of the J., M. & I. R. Co. was by the Indiana P., C., C. & St. L. Ry. Co. alone, and that the citizenship of the corporation for the purpose of removal must be determined upon the fact thus stated, or, rather, that the identity of the litigant opposed to the plaintiffs and its citizenship must be thus ascertained. Without stating other facts, the pleader assumes as a legal conclusion that the assumption of the obligations of the J., M. & I. R. Co. was, as he expressed it, "by virtue of the consolidation." But the pleader also says that the corporations entering into the consolidation were citizens of the states of West Virginia, Ohio, Illinois, and Indiana, and does not by any averment of fact, as distinguished from a conclusion of law, attempt to show that one only of the integral parts of the consolidation assumed the outstanding obligations of the J., M. & I. R. Co. It is all left to inference, as the articles of consolidation are not exhibited. In short, the conclusion drawn in the amendment to the petition for removal is that, "in respect to the obligations sought to be enforced by this

suit," the P., C., C. & St. L. Ry. Co. is an Indiana corporation only. It is not shown by the articles of incorporation or those of the consolidation of the P., C., C. & St. L. Ry. Co., or otherwise, that any such distribution of obligations was made to the separate P., C., C. & St. L. Ry. Cos. of the several states which created corporations with that name; nor can it, I think, be fairly inferred that there was any such distribution of obligations among them, in the absence of a positive statement of the fact, when we consider the facts disclosed by this record, some of which have been specifically referred to.

I conclude that while the citizenship of the P., C., C. & St. L. Ry. Co. is distinct and separate in the several states of West Virginia, Ohio, Indiana, and Illinois, which states severally created corporations of that name, the obligations of the several corporations were presumably united and joined, and that in this case the Illinois corporation was as much and as certainly bound to the plaintiffs, and as much sued by them, as was the Indiana corporation. It is not shown nor contended that the Indiana corporation has a different and independent management. On the contrary, it is shown by the record that the management of that P., C., C. & St. L. Ry. Co. which incurred the liability for the tolls sued for was located at places outside of Indiana.

It is important in this connection to remember that the greater part, if not all, of the claim against the P., C., C. & St. L. Ry. Co. yet in controversy, and which was set up in the later and supplemental pleadings filed by the plaintiffs in the state court, arose under the management just referred to, and while that management operated the P., C., C. & St. L. Ry. Co. as an entirety. This, too, for the most part, was long after the creation of the several corporations of that name. The services of the bridge company, out of which the claim arose, were rendered to the P., C., C. & St. L. Ry. Co., and not to the J., M. & I. R. Co. In the light of the record, the former company, if anybody, owes the tolls on its own account, and in no proper sense on the account of the latter, although by general acquiescence the P., C., C. & St. L. Ry. Co. years ago took the place of the J., M. & I. R. Co. in then existing arrangements, and thus entirely superseded and eliminated the latter, with the full knowledge and consent of the bridge company. For many years the J., M. & I. R. Co. has been dead, or at least moribund. It is not a going concern.

Indeed, the effect of it all seems to be that the court is asked to extend and enlarge the test of citizenship in a case like this so as to make the question determinable, at least to some extent, upon whether an association of corporations like the P., C., C. & St. L. Ry. Co. can in this court, in Kentucky, at its own option, treat itself as a citizen of Indiana only, merely because, in an antecedent or general way, it contracted upon the same subject-matter with a citizen of that state. Legislative creation does determine the citizenship of a corporation, but in this case that proposition presents no difficulty in itself. The doubt is as to which of the several corporations of the same name created by several states is the litigant opposed to and

sued by the plaintiffs, and we are asked to solve that question and that doubt largely upon an inference only, and not upon a full and explicit statement of facts. We are asked to hold that, because there was and is a citizen of Indiana named the P., C., C. & St. L. Ry. Co., and because a citizen of that name was substituted in a contract made by another Indiana corporation, therefore, and notwithstanding other states had incorporated a P., C., C. & St. L. Ry. Co., and notwithstanding the several incorporations of that name were all associated under one management, with its chief offices outside of Indiana, still that when citizens of Kentucky and Illinois sue a P., C., C. & St. L. Ry. Co. in this state, the fact that the substitution was made shall be accepted as conclusive of the fact that the plaintiffs were suing the Indiana corporation alone, and not any one of the others. We think no decision of any court will justify a ruling which supports that contention, and we cannot conclude, upon the petition for removal and the record, either that the Indiana corporation alone is the real litigant opposed to the plaintiffs, and which alone was sued by them, or that it alone is the corporation which used the bridge company's property, and consequently became liable for the tolls. The only test, we repeat, of the citizenship of a corporation, is the legislation creating it. The test here sought to be invoked for the determination of the question of which corporation was sued might become kaleidoscopic and elusive, inasmuch as there is no reason why any one or all of the P., C., C. & St. L. Ry. Cos. might not have used the bridge of the bridge company in Kentucky. Citizenship, per se, is easily ascertainable with respect to a corporation, but whether a debt was created by one corporation or another, when they are as intimately associated as in this instance, and whether one corporation or another, under such circumstances, is the litigant, are questions of fact; and, when the right of removal is claimed, the petition therefor should show the facts very explicitly and fully, and not leave them to inference in any essential respect.

There is an obvious ambiguity in the premises, growing out of the creation by several states of a corporation of the same name; and when the associated corporations seek, or when any one of them seeks, to exercise the right of removal, the claim to that right should be made manifest. In such cases the petition for removal should clear up the ambiguity, and make plain the exact situation. As we have endeavored to show, this has not been done in this instance. On the contrary, doubt as to which corporation should be regarded as the real litigant is intensified at the crucial point by the petition as amended, and by the other facts we have stated.

We may note some of the numerous authorities bearing on the question, and the general propositions they establish:

First. Although corporations have the same name, yet, if they are incorporated under the laws of different states, they are separate and distinct corporations, and each is a citizen of that state alone which created it. *Ohio, etc., R. Co. v. Wheeler*, 1 Black, 286, 17 L. Ed. 130; *Railroad Co. v. Whitton*, 13 Wall. 283, 20 L. Ed. 571; *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207; *Nashua, etc., R. Co. v. Lowell*

R. R., 136 U. S. 357, 10 Sup. Ct. 1004, 34 L. Ed. 363. There are many other cases to the same effect.

Second. The fact that there was a consolidation of several railroads in several states, under the sanction of state legislation, does not change the result. *Paul v. B. & O. R. R.* (C. C.) 44 Fed. 513; *Baldwin v. Chicago, etc., R. Co.* (C. C.) 86 Fed. 167. While in some of the cases stress seems to be laid on the question of which was the first state to create a corporation situated like the P., C., C. & St. L. Ry. Co., and also some upon the question of where the cause of action arose, yet in none of them is either of those questions made a controlling factor in the decision. Still less, we think, can the question of where a contracting party resided be made so, especially when it is neither claimed that such party contracted at its residence, nor that the services were performed there.

Third. In *St. Louis, etc., Ry. v. James*, 161 U. S. 555, 16 Sup. Ct. 621, 40 L. Ed. 802, and again in *Southern Ry. Co. v. Allison*, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078, it has been established that for the purposes of jurisdiction there is a conclusive presumption that all the stockholders of a corporation are citizens of the state creating it. When a corporation, for example, of Pennsylvania, is, by its own name, instead of the names of citizens, incorporated by a law, for example, of Indiana, this would make the Pennsylvania corporation, and not the citizens who were its stockholders, a citizen of Indiana, for jurisdictional purposes, notwithstanding the rule that the stockholders of the Pennsylvania corporation were still presumed to be citizens of Pennsylvania. *Memphis & C. R. Co. v. Alabama*, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518. Priority of creation of a corporation in this connection sometimes becomes important, but in the case before us the bridge company corporation does not sue, and hence the rule in the *James Case* and in the *Allison Case*, which has just been referred to, does not apply. In this connection it must be remembered that it is *res adjudicata* that the individual plaintiffs have the right to sue, and are properly exercising that right in this case. They do not sue in the right of the bridge company, but in their own individual right, and hence their citizenship is the important question.

To sum it all up, the question would, indeed, have been a simple one, if, as the plaintiffs contend, it is apparent that they, including Mrs. Blakemore, a citizen of Illinois, are suing that P., C., C. & St. L. Ry. Co. which was incorporated under the laws of that state. So, on the other hand, it would have been equally simple, if, as the defendant contends, the plaintiffs are suing no one except that P., C., C. & St. L. Ry. Co. which was incorporated under the laws of Indiana. But which of the various corporations of that name the court must regard as the real defendant litigant is a much more complex proposition, and the indicia, both upon the one side and upon the other, are quite obscure and unsatisfactory. The burden in the premises, being on the party seeking the removal (*Carson v. Durham*, 121 U. S. 425-26, 7 Sup. Ct. 1030, 30 L. Ed. 992), places that party at any disadvantage that may inhere in the situation, and, as

already pointed out, requires that it shall so far clear up all ambiguity and obscurity as to make it reasonably certain that the jurisdiction of this court has attached.

The defendant relies on the assertion that a P., C., C. & St. L. Ry. Co. which was an Indiana corporation consolidated with the J., M. & I. R. Co., which was another Indiana corporation, and that that P., C., C. & St. L. Ry. Co. took the place of the J., M. & I. R. Co. in the contract sued on, and says that therefore, in respect to the claim sued on, the defendant litigant in this case is the Indiana corporation. Probably, on the whole record, no great plausibility would be imparted to this contention, in the absence of fuller and more explicit averments than are made in the petition for removal, as amended, if it were not that the J., M. & I. R. Co. alone had tracks that extended to the bridge company's bridge, which was constructed from Indiana to Kentucky across the Ohio river; but this plausibility might be, and probably is, neutralized by the fact that the entire management and control of that P., C., C. & St. L. Ry. Co. which, as an actual, living potentiality, used the bridge and became liable for the tolls, had its home far outside of Indiana. Mere propinquity cannot furnish the ultimate test for a decision of the question to be solved. As to the pending motion, the question is, which of the numerous P., C., C. & St. L. Ry. Cos. is the real litigant defendant, and which one of them was sued by the plaintiffs? Previous to the petition for removal, neither side undertook to make that matter at all definite or certain, nor, as we have seen, can either party do it now at its own option, nor by mere assertion or inference; but we hold that the just conclusion upon the matter, in view of the impossibility of any definite finding that any particular one of the P., C., C. & St. L. Ry. Cos. alone was sued, is that they were all sued—the Illinois company as much and as well as the others—and hence that the removal to this court cannot be maintained on the ground of adverse citizenship, because one of the plaintiffs is a citizen of Illinois.

If the plaintiffs had brought their suit in Indiana, or in any other one of the states which had incorporated the railway company, there could not have been a removal, because the company, as the authorities establish, could not have claimed, in respect to suits in that state, that it was a citizen of any other state. But as this suit was brought in Kentucky, which did not incorporate the company, at this late date, upon this record, and under all the circumstances referred to, I do not think it lies in the mouth of the P., C., C. & St. L. Ry. Co. to say, in the present emergency, that it, as a citizen of Indiana, rather than as a citizen of Illinois, is the litigant defendant in this suit, in the face of a claim to the contrary now made by the plaintiffs. It seems to me that the defendant has no right so to elect at this stage, under the facts of this case.

Thus far we have proceeded upon the idea that the allegations of the petition for removal, as amended, were true, so far as they stated facts and not mere legal conclusions. As many of the allegations of fact, however, were controverted of record, the matter is still clearer, inasmuch as, to say the least, the proof can hardly be considered as being as strong as the allegations.

2. While giving the other feature of the case more prominence, I am not at all sure, under the Kentucky practice, and under the decisions of the state courts in this case, that the amended and supplemental petition filed February 25, 1904, is to be regarded otherwise than as perfecting the cause of action insufficiently set up in the pleading of October 15, 1903. If it be correct to say that the amendment of February was merely supplemental to that of October, making it definite and sufficient, then the application for a removal came too late—first, because that application was not made until March 3, 1904; and, second, because the P., C., C. & St. L. Ry. Co. on October 29, 1903, had filed its answer to the amendment of October 15th, and March 3d would have been long after the time for answering it had expired.

3. Again, disregarding as of no importance in the decision of pending questions the answer of the bridge company filed in this court since the removal, it is altogether probable, under the Kentucky practice, that the bridge company was an indispensable party defendant to the litigation, and, as that company is a Kentucky corporation, there was not the requisite diverse citizenship to authorize a removal. This view may be regarded as emphasized by the fact that the bridge company, up to the removal to this court, had ranged itself with the railway company, and had been an active litigant in the case against the plaintiffs, and in opposition to their claims.

4. If the bridge company was an indispensable party defendant, it may be doubted whether there was a separable controversy between the plaintiffs, on the one side, and the P., C., C. & St. L. Ry. Co., on the other, which could be fully settled, as between them, without the presence of the bridge company as a party to the cause.

5. To say the very best in behalf of the P., C., C. & St. L. Ry. Co., there is much doubt about the right of removal in this case. The general rule is that jurisdiction on removal must be clear, in order to justify the federal court in assuming cognizance of the case. Unless it is, in the legal sense, fairly clear, the case should be remanded. *Johnson v. Wells, Fargo & Co.* (C. C.) 91 Fed. 4; *Fitzgerald v. Railroad Co.* (C. C.) 45 Fed. 812; *Hutcheson v. Bigbee* (C. C.) 56 Fed. 327; *Coal Co. v. Haley* (C. C.) 76 Fed. 882.

My conclusion upon the whole case is that the plea to the jurisdiction of this court, and the motion to remand the action to the state court, should be sustained.

RIGGS v. STANDARD OIL CO. (two cases).

(Circuit Court, D. Minnesota. April 22, 1904.)

1. NEGLIGENCE—DANGEROUS ARTICLES—LIABILITY OF MANUFACTURER.

A manufacturer who places on the market an article which is dangerous under the name of one which is not dangerous may be liable for an injury resulting to a purchaser from its use in the manner in which it is intended to be used, although such purchaser did not buy from the manufacturer, and there is no direct contractual relation between them.

2. SAME—ACTS OF AGENTS—LIABILITY OF PRINCIPAL.

One employed by a refining company to sell and distribute oil to customers, being paid by a commission on the amount of sales, is an agent or servant of the company, which is liable for acts of negligence in the conduct of the business on the part of the agent or others employed by him.

3. SAME—ACTION FOR PERSONAL INJURY—QUESTION FOR JURY.

There can be no recovery against a manufacturer of kerosene oil purchased by plaintiff from a dealer for an injury resulting to plaintiff from its explosion, claimed to have been due to its being mixed with gasoline, which reduced it below the legal standard of safety, where there is no direct evidence of such mixture, or whether, if there was, it occurred before or after the delivery of the oil by defendant to the dealer, and where the circumstantial evidence afforded no ground for determining such questions except by conjecture; and such evidence does not warrant the submission of the case to the jury.

4. SAME—CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR COURT.

On an issue as to contributory negligence, if there is no dispute as to the facts and the circumstances surrounding the facts, it is the duty of the court to determine the issue as a matter of law, and to instruct the jury accordingly.

5. SAME—POURING KEROSENE OIL FROM CAN ON LIVE COALS.

Plaintiff poured kerosene oil from a can on wood and kindling in a stove in which she knew there were live coals, and there was an explosion of the can, resulting in her being seriously burned. *Held*, that she was chargeable with negligence which precluded her recovery for the injury from the manufacturer of the oil on the ground that it was below the legal standard of safety.

At Law. On motion by defendant for direction of a verdict after the closing of the evidence in behalf of both parties.

L. E. Utley, William A. Kerr, and E. F. Waite, for plaintiff.
Stringer & Seymour and Alfred D. Eddy, for defendant.

LOCHREN, District Judge (orally). The action that is brought by Mrs. Anna B. Riggs is to recover from the Standard Oil Company damages for the injuries which she sustained by reason of an explosion of oil used by her to light a fire on the 18th of June, 1903, upon the claim that the oil was a mixture of kerosene and gasoline, although purchased by her husband as kerosene oil; and that under the Minnesota statute, which prescribes a test for kerosene, and forbids the sale of any oil which will not stand that test, of not burning at any point below 120 degrees Fahrenheit, the Standard Oil Com-

¶ 1. Liabilities of manufacturers and venders of injurious substances for injuries to persons other than immediate vendees, see note to *Standard Oil Co. v. Murray*, 57 C. C. A. 5.

See Negligence, vol. 37, Cent. Dig. § 25.

pany was guilty of negligence in selling such dangerous oil, and responsible for the very grievous injuries which she sustained by reason of being burned.

It is evident that the injuries are very severe, and, if there is evidence to show that the Standard Oil Company is responsible for these injuries, then it certainly ought to be required to make compensation. On the other hand, if the evidence fails to establish such claim, and if there is no evidence from which the jury can rightfully find responsibility on the part of the Standard Oil Company, then it would be unjust and improper to permit a verdict against the defendant, notwithstanding the severity of the injury which the plaintiff has sustained.

The case on the part of the husband depends upon that of the wife: the injury which he has sustained being by reason of her injuries.

Counsel for defendant made a motion at the close of the plaintiff's evidence that the jury be instructed to return a verdict for defendant on the ground that there was no evidence which would support a verdict on behalf of the plaintiff. It is claimed, in the first place, that there was no contractual relation between the plaintiff and the defendant; that the plaintiff did not buy oil of the defendant, and that, therefore, the defendant is not responsible for what somebody else sold. Ordinarily, that is true; but it is not true where a party puts upon the market an article which is dangerous, under the name of an article which is not dangerous, whereby a third party may be deceived in purchasing it, although that third person does not buy directly of the one who puts it upon the market. This is a doctrine which is applicable in the case where a harmful drug is sold under the name of a drug that is innocuous, it being really poisonous and dangerous; and where it is put up in the form in which it is sold, not by the druggist, but by the manufacturer. In that case the person who puts it upon the market in that form is liable to any person who may be injured by the use of it in the manner in which it is expected to be used. In this case the evidence shows without contradiction that the oil that was furnished by the defendant, the Standard Oil Company, at Monticello, during the spring and early part of the summer of 1903, and until past the time of the sale of this oil, consisted of three car tanks of oil, which had been inspected by the deputy inspector of oils, and found to stand the test—one car being of such a quality that the flashing point was 121 degrees, another car 123, and the third, I think, 125 degrees; at any rate, it was all above 120 degrees. There is also testimony without contradiction that kerosene from these cars was transferred by pumping the same into the storage tanks of the Standard Oil Company at Monticello, and that the kerosene which was sold in that village and in the surrounding villages by Mr. Crozier from some time in the early spring until the time of this accident was taken from these storage tanks, and was part of the oil that came out of these three cars, the quality of which has been shown by uncontroverted evidence to be above the required standard. The evidence shows that Mr. Crozier furnished oil to Mealey & Co., and it is claimed here by defendant that it is not liable, for the reason that, even if there were any fault in the oil

which was furnished to Mealey & Co. and the plaintiff, or if there was any mixing of the oils, it must have been done by the drivers employed by Mr. Crozier, who were not employes of the Standard Oil Company. Cases have been cited where it was held that the owner of a property or business is not responsible for the acts of the servants of an independent contractor that he may employ about his property or business. That is true. I think there is no doubt but that is the universal rule; but it does not strike me that the evidence as to Mr. Crozier makes a case of that nature. I think he was not in the position of an independent contractor. He was none the less the agent and servant of the Standard Oil Company because he was serving for a commission. The details of that contract are not explained, but it appears that his compensation depended upon the amount of oil that he disposed of. That would make him no less an agent or servant than if he were employed under a fixed salary; and the fact that he employed others to do the work which he had engaged to do for this commission would make the acts no less the acts of his principal than if he had done them himself, he not being an independent contractor, but simply an agent or servant himself. If he employed a co-servant to carry the oil or drive a tank wagon, I think it would be the same as if he had done it himself, and that it also would be an act of the defendant, or an act which would make the defendant responsible in case there was any negligence in performing it. There is not any direct evidence whatever of any mixing of oil by these teamsters. There is not any evidence from which it might be inferred that there was any mixing of oil by the teamsters, other than the evidence of Dr. Drew as to tests made by him upon the oil which was brought to him by Mr. Utley in a bottle. The testimony of the drivers themselves is to the effect that the oil which they delivered to Mealey & Co. was kerosene oil from this storage tank, which had already been tested by the deputy inspector. The testimony showed that Mealey & Co. did not deal in gasoline, and there is no testimony that they dealt in any other kind of petroleum oil than kerosene; but there is direct testimony that they did not deal in gasoline. Now, the only testimony from which it is claimed or could be inferred that this was kerosene mixed with gasoline, so as to be below the standard required by the Legislature, is, as I have said before, the test made by Dr. Drew of what was found in a lamp which had been broken, and which had lain out in a garbage box, as it is claimed, for some eight or nine months, out of doors. If there was anything in the oil that was used other than kerosene of the standard grade, there seems to be no direct evidence as to how it came there, or that it came there in any way for which the defendant is responsible. It could hardly be done by mistake, as the methods of getting gasoline into the tank wagon and of getting kerosene into it were so different that it could hardly happen that one of the fluids would be put in by mistake for the other. If the wagon tank had been filled with gasoline, and Mr. Mealey's tank filled from that, it would doubtless have made a disturbance in the town, of which there would have been heard more than this one explosion. The testimony with regard to that is that there was no complaint whatever as to the

kerosene that was sold by Mr. Mealey during these months by those who bought and used it. There was some testimony of an indefinite character as to some lady, whose name is not given, making some complaint, the substance of which is not stated, as to a gallon of kerosene which she bought of Mr. Mealey. One of the clerks testified that he smelled of it, and thought it smelled like gasoline somewhat, and he went and smelled of the tank, which smelled to him the same; but still he told the lady that it was all right, and sent her home with the kerosene; and neither he nor the other clerks whose attention was called to that lady's complaint considered it of sufficient importance to make any report of it either to Mr. Mealey or his partner. Then there is the testimony of Mr. Kries, the druggist, that about the 1st of June—some three weeks before this accident—he sold a gallon of gasoline to the plaintiff's child, who came for it, and that she paid for it and took it away, being at the time with another little girl. What was done with this gasoline, what it was bought for, or what use was made of it, does not appear. I do not know but that it is just as safe to conjecture that in some unexplainable way it got mixed with the kerosene that the plaintiff bought at Mealey's as that there was any gasoline mixed with it in any other way. The evidence is not at all satisfactory with regard to that. It is doubtful whether the jury ought to be allowed to conjecture, where there can be nothing else than conjecture, to determine whether there was gasoline mixed with this kerosene before plaintiff bought it, or as to how it became mixed, if there was any mixture.

The other question in the case is as to whether the plaintiff herself was not guilty of contributory negligence which should prevent any recovery. The rule of law in that respect is stated in many of the cases cited by counsel to the effect that, where there is negligence shown on the part of a defendant, which is a proximate cause of the injury sustained by the plaintiff, if at the same time the evidence shows that the plaintiff himself was guilty of negligence which also contributed to the injury, whether in a greater or less degree than the negligence of the defendant, there can be no recovery. The law will not undertake to separate or determine as to the responsibility in cases where there is concurring negligence of both plaintiff and defendant.

It is also claimed on the part of the defendant that, there being no dispute as to the facts upon which it is claimed this contributory negligence arises, as a matter of law it is the duty of the court to decide the question. If there be any question of fact in dispute respecting plaintiff's alleged negligence, or if there were any inference of fact arising from the testimony from which there might be a difference of opinion respecting such alleged negligence, then it would be a matter for the jury to decide; but if there is no dispute as to the facts and the circumstances surrounding the facts, then the court cannot escape the duty of passing upon the question and instructing the jury one way or the other, and as to whether those facts constitute negligence or do not constitute negligence. I do not remember any dispute as to the facts here. At any rate, in passing upon a question of this kind, I should and must take the statement of facts most fa-

vorable to the plaintiff. Taking her own testimony in respect to the matter in controversy, it appears that her husband came home to dinner about noon. Of course, she had a fire in the stove to cook his dinner. Some time later she put some more wood in the stove, heated water, and washed the dishes, and attended later to some other work, which she mentioned in her testimony. That at or about half past 5 o'clock in the afternoon, she, in order to get supper, commenced to build a fire. That she opened the cover on the west side of the fire box of the stove, and found there were coals in the stove. She mentioned that there were six or eight of them about the size of a hickory nut or a walnut. She states that she then pushed these coals to the east side of the firebox of the stove, where the cover was not open, got some light kindling wood which she split up and put into the firebox, and got some oak wood, and put in two or three sticks of the oak wood on the kindlings. Then she got the can of kerosene from behind the flour box, and came to the opening where the cover had been taken off on the west side of the firebox, and poured upon the wood, or commenced to pour, some oil from the can, and it exploded immediately, and filled the room with fire, which caught her clothes, and she ran out of doors. The only testimony with respect to the condition of the stove was the testimony of Mrs. McEachern and her father. It seems that Mrs. McEachern lived near by, and saw from her chamber window the plaintiff as she ran out of doors with her clothes on fire. She immediately ran down and caught up a rug on the way, and, the plaintiff having fallen down, she wrapped the rug around her to extinguish the flames, and returned, and sent the little girl to call a doctor; and while she was gone her father, the witness Mr. Stokes, came up and put out the fire by pouring water upon the plaintiff. Mrs. McEachern testifies that after coming back the second time to the house she went into the kitchen, and that she saw the skillet on the stove, in which the plaintiff stated she had put some potatoes, with some butter in it, to fry for supper, and that the skillet was sizzling at that time. The testimony of Mr. Stokes was that there was fire in the stove when he went there, and he got in there before Mrs. McEachern, his daughter. The only other testimony in connection with the stove is the testimony of Mrs. Hallett, which was to the effect that the fire was out, and that the skillet was cold, and also its contents; and that on the stove there was either water or kerosene.

It does not seem from these statements that there is any question about the facts, as far as they are material, or with reference to any inference that can be drawn from them. It is plain that the plaintiff found fire in the firebox—found live coals there; that she placed her kindling wood upon the coals in the firebox, with the other wood upon it, and poured this oil upon the wood, intending to light a fire, not being content to wait until the kindling wood had ignited from the coals; and that there was an explosion immediately. Now, of course, nobody will claim that there was anything in the nature of spontaneous combustion there, and it is plain that the explosion must have occurred by the contact of that oil with the fire that was in the stove. It is true that the legislative act requires that kerosene shall

stand a test of 120 degrees Fahrenheit before burning, which is construed by the inspectors as "before flashing," which is a higher test, as I understand the testimony. There is no doubt that, if any of this kerosene reached the coals, it would instantaneously very much exceed a temperature of 120 degrees. One hundred and twenty degrees is, as I understand, a moderate amount of heat. It would simply be a slightly warm fluid at 120 degrees, while a live coal of fire is of a distinctly higher temperature, and, if kerosene of the standard required by the statute would burn or even flash at 120 degrees, it would certainly, in contact with coals of fire, ignite, and it would form a gas instantaneously, which would ignite as instantaneously, and would pass back over the current of kerosene connected with it to the can. It would form gases as rapidly as it passed back, much as if it were a train of gunpowder that was being poured over a pan of fire. The fluid would be changed in that case into gas, and then into flame, almost instantaneously. It seems to me that this must necessarily have happened in this case, and that there was nothing else needed to cause the explosion except that fire and the pouring of kerosene upon it from the can.

Now, there has been testimony introduced from witnesses on the part of the defendant, or from the cross-examination of defendant's witnesses, that it is customary with some men to make fires with the use of kerosene by pouring it upon kindling to light the fires. It is very possible that this may be done with entire safety if there are no coals of fire in the stove; by putting the wood and kindling in the stove and pouring oil upon it, putting the oil can away, and then applying a match to it. It is very probable that there will be no explosion under such circumstances; or, if there be a flash, then there will be no can near to explode. But, if there is fire in the stove, it seems to me that this case demonstrates the fact that there is great probability of an explosion; and that the nature of petroleum oils of all kinds, including that of kerosene, is well known to be such, as a matter of common knowledge, that it is very dangerous to use them where they may come in contact with fire, and that when they come in contact with fire an explosion is very liable to occur.

It seems to me that I must hold, as a matter of law, that it is hazardous negligence to attempt to light a fire in a stove where there are either live coals or a blaze, by the use of kerosene oil even of the standard required by the statute.

I think the motion must be granted, and a verdict for defendant will be directed.

O'NEIL v. PITTSBURG, C. C. & ST. L. R. CO.

(Circuit Court, W. D. Kentucky. March 18, 1904.)

1. MASTER AND SERVANT—INJURY TO SERVANT—FELLOW SERVANTS.

A flagman employed by a railroad company and stationed at a street crossing, with the company's tracks on either side of him, necessarily assumes the risk incident to crossing such tracks in passing to and from his station, and until he has passed over them after his hours of work

are over he remains a fellow servant with the employes running trains thereon, and cannot recover from the master for an injury due to their negligence.

2. SAME—CONTRIBUTORY NEGLIGENCE.

A flagman, injured by an engine while he was crossing the tracks of his employer's road in the dark when leaving his station, *held* chargeable with contributory negligence, which precluded his recovering damages from the railroad company, where he neither stopped before stepping on the track, nor listened for the train, which he had previously seen approaching.

Action for Personal Injury. On motion by defendant for direction of a verdict.

This is an action for damages for personal injuries. The plaintiff was a flagman stationed in the midst of the railroad tracks at the intersection of Fourteenth and Rowan streets, in this city. Three or more parallel tracks of the defendant's road ran northwardly along Fourteenth street to the bridge across the Ohio river, a few hundred yards away. Plaintiff usually left his station at 6 p. m., after the local train called the "Dinkey," running between Louisville, Ky., and New Albany, Ind., had "pulled out." Probably thinking this had occurred, at 6 p. m. on the 28th day of November, 1900, plaintiff put away his flag, got his coat, and, his day's work being done, started westwardly across the tracks on that side, on his way home. Some minutes before starting, however, he had seen a freight train on the bridge, coming southwardly towards him, but, apparently forgetting this, he approached the tracks on which the train was moving, and, without stopping or listening, and apparently without looking, though he says it was then too dark to have seen the train if he had looked, and also that a car on an intervening track obscured the view, he stepped upon the second track, and at the instant of doing so was struck by the slowly approaching freight train. and injured.

W. M. Smith, for plaintiff.

C. H. Gibson, for defendant.

EVANS, District Judge (after stating the facts as above). The testimony having been concluded, the defendant has moved the court, upon the whole case, to instruct the jury to find for it, and urges the motion upon three grounds: (1) It insists that the evidence does not show any negligence upon its part to bring it under any obligation to compensate the plaintiff for the injuries sustained; (2) that, even if the defendant was negligent, the plaintiff would not have been injured if he had not contributed to it or brought it on by his own negligence; and (3) that any negligence, if there was any, which caused the injury to the plaintiff, was that of his fellow servants, and therefore did not impose any liability on the defendant. I have examined these contentions as carefully as existing conditions would permit, and will briefly state my conclusions.

I do not doubt that the plaintiff and the engineer and fireman on the engine by which he was hurt were fellow servants. It is quite true that there is conflicting testimony upon several points, such, for example, as whether it was so dark when the plaintiff was injured that he could not see the engine when he went to the track on which it was running, although it may be remarked that when all of the testimony is considered it would be difficult to have much doubt on that point. There was conflict as to whether the engine and tender had been detached from the train before the plaintiff was struck;

also as to whether the so called "Dinkey" train had passed to the north of Rowan street when the injury occurred; also as to whether there was a light on the tender which struck plaintiff, which could have been seen as it approached Rowan street; also as to whether the bell was ringing as it approached that street; also as to whether there were cars standing near Rowan street on what is called the "main" track of the railroad. There may be other points of conflict, and there might be room to doubt as to whether the "Dinkey" train, as it moved out, made a noise so dominant as to drown any made by the incoming freight train or the engine which inflicted the injury, and which was moving with steam shut off. But there is no conflict upon several points: None that the point where plaintiff worked was in the intersection of Fourteenth and Rowan streets, where three parallel tracks ran east of him and three west of him; none that the plaintiff did not stop or listen when he approached and went upon what is called the "bridge" track, on which the freight train was moving; nor any that he had seen that train when north of Portland avenue and moving southward; nor any that he saw certain persons get off of it and go with lanterns over towards the "Dinkey" train; nor any that he was perfectly well informed as to the entire local situation, and knew its dangers; nor any that he, like those upon the freight train or engine and tender, were all employés of the defendant. The last proposition, indeed, is in no way denied, though it is insisted that the plaintiff's duties as an employé had ceased for the day, just before the accident, and that he was then off duty and on his way home, and that these facts take his case out of the usual rule as to fellow servants. His statements bearing upon this subject have been copied from the stenographer's notes, and are as follows:

Extract from direct examination of O'Neil: "Q. By Mr. Smith: What were your hours of labor there? A. From 6 o'clock in the morning until 6 o'clock in the evening. Q. Did you leave your work there before your time was up in the evening there on that day? A. No, sir; I never did leave there until the dinkey at 6 o'clock; got orders from the detective there not to leave until the six o'clock dinkey would go out. Q. How do you know you left after 6 o'clock on this 28th of November, 1900? How do you know it was after 6 o'clock? What were you governed by? A. I was governed by the dinkey, and by the bell that I heard ring, and whistles. Q. What bell was that you speak of? A. St. Patrick's bell; it rings at 6 o'clock every night of the year. Q. You were governed by that bell and the going out of the dinkey? A. I was governed by the dinkey; I could not leave until the dinkey should go out. * * * Q. By Mr. Gibson: You went on duty at 6 o'clock in the morning, and you had remained on duty until the 6 o'clock dinkey went out, did you? A. Yes, sir. Q. If it was delayed, you had to stay there, didn't you? A. Yes, sir; I had to stay there; I would be discharged if I would go home. Q. This evening you say you waited until the 6 o'clock dinkey had crossed north over Rowan street? A. Yes, sir. Q. Then you put out your lamp? A. Yes, sir. * * * Q. As long as you are there on the premises, you are supposed to be on duty, are you not? A. Certainly. Q. Until you get clear off it is your duty to look out for all trains that come there, is it not? A. No, sir; I was done at 6 o'clock. There was no flagman there at night. Q. But if, right at 6 o'clock, before you got off the premises, you saw a train coming and a wagon in the way, do you do anything, or not? A. Certainly, I will; I won't get anybody hurt. Q. As long as you are on the premises, then, you undertake to flag trains, look out for them, do you? A. Yes, sir."

The plaintiff is entitled to have these statements construed favorably to him in disposing of the pending motion. It will therefore be assumed that just before the accident he had practically finished his duties for the day, and had just started home, and had gotten a very short distance on his way when he was struck.

I have made as much effort as has been within my power to ascertain the settled rules of law applicable to the state of facts indicated. One rule of law (unless under conditions not involved in this case) is that the servant or employé, when entering upon an employment such as the plaintiff had in this case, impliedly agrees to assume all of the ordinary risks of his employment; and from this and other considerations it follows that his employer is not responsible for any injury to him which results from the negligence of such co-employés as are called fellow servants. One of the ordinary risks incurred and involved, where the employment is such as plaintiff's was, must necessarily relate to the dangers attendant upon the servant's going to and departing from the exact place among the tracks and at the crossing where he performs the duty of watching and flagging trains. He takes upon himself responsibility for the ordinary hazards and risks of getting to his work over the tracks to the flagging station, and, equally necessarily, those of going over those tracks, after the day's work is done, from the flagging station to a point of safety beyond the tracks. He must necessarily go to his work, and, equally necessarily, he must leave it when the day's work is done, and I think the rule must be that the assumption of risk begins when he gets to the defendant's premises for the purpose of going to work, and must end when he has left those premises on returning home. In other words, the very nature of plaintiff's employment as flagman necessarily involved and included ingress over defendant's tracks to the point where plaintiff's duties were to be performed, and also egress therefrom over the same tracks after the day's work ended. As there was no possible avoidance of this, it must follow that, in the contemplation of the parties, they were both included, and the plaintiff must for that reason be regarded as having assumed all the ordinary risks attendant upon his attempts to get over the tracks to the place where he worked, and over the same tracks to a place of safety after his work ceased, and such assumption must therefore be regarded as first taking place when ingress began, and as having terminated when egress was completed. When he, on his way home, has entirely left the premises where his labors were performed, then, and not till then, his situation becomes like that of any other person not an employé. I see no escape from this conclusion upon any reasonable ground consistent with the rules of law referred to.

Upon hurriedly looking into the authorities since we adjourned, I have found that in *Fletcher v. B. & P. R. Co.*, 168 U. S. 135, 18 Sup. Ct. 35, 42 L. Ed. 411, the employé was on the company's premises and train coming to his work, but before he got there was injured by the negligence of his fellow servants. He was not permitted to recover, because of the rule we are discussing. In the case of *N. P. R. Co. v. Charles*, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999, the plaintiff was injured by employés of the company for which plain-

tiff also worked, and he was allowed to recover, apparently because, at the time the injury was inflicted, he had entirely left the grounds and workshops of the company, and was therefore situated like any outside person. A similar result followed under practically similar circumstances in *Orman v. Salvo*, 54 C. C. A. 265, 117 Fed. 233. If, while on the master's premises, going to his work, but before he got to it, a servant is regarded as having assumed the ordinary risks attendant upon so going, as held in the *Fletcher Case*, 168 U. S. 135, 18 Sup. Ct. 35, 42 L. Ed. 411, there seems to be no reason why the same rule should not be applied to a servant who is still on the master's premises, and must of necessity be subjected to the usual hazards until he has left the premises on his way home. The rule seems to cease and change only when the servant has gotten entirely off the master's premises, as in the *Charless Case*, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999.

When the accident occurred in the case before us, the plaintiff had not entirely nor at all severed his relations with the defendant when he started home after his day's work. He was still an employé, even if not then on duty. Hence his case is not like one where, before he started home, the relation of master and servant had entirely ceased, as, for example, by a discharge by the master or the quitting of the service finally by the servant, in either of which events he would have no fellow servants, and the operation of the doctrine as to assumed risks would cease *eo instante*, and would not protect the master for a moment afterwards. Such seems to have been the view necessarily taken by the court in the case of *Packet Co. v. McCue*, 17 Wall. 508, 21 L. Ed. 705. I have, however, found no case meeting the exact situation of the one before us, but I cannot persuade myself, upon the facts shown, that the plaintiff, when injured, was in a position to be exempt from the general rule. To benefit him, there must be a relaxation of the doctrines relating to injuries inflicted by fellow servants and those relating to the risks assumed by the servant, which relaxation it would be more becoming for me to leave to the superior power or liberty of a higher court to make. I therefore conclude, upon the testimony, that the plaintiff's case comes within the established rule that he cannot recover, even if, as he contends, there was negligence upon the part of the defendant's employés. In other words, I consider the rules of law relating to the nonliability of masters to servants for injuries caused by the negligence of fellow servants as embracing a case like this, when fair effect is given to the testimony.

The evidence does not show any contract with the plaintiff to work merely from 6 a. m. to 6 p. m. It is true that ordinarily his labors for the day ceased about 6 p. m., but no contract was shown to prove any hard and fast rule or stipulation that his duties were to cease at precisely that hour. On the day of the accident the actual performance of his work brought him so close up to the duty of looking out for and flagging the train or engine which hurt him, and which he admits having seen after it crossed the bridge and was coming in his direction, as to bring his case up to, if not entirely within, the rules of law relating to contributory negligence. It is undeniably true that

the plaintiff was well acquainted with the locality where he worked, and with its numerous dangers. He seems clearly to show that, as he approached the "bridge" track on which the engine or freight train was coming, he did not stop or listen. Probably he did not even look, though he says it was so dark he could not see the engine, although his own witnesses testify to having seen him at the time and at a much greater distance. If he had stopped and listened, even without looking, it seems unreasonable to suppose that the approach of the train would not have become known to him. Indeed, so close was the engine to him that if he had stopped at all, even if for only a moment, it would have been right in front of him, and have blocked his way before he could have reached the "bridge" track at which he was hurt, and in this way he would have escaped injury. He perfectly well knew the track was there. It was of itself a warning of danger and of its hazards, and he knew, as before stated, that the train had left the bridge and was coming towards his place of duty. The duty of stopping and of listening rested upon him, and under these circumstances was emphasized by what he knew and ought to have remembered. So that, even if he looked, which we can hardly reasonably suppose was the case, he did not stop and he did not listen. As the proof makes it clear that he could not have reached the track in advance of the engine if he had stopped at all, it appears to be manifest that his failure to stop was not only negligence on his part, but was really the cause of the injury to him. If this be so, I see no grounds for believing that his own negligence did not cause the injury or contribute to it.

The question of whether there was any negligence at all on the part of the defendant or its employés I do not undertake to decide, but have assumed that there was such negligence for the purposes of the pending motion.

Upon the whole case as presented by the testimony, and giving to it what I regard as its full effect, I am of opinion that it cannot reasonably be concluded therefrom that the plaintiff is entitled to a verdict. It may be that upon either of the grounds I have discussed I ought to sustain the defendant's motion. The force of the two combined appears to be irresistible, and the jury will be instructed to find a verdict for the defendant.

GREENLEAF v. NATIONAL ASS'N OF RY. POSTAL CLERKS.

(Circuit Court, D. Maine. May 26, 1904.)

No. 49.

1. INSURANCE—FOREIGN ASSOCIATIONS—STATE LAWS—APPLICATION.

Rev. St. Me. c. 49, § 79, provides that no foreign insurance company shall transact insurance business within the state without a license from the Insurance Commissioner; sections 80-84 provide for the issuance of such license; and section 92 declares that any person having a claim against any foreign insurance company may bring an appropriate suit thereon in the courts of the state, and that process may be served on the Insurance Commissioner or on any duly appointed agent of the company

within the state. *Held*, that section 92 applies only to foreign insurance companies which have complied with the statutes and obtained a license to do business in the state.

2. **FEDERAL COURTS—REMOVAL OF CAUSES—MOTION TO DISMISS—APPEARANCE.**

Where a foreign insurance association, after suit brought in the state court, took seasonable steps to have the same removed to the federal court, it was entitled after such removal to appear specially for the purpose of moving to dismiss on the ground that the court had not obtained jurisdiction of defendant's person.

At Law.

Levi Greenleaf, for plaintiff.

Samuel W. Emery, for defendant.

HALE, District Judge. Annie S. Greenleaf, of Portland, Me., a citizen of Maine, commenced suit in the Supreme Judicial Court in the county of Cumberland and state of Maine, at the October term, 1903, against the National Association of Railway Postal Clerks, incorporated under the laws of the state of New Hampshire, to recover the sum of \$5,000, alleged to be due from said association to the plaintiff under a certain beneficiary fund certificate set forth in the declaration. The writ was served by delivery to S. W. Carr, State Insurance Commissioner, of a summons and attested copy of the writ. On the second day of said term of court (the 14th day of October, 1903), defendant filed its petition and bond for removal in that court; and on that day an order was issued removing the cause to the Circuit Court of the United States for the District of Maine, and directing the transmission of the transcript of the record. The petition alleged that the matter in dispute exceeded the sum of \$2,000, exclusive of interest and costs, and that the controversy was between citizens of different states; that the petitioner was at the time of the commencement of the suit, and still is, a corporation duly incorporated, organized and doing business under the laws of the state of New Hampshire, and a resident and citizen of the State of New Hampshire, and the plaintiff was then, and still is, a citizen of the state of Maine, and a resident of Portland, in said state of Maine. The record was duly filed in the Circuit Court of the United States for the District of Maine on the first day of the April term of said court, when said suit was entered in the said Circuit Court of the United States for the District of Maine, to wit, April 19, 1904, on which said day the defendant filed a motion to set aside the service of the plaintiff's writ in the case, and to dismiss the writ and the plaintiff's action, for want of jurisdiction of the person of the defendant in the state court from which the cause was removed. The defendant offered, with his motion, the affidavit of George A. Wood, the treasurer and secretary of the defendant corporation, which affidavit shows that the corporation carries on no business in the state of Maine, and has no agents in said state; that all policies are issued in the state of New Hampshire, and mailed to the applicant in the state of Maine, or in whatever state the applicant resides; that assessments are received in Maine for the convenience of members; that each member of the

¶ 2. See Appearance, vol. 3, Cent. Dig. 135; Removal of Causes, vol. 42, Cent. Dig. § 238.

society may remit assessments direct to the secretary at Portsmouth, N. H., or, in case it is more convenient for such member to pay a local member of the association, there are two members of the association, who are residents of Maine, authorized to accept payments. The two members in Maine so receiving assessments have authority to perform no other act whatever for the association. The association has no person who acts as its agent in the state of Maine, unless the two aforesaid persons should be held to be such agents. The association never has procured license to do business in the state of Maine, because it has not supposed that it is doing an insurance business for the doing of which a license must be procured of the Insurance Commissioner of Maine; and it never has appointed the Insurance Commissioner of Maine, or any other person in that state, its attorney or agent to receive or accept service of any process against it. The affiant has appended to his affidavit a copy of the constitution of the association, in which, in article 2, it is alleged:

"The object of this association is to conduct the business of a fraternal beneficiary association for the sole benefit of its members and beneficiaries and not for profit; to provide closer social relationship among railway postal clerks; * * * to provide relief for its members and their beneficiaries and make provision for the payment of benefits to them, in case of death, sickness, temporary or permanent physical disability, either as a result of disease, accident or old age."

Section 79 of chapter 49 of the Revised Statutes of Maine provides that "no foreign insurance company shall transact any insurance business in the state unless it first obtain a license from the commissioner." Section 80 provides that foreign insurance companies shall not be licensed to do business in the state until they have complied with all the provisions of law relating to the admission of companies, and have also made a deposit with the treasurer in a sum not less than the capital or assets of like companies existing under the laws of other states. Section 81 provides that all the real estate and other assets of any such company shall be held by trustees for the benefit of creditors. Section 82 provides that when such foreign insurance company has complied with the foregoing provisions, and the Insurance Commissioner is satisfied that it is solvent, he may issue to it a license to transact business in the state. Section 83 provides for reciprocal provisions upon all insurance companies doing business in the state, or applying for admission to it. Section 84 provides that the Insurance Commissioner may revoke the license of any foreign insurance company authorized to do business in the state which shall neglect to comply with the laws of the state or shall violate certain provisions of the statutes. Section 92 provides as follows:

"Any person having a claim against any foreign insurance company may bring a trustee action or any other appropriate suit therefor in the courts of this state. Service made upon the Insurance Commissioner or upon any duly appointed agent of the company within the state shall be deemed sufficient service upon the company."

It is contended by the plaintiff in the case before us that the provisions of section 92 which we have just quoted permit service upon the company by leaving a copy of the writ with the Insurance Commissioner, and that this provision applies even though the company has

not obtained license to do business within the state, and has not complied with the foregoing statutes which we have cited, and all other statutes on the subject. If section 92 were read alone, without reference to other sections of the chapter, there might be good ground for the contention of the plaintiff; but the intention of the Legislature must be ascertained by a careful examination of the whole statute, and not alone by a reference to any one section. It is clear from the citations which we have just made from the statute that the Legislature is passing upon the rights of companies who have applied for admission into the state, and have complied with its laws. It is plain that section 92 was not intended to apply to any foreign insurance company, whether it had been licensed to do business in this state or not. It can readily be seen that, if the contention of the plaintiff were allowed to prevail, the utmost uncertainty would result in reference to the service of writs upon companies having no standing whatever in the state. Great opportunities of collusion might also arise from such construction. In fact, such construction might well be held to be open to the objection of being inconsistent with the fourteenth amendment of the Constitution of the United States, for, if this statute were allowed so wide an application as contended for by the plaintiff, it might be held to abridge the rights of certain foreign corporations which are "citizens of the United States." We therefore have no hesitation in concluding that the provision of section 92 can apply only to foreign insurance companies which have complied with the statutes, and have obtained license to do business in the state.

The learned counsel for the plaintiff further contends that the objection to the jurisdiction of the person should have been raised in the state court on one of the first two days of the term at which the writ was entered, and that, by not appearing in the state court and making a timely motion to dismiss, defendant has waived his rights to move for a dismissal of the writ on the ground that the court had not jurisdiction of the person of the defendant. The Supreme Court has already passed upon this question in *Wabash Western Railway v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431. Chief Justice Fuller, speaking for the court, at page 278, 164 U. S., page 128, 17 Sup. Ct., 41 L. Ed. 431, says:

"An appearance which waives the objection of jurisdiction over the person is a voluntary appearance, and this may be effected in many ways, and sometimes may result from the act of the defendant even when not in fact intended. But the right of the defendant to a removal is a statutory one, and he is obliged to pursue the course pointed out, and when he confines himself to the enforcement of that right in the manner prescribed, he ought not to be held thereby to have voluntarily waived any other right he possesses. An acknowledged right cannot be forfeited by pursuit of the means the law affords of asserting that right. *Bank v. Slocomb*, 14 Pet. 60, 65 [10 L. Ed. 354]. The statute does not require the removing party to raise the question of jurisdiction over his person in the state court before removing the cause, or to reserve that question in respect of a court which is to lose any power to deal with it; and to decide that the presentation of the petition and bond is a waiver of the objection would be to place a limitation upon the jurisdiction of the Circuit Court which is wholly inconsistent with the act."

In the case before us, learned counsel for the defendant appeared specially for the sole purpose of making his motion to dismiss. He has

complied with the terms of the statute in obtaining the removal of the cause, and he is seasonable in applying for a dismissal of the suit on the ground that the court had no jurisdiction over the person of the defendant. The language of Chief Justice Fuller applies distinctly to the case at bar:

"The statute does not require the removing party to raise the question of jurisdiction over his person in the state court before removing the cause, or to reserve that question in respect of a court which is to lose any power to deal with it."

It is ordered that the writ be dismissed.

THE NELLIE.

CAMPBELL et al. v. WETHERILL.

(District Court, E. D. Pennsylvania. May 12, 1904.)

No. 56.

1. WHARVES—LIABILITY OF OWNER—INJURY OF VESSEL FROM OBSTRUCTION ON BOTTOM.

A few feet in front of a wharf owned by respondent there was a piece of submerged piling about 18 inches high, and the person who built the wharf placed fenders in front running diagonally from the top of the wharf to the bottom of the river to keep vessels from being damaged on such piling. Libelants' barge laden with coal for respondent tied up at the wharf, and, having settled against the fenders as the tide ebbed, one of them was pulled up by the master and respondent's manager, and the barge settled on the pile and was injured. The master was given no notice of the obstruction, nor was its existence known to respondent, who never inquired why the fenders were placed there. *Held*, that he was liable for the injury, it being his duty to know of the obstruction, and to warn vessels using the wharf of the same.

2. CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

The defense of contributory negligence on the part of libelants, when relied upon, must be affirmatively proven by a preponderance of evidence.

In Admiralty.

Willard M. Harris, for libelants.

Henry R. Edmunds, for respondent.

HOLLAND, District Judge. Libelants brought this action to recover damages caused to their barge *Nellie* while lying at the wharf of respondent, located in front of his Club House, along the Cohansey creek, in the state of New Jersey. She was loaded with 175 tons of coal, consigned to the respondent, and arrived there on May 31, 1903, at 4 o'clock p. m. The *Nellie* is a steam barge, of regular canal boat build, flat bottom and round bilge, 96 feet long, 22½ feet beam, and on this date was drawing 8 feet 4 inches aft and 7 feet 6 inches at the bow. The barge was moored with bow up stream and starboard side to the wharf. Capt. Campbell had been to this wharf, with the same barge, not long before, with a car load of dirt, and at the time was aware of the fact that he would soon be required to revisit the place for the purpose of delivering the boat load of coal, at the request of re-

spondent, for which he had the order at the time. He therefore made soundings about the wharf and the boat for the purpose of ascertaining the nature of the bottom so that he would not strain her in case she grounded at the time the coal was delivered. As to the nature of the bottom of the river in front of the wharf, there is very little dispute. He found that there was a slight descent from the wharf outward. Actual measurements subsequently demonstrated this to be $2\frac{1}{2}$ feet in 30. The bottom was of a firm nature, composed of coarse gravel up to the face of the wharf, over which there flowed 12 feet of water at high tide and 6 feet at low tide. The wharf had been rebuilt some time prior under the supervision of Capt. Woodruff, who was at that time the manager for respondent, and was called as a witness in this case. Capt. Woodruff ascertained by sounding that about 7 feet 6 inches out into the stream from the upper end of the wharf there projected a submerged piling about 18 inches in height. To protect vessels from taking damage on this snag, he placed two fenders, one at the upper and one at the lower point of the wharf, resting on the cap log, and extending out about 13 feet into the stream. The upper fender was about $21\frac{1}{2}$ feet long, and rested upon the bottom 13 feet out from the piling as originally placed by Mr. Woodruff. No other wharf along the Cohansey river was equipped with these fenders, and it was generally thought by watermen (including Capt. Harris, who was in charge of the barge at the date of delivery of the coal) who saw the arrangement that they were placed there for the purpose of keeping vessels off from the wharf or irregular bottom. The respondent asserts that he knew nothing about the submerged piling, and supposed the fenders were there to keep vessels off from the wharf, although he had directed his own manager to rebuild this wharf some time in 1900, and did not inform himself from that time until the date of the damage as to the true condition of the bottom of the river at the face of the wharf, or the real reason for which the fenders had been placed there. Under these circumstances the Nellie arrived, as has been said, on May 31, 1903, at 4 o'clock, on an ebb tide, and proceeded to tie up to the respondent's wharf. Two spring lines were put out (one from the bow, one from the stern), a stern line to a stump on the bank, two lines from the Sampson post (one off to a post on the wharf, and the other upstream from the bow to a tree). The last-mentioned line was the line belonging to respondent, and had been handed to one of the deck hands for use by Mr. Gandy, respondent's manager, who succeeded Woodruff, and had been used for mooring the respondent's yacht. About two hours after the barge arrived, Capt. Harris was informed by Mr. Gandy that his boat was listing to port, and upon examination he found she was resting upon something on the bottom. The two men moved the fender and pulled it up. They attempted to back the barge, but were unable to do so. Upon subsequent examination it was found the submerged piling had penetrated the bottom. No warning had been given Capt. Harris by the respondent or any of his employes, nor is there sufficient evidence to charge libelants with a want of due care in mooring the barge, or of a failure to exercise proper supervision for the safety of the boat up to the time they discovered she had listed, unless it be, as claimed by the respondent, that he permitted the lines to become taut,

thereby preventing her from sliding down the fenders as the tide receded, and this amounts to contributory negligence and a good defense.

It appears that Mr. Gandy informed the captain the boat had listed. It was found that the bow line running to the tree was taut, and the two spring lines were in the same condition. These, however, were put out for the purpose of preventing the barge from moving fore or aft; and, as explained by Mr. Gandy, the bow line to the tree would naturally be tight, owing to the ebb of the tide sweeping down against the bow. As to the bow line off to the wharf, there was some dispute as to its being taut or slack, but upon the whole evidence the court is led to the conclusion that it was as slack as the conditions reasonably suggested to a careful master.

The respondent was negligent in inviting the libelants to his wharf without providing a safe berth thereat, and his indifference as to the condition of the wharf and the reason for which the fenders were placed there by his manager will not exempt him from liability for any damage done in this case. The rule of law in cases of this kind is very plain, and established by a long line of decisions. In *Moorcock*, L. R. 13 Prob. Div. 157, defendants, who were wharfingers, agreed with plaintiff for a consideration to allow him to discharge his vessel at their jetty, which extended in the River Thames, where the vessel would necessarily ground at the ebb of the tide. The vessel sustained injury from the uneven condition of the bed of the river adjoining the jetty. Defendants had no control over the bed, and had taken no steps to ascertain whether it was or was not a safe place for the vessel to lie upon. It was held that, though there was no warranty, and no express representation, that there was an implied undertaking by defendants that they had taken reasonable care to ascertain that the bottom of the river at the jetty was not in a condition to cause danger to a vessel, and that they were liable. This case was quoted and approved by Chief Justice Fuller in delivering the opinion of the Supreme Court of the United States in *Charles G. Smith et al. v. Charles Burnett et al.*, 173 U. S. 430, 19 Sup. Ct. 442, 43 L. Ed. 756.

Respondent had the ready means of obtaining information as to the condition of the bottom, but he took so little interest in the unusual fact of the existence of the fenders at his own wharf that he never inquired of his own manager, who knew all about it.

The defense of contributory negligence on the part of the libelants, when relied upon, must be affirmatively proven by a preponderance of evidence. *Railroad Company v. Gladmon*, 15 Wall. 401, 21 L. Ed. 114; *Railroad Company v. Horst*, 93 U. S. 291, 23 L. Ed. 898. It was not necessary for the libelants to show that the respondent was aware of the existence of the submerged piling which occasioned the injury of the barge. It suffices to charge the respondent with negligence that he could have discovered if he had exercised proper care to inform himself of the condition of the bottom. *Smith v. Havemeyer* (C. C.) 36 Fed. 927.

In the absence of warning as to the real reason of their existence, boatmen lawfully using the wharf cannot be considered negligent because they make an erroneous guess as to why the fenders were placed there.

There is nothing in the evidence to show that the mooring was not reasonably and carefully done by Capt. Harris in view of all the surroundings, and as he knew them, and could reasonably judge them from the conditions existing at that wharf at that time. The respondent says that, in his opinion, this accident occurred "by the vessel being held too tight in against the wharf with the lines, and that she pushed the foot of the skid into the water until the bilge rested upon the submerged pile. Then the tide still going further relieved the weight upon the skid, the pile holding the bilge of the vessel." He further states that it would be necessary that this skid should have been pushed into the gravelly bottom in a lateral position to the extent of three feet. This explanation is unsatisfactory. Aside from the fact that the bottom was such as to preclude the idea of the skid being sufficiently strong to endure the weight to drive it down to the extent required, it seems almost incredible that two men could have pulled it up.

The evidence that vessels and the yacht of the respondent has used this wharf for some time with safety was valuable only to show that under certain circumstances it could be used without occasioning injury to vessels using it, but was quite unimportant when it appeared beyond doubt that there were defects capable of producing mischief, which could have been readily discovered and remedied by a proper examination and inquiry by the owner. *Smith v. Havemeyer* (C. C.) 36 Fed. 927.

A decree is entered for the libelants, with an order of reference to assess damages.

QUILLAN v. BRUNSWICK & BIRMINGHAM R. CO.

(District Court, S. D. New York. May 10, 1904.)

1. SHIPPING—CONTRACT FOR CHARTER OF VESSEL—PARTIES BOUND.

The agent of a vessel, who had previously made similar contracts with an individual acting both for a railroad company of which he was president and for a construction company, sent him a telegram, addressed to the railroad company, respecting the employment of the vessel; and an agreement was made for such employment by a telegram confirmed by a letter bearing the letter head of the railroad company, and signed by such individual as president. *Held*, that the contract bound the railroad company, whatever may have been the actual intention of the president; it being apparent that he must have known that such was the intention and understanding of the agent of the vessel.

In Admiralty. Suit to recover damages for breach of an agreement for the employment of a vessel.

Robinson, Biddle & Ward, for libellant.

Davies, Stone & Auerbach and Herbert Barry, for respondent.

ADAMS, District Judge. This action was brought by the libellant, William J. Quillan, as master and managing owner of the schooner *Salie C. Marvel*, to recover from the Brunswick and Birmingham Railroad Company the damages, amounting to about \$2,500, claimed to have been suffered through a breach of an agreement for the employment of the schooner to carry a cargo of 800 tons of steel rails from Baltimore, Maryland, to Brunswick, Georgia. The agreement, which was made

in Baltimore in the month of May, 1903, was partly arrived at by telephone and partly by the exchange of telegrams and a letter from the respondent dated May 2nd. The contract was completed about the 4th of May. The libellant reported, as he contends, to the respondent about the 20th of May and on the 22nd of May, he placed the vessel at Jackson's wharf in the port of Baltimore to take the contemplated cargo, but the cargo was not furnished and after waiting till June 5th, 1903, the libellant, upon being advised that the cargo would not be furnished, sought other employment for the vessel.

The defence is that the respondent was not a party to the contract.

The vessel's business in Baltimore was in charge of S. B. Marts Company. The secretary of the company was negotiating with one E. C. Machen for the charter of the vessel. The libellant contends that at the time of the making of the contract, Machen was acting for the railroad company.

The respondent contends that Machen was acting for the Brunswick and Birmingham Construction Company, to which all the business of the railroad company, relating to its construction, had been transferred. There was a contract between the railroad company and the construction company which, inter alia, provided:

"The Company agrees to employ and hereby employs, the Contractor to construct its railroad and works, and further agrees, so long as the contractor is not in default hereunder to enter into no agreement with any other person or corporation for the construction of the same, or any part thereof without first obtaining the consent of the Contractor."

The testimony indicates a rather mixed state of affairs, owing to the business of the railroad company, being, to some extent, in the hands of Mr. Machen, who at one time was acting for the railroad and then again for the construction company. It appears that the Marts Company was dealing with Machen in both capacities. It had furnished vessels for practically the same kind of work, to him as agent of the construction company, as well as the railroad company, but after February, 1902, the dealings were with the construction company up to May, 1902, when some telegrams were sent to Machen, "Brunswick and Birmingham Railroad, Brunswick, Ga.," and in reply a letter, of which the following is a copy, was received by the Marts Company:

"Brunswick & Birmingham Railroad Company
Office of the President

E. C. Machen
President

Brunswick, Ga., May 2nd, 1903.

Messrs. S. B. Marts Co.,
Baltimore, Md.

Gentlemen:—

Have just wired you in answer to yours of yesterday, leaving the matter of which vessel you take to your judgment. We want to get the rails here as quickly as possible, and if I understand it aright, the difference in freight between the 1200 and 8000 ton vessel will be, under the arrangement made, about \$200.00. In other words, the 1200 ton vessel will charge \$2.25 on 800 tons. If I am right, the matter of the \$200.00 would cut but small figure, therefore I left the whole matter to your judgment.

Will wire Mr. Martin as suggested by you so we will get on this rolling.

I was in hopes that the Sparrow Point mill would roll these rails and save us the extra freight from Steelton, but as we have to do what we can in

these days when rail mills are chuck full of orders, and not what we would like to do, I can only thank you in advance for anything that you will do to serve our interests. Remember that time is very valuable to us in this matter.

Very truly,

E. C. Machen
President."

The Marts Company seems to have considered that in this transaction, it was dealing with the railroad company. There were letters written to the latter on May 4th, 9th and 14th, addressed to Brunswick & Birmingham Railroad, New York. The letter of May 4th mentioned the charter party of this schooner as being enclosed and asked for the signature of the railroad company. That of the 9th asked for the return of the charter party and that of the 14th repeated the request. It was not, however, returned, but it is alleged by the respondent was subsequently delivered to the libellant's agent. It has not been produced on the trial, nor its absence accounted for, both parties contending that it remains in the possession of the other.

It is said by Mr. Machen, on behalf of the respondent, that the letter of May 2nd was not actually signed by him but by his secretary, who took the dictation from him, and that he did not intend to have it signed as president of the respondent. Assuming the correctness of the contention that the signing was a mistake of the secretary, it does not seem to aid the respondent, because the letter was in reply to a telegram, dated May 1st, addressed to Machen, "Brunswick & Birmingham Railroad, Brunswick, Ga." Mr. Machen's position as president of the railroad was established. The circumstances seem to indicate something more than a "nominal" presidency by him, and I can not resist the conviction that this transaction was intended to be with the railroad company. I do not entertain any doubt that the Marts Company so meant and the intention must have been apparent to Machen, who had authority to bind the railroad company. If there had been only a mere acquiescence on Machen's part in the Marts Company's intention, it was sufficient to fix the liability upon the respondent, under the circumstances.

Decree for the libellant, with an order of reference.

In re GEORGE WATKINSON & CO.

(District Court, E. D. Pennsylvania. May 21, 1904.)

No. 1,184.

1. BANKRUPTCY—RECONSIDERATION OF CLAIM—EXPENSES OF CLAIMANT AS WITNESS.

Where an order is made on petition of a trustee for the re-examination of a claim previously allowed to a creditor who resides at a distance, and he is required to appear before the referee for examination, he may properly be allowed his expenses if his claim is finally allowed, but there is no ground for allowing him counsel fees.

2. SAME—EXAMINATION OF CLAIMANT.

A referee has power, in an order for the examination of a nonresident creditor on a reconsideration of his claim, to permit him, in the alternative, to appear before a referee in the district in which he resides.

3. SAME—GROUNDS FOR RECONSIDERATION.

The petition of a trustee, asking an order for the reconsideration of a claim which has been allowed, need not allege facts which, if proved, would defeat the claim, but is sufficient if it shows facts constituting sufficient cause for the re-examination.

In Bankruptcy. On certificate from referee.

Arthur G. Dickson, for trustee.

Edwin O. Michener, for creditor.

J. B. McPHERSON, District Judge. The referee in this case (Theodore M. Etting, Esq.) has certified as follows:

"And now, to wit, this 20th day of April, 1904, upon consideration of the above and foregoing petition, and the answer of Frank M. Fargo thereto, upon motion of Arthur Dickson, Esq., for petitioner, it is ordered that the petition of the Provident Life & Trust Company, trustee of the estate of George Watkinson and Irving Watkinson, individually and trading as George Watkinson & Co., bankrupts, filed on the 19th day of January, 1904, may be withdrawn, and that the claim of Frank M. Fargo as an individual creditor of the said George Watkinson be re-examined.

"It is further ordered that the said Frank M. Fargo appear before me at my office, No. 701 Arcade building, City Hall Square, Philadelphia, on the 13th day of May, 1904, at 10 o'clock a. m., for examination in relation to said claim, or that he appear for examination with respect to said claim before a referee of the district in which he resides, upon due notice, if he cannot, without hardship to himself, owing to the distance of his residence, appear before me at the time and place above mentioned.

"It is further ordered that the said George Watkinson appear before me at the time and place above mentioned for examination with respect to the claim of the said Frank M. Fargo, and that ten days' notice of the above and foregoing order be given, by mail, to the said Frank M. Fargo and George Watkinson, or to their respective counsel.

"On the 26th day of April, 1904, Frank M. Fargo, the claimant above referred to, feeling aggrieved at the above order, filed a petition for review. The question presented for review by the above petition is whether or not the referee erred in the above order in the following particulars:

"(1) In ordering that the claim of Frank M. Fargo as an individual creditor of the said George Watkinson be re-examined.

"(2) In ordering the said Frank M. Fargo to appear before the referee at his office, No. 701 Arcade building, City Hall Square, Philadelphia, on the 13th day of May, 1904, at 10 o'clock a. m., for examination in relation to said claim.

"(3) In ordering that the said Frank M. Fargo appear before the referee at his office, No. 701 Arcade building, City Hall Square, Philadelphia, on the 13th day of May, 1904, at 10 o'clock a. m., for examination in relation to said claim, without providing that the trustee, upon whose petition the said order for re-examination had been made, should pay all the expenses of said Frank M. Fargo in traveling from his home, in Chicago, to Philadelphia and return, and his expenses while in Philadelphia.

"(4) The referee erred in ordering, in the alternative, that the said Frank M. Fargo should appear for examination with respect to said claim before a referee of the district in which he resides, upon due notice, if he cannot, without hardship to himself, owing to the distance of his residence, appear before the referee at the time and place above mentioned.

"(5) The referee erred in ordering, in the alternative, that the said Frank M. Fargo appear for examination with respect to said claim before a referee of the district in which he resides, upon due notice, if he cannot, without hardship to himself, owing to the distance of his residence, appear before the referee at the time and place above mentioned, without providing for the payment of the expenses and counsel fees of the said Frank M. Fargo by the petitioner upon whose petition the order for examination was made.

"For the information of the court, the following papers are annexed hereto.

"(1) Copy of the claim of Frank M. Fargo.

"(2) Petition of the Provident Life & Trust Company, trustee, asking for a re-examination of the above claim.

"(3) Answer of claimant.

"(4) Order of referee above referred to.

"(5) Claimant's petition for review.

"For further information of the court, it is proper that I should say that the order complained of was made in the alternative because the statement made by claimant's counsel at the hearing was that it would be a hardship to bring him some 800 miles from his home, and this I desired, if possible, to avoid. Under the order as made, the claimant's testimony may be taken either at Philadelphia or at his place of residence, and in this regard I believe the case of *In re Kyler*, 2 Ben. 414, Fed. Cas. No. 7,956, to be a sufficient precedent.

"I did not include in the order the expenses of travel to and from Philadelphia, or the claimant's hotel bill whilst here. At the time of hearing, and before the order was reduced to writing, an agreement in this regard was reached between counsel for claimant and trustee; the latter agreeing to pay these expenses if the testimony should be taken here. As this agreement was made in my presence and with my approval, it seemed unnecessary to incorporate it in the order.

"With respect to the allowance of counsel fees, I know of no reason for making a distinction between counsel for this particular claimant and counsel for other claimants. The claimant is a party to the proceedings. He is seeking to establish his right to a pro rata proportion of the fund. The difference between his position and that of the claimants generally is that their proofs, as filed, establish their rights; whereas in his case the connection between the bankrupt and himself, the circumstances surrounding the claim as made, and lack of particularity of statement give occasion for further inquiry. If, under the circumstances, the claimant desires the benefit and advice of counsel, why should it not be at his own expense?

"The claim in question was forwarded to the referee by mail from Milwaukee. At the time of the receipt there was no fund in the trustee's hands for the payment of claims. A fund recently realized has made the payment of a dividend possible in the near future, and the claims of creditors are now being scrutinized with greater particularity than at the time of their original presentation, for the purpose of dividing the fund among those who may be lawfully entitled to participate in such distribution. From such examination it appears that Fargo's claim, as filed, is founded on moneys advanced under an 'agreement or understanding' with Watkinson. Whether such agreement was verbal or written does not appear. If written, the agreement, under the rules of practice, should have been annexed to the claim. From the petition of the trustee—and its allegations in this regard are not denied by the claimant—it appears that Fargo is a son-in-law of Watkinson. This circumstance, which was not known to the referee previously, is material. In *re Rider*, 3 Am. Bankr. R. 192, 96 Fed. 811. By the express terms of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), the referee may, for 'cause,' on his own motion, continue the consideration of claims, or he may, on motion of the trustee, reconsider allowed claims. Neither the terms of the act, nor the general orders, require the petitioner to aver facts which, if proved, would defeat the claim. It is only necessary, in my judgment, to aver facts which, if true, are a sufficient cause for the re-examination of the claim. The claimant pleads the delay of the trustee as a bar. Until the present time there has been no possibility of the payment of a dividend, and there has been no necessity for the trustee to take such action, especially as Watkinson until quite recently has been in its employ. Moreover the act expressly provides for the re-examination of claims at any time 'before the estate is closed.'"

The foregoing report of the learned referee is adopted as the opinion of the court. The order recommended is so far modified, however, as to provide that if the examination of the claimant is held in Philadel-

phia, and if his claim shall be finally allowed, he shall be repaid his reasonable traveling and hotel expenses. In other respects, the order is approved, except that another day for the claimant's examination must now be fixed by the referee.

THE VIRGINIA JACKSON.

THE MICHAEL J. COFFEY.

(District Court, S. D. New York. May 6, 1904.)

1. COLLISION—TOW AND CROSSING TUG—VIOLATION OF RULES.

A tug on the way from a pier in North river to New Jersey in the evening, with four coal barges in tow on one side, and two on the other, held in fault for a collision between another tug on a crossing course and the starboard barge, on the ground that, having the other tug on her right hand, it was her duty to keep out of the way, whereas she allowed herself to drift with the tide across the other's course. The failure of the other tug to see the lights of the tow, or of the barge to carry proper lights, were neither of them faults contributing to the collision, since it was the duty of such tug to keep her course and speed, which she did until in extremis.

In Admiralty. Suit for collision.

De Forest Bros. and George Holmes, for libellant.

Carpenter, Park & Symmers, for the Virginia Jackson.

James J. Macklin, for the Michael J. Coffey.

ADAMS, District Judge. This action was brought by the Lehigh & Wilkes-Barre Coal Company to recover the damages it sustained on the 19th of December, 1902, about 7 o'clock P. M., by reason of a collision between its coal barge, L. & W. B. No. 39, in tow of the tug Virginia Jackson, proceeding from pier 18 North River to Bayonne, New Jersey, and the tug Michael J. Coffey, proceeding, light, from pier 11 Hoboken, New Jersey, to pier 13 North River, New York side. The Jackson had 6 barges in tow, 4 on the starboard side and 2 on the port side. The No. 39 was the outside boat on the starboard side. The weather was clear and the tide ebb.

When the Jackson, with her tow, reached a point about opposite the foot of Cortlandt Street, New York, several hundred feet out in the river, the Coffey was seen approaching from New Jersey, on the Jackson's starboard hand. Shortly afterwards the collision took place, the Coffey striking the barge a severe blow on the starboard side, about amidships.

Numerous allegations of fault are made by the libellant against both tugs, which it is unnecessary to particularize.

The Jackson claims that the red light only of the Coffey was seen and that she gave no heed to two signals of one whistle each, which the Jackson blew to her, and that instead of keeping her course and passing ahead of the Jackson, the Coffey starboarded her wheel and, keeping on at full speed, struck the barge as stated.

The Coffey alleges that as she was heading for pier 13, New York, she saw the Jackson and tow, but no lights, except the towing lights on

the tug, as the tow was without them and the Jackson's side light not observable, owing to the character of her tow.

The situation was such that it was the duty of the Coffey to keep her course and speed and of the Jackson to avoid her. The testimony shows that the barge had a light aft, on her cabin, and that the side lights of the Jackson were duly displayed. The light of the barge and the tug's green light should have been seen by the Coffey; the latter notwithstanding some cabin projections above the decks of the barges. These projections were too far aft and not high enough to obscure the Jackson's green light. While the failure to see the lights indicated an absence of lookout or some want of care on the Coffey's part, it did not, I conclude, contribute to the collision, because it was the Coffey's duty to keep her course and pass ahead. Those on the Jackson say that if the Coffey had kept her course, she would have passed clear. It is evident that the Jackson was not fulfilling her duty to avoid the Coffey and this failure was the proximate cause of the collision. She was admittedly drifting down the river with the tide and across the Coffey's course. The latter changed her course to port just before the collision. It is barely possible that if she had kept on, she might have cleared by a small margin but it is not probable and the change *in extremis* was not a fault.

The injured boat was not properly lighted, under Rule 11 of the Inland Pilot Rules, in failing to have a light forward, but it appears that such a light would not have had any effect upon the collision and, under the circumstances, the boat was not in fault.

Decree for the libellant against the Jackson with an order of reference. Libel dismissed as to the Coffey.

BUSH CO., Limited, v. CENTRAL R. CO. OF NEW JERSEY.

CENTRAL R. CO. OF NEW JERSEY v. BUSH CO., Limited.

(District Court, S. D. New York. April 26, 1904.)

1. SINKING OF CARFLOAT AT FLOAT BRIDGE—UNSEAWORTHY CONDITION.

Libellant left a carfloat, with nine loaded cars thereon, at respondent railroad company's float bridge at Communipaw, N. J. After respondent had removed the three cars on the starboard track, the float listed to port, and sank with the remaining cars. There was a depth of water of about two feet in the float, which was an unusual quantity; and, when the weight was removed from one side, the water flowed to the port side, and added to the weight there. *Held*, that it was not respondent's duty to inspect the float, and, as it was not notified of its condition, and removed the cars in the usual manner, it was not in fault, but the sinking must be attributed to the unseaworthy condition of the float.

In Admiralty. Cross-actions to recover damages for sinking of carfloat at the railroad company's float bridge.

Albert A. Wray, for Bush Co.

De Forest Bros. (George Holmes, advocate), for Railroad Co.

ADAMS, District Judge. The first of these actions was brought by the Bush Company, Limited, to recover from the Central Railroad

Company of New Jersey the damages, amounting to about \$7,600, caused, it is alleged, by the improper handling on the part of the railroad company of the Bush Company's carfloat Independent Stores No. 3, which was towed to the railroad company's float bridge at Communipaw, New Jersey, on the 20th day of July, 1903. There were nine cars containing merchandise on the float of which the libellant had possession as bailee for hire. The cars were loaded on the float on three parallel sets of tracks, three on each track. The float was towed to the bridge by the Bush company's tug Independent, which left after the float was fastened to the bridge. Subsequently three of the cars were removed from the north side of the float and shortly afterwards the float took a list to port and filled and sank, decks to, causing damages to the float and to the remaining six cars and contents. The Bush Company alleges that the float was seaworthy and the accident caused by negligent handling on the part of the railroad company, and that as to the cargo, the railroad company was liable as a common carrier, in the absence of affirmative proof that the damages arose from some cause for which it was not responsible.

The second action was brought by the railroad company to recover the damages caused by the blocking of its float bridge. The contention is, that the float was unloaded in the usual manner and that the accident was due to her unseaworthy condition in having so much water in her, that when the cars on one side were removed, the weight of water flowed to the other side, causing the float to go down on that side, submerging the outer corner and permitting additional water to enter through a slatted hatchway, with the effect of throwing more weight to port and causing the damages sustained by both parties.

The testimony shows that the float had considerable water in her when she arrived at the railroad company's place. The Independent spent about two hours in pumping on this water and it is contended by the Bush Company, removed the substantial part of it, leaving the float in a seaworthy condition, and that the cause of the accident was the negligent manner of fastening the float to the bridge in the unusually low tide which prevailed, rendering it necessary to force the floating end of the bridge down in the water low enough to allow the float to be toggled on, so that when the weight of a locomotive and a car, which were placed upon the bridge for additional weight, was removed, the bridge arose about 2 feet and depressed the outer end correspondingly.

The testimony does not show that there was any unusual condition of the tide on the occasion, and the facts sustain the railroad company's contention generally. There was an unusual depression of the bridge where the float was fastened to it, owing to her low freeboard. This was partly caused by the water in her, but she was ordinarily lower than most floats and the depression did not excite especial attention. The condition could have been determined by a careful examination, but it was not apparent that a disastrous result would follow an attempt to discharge her and the railroad company can not be held in fault in view of the fact that the proximate cause of the loss was the unseaworthiness of the float. It seems to be the practice of the company to carefully inspect its own floats before they are toggled to the bridge and not to make any fast having more than about 6 inches of water in them,

while this float had about 2 feet, but it appears that it is neither usual nor incumbent upon the company to examine outside floats, which are expected to notify the bridge men if there is anything wrong with them. No such notice was given in this case by the Bush Company's representatives on the scene, and under the circumstances, it can scarcely be said that the railroad company was legally in fault.

The libel of the Bush Company should be dismissed and that of the railroad company sustained, with an order of reference. Decrees accordingly.

FRANK et al. v. UNION CENT. LIFE INS. CO.

(Circuit Court, W. D. Tennessee, W. D. April 22, 1904.)

1. PARTIES—USE PLAINTIFF—BRINGING IN BY AMENDMENT.

Leave will not be granted to amend the writ, before the appearance of the defendant or the service of the writ and the filing of pleadings in the cause, by inserting the name of a third person as plaintiff suing for the use of the persons originally named as plaintiffs, where such third person is not before the court nor within the jurisdiction, and cannot be served with notice of the application, even though it is proposed to reserve to him the right to object to the order, such an order being, in form at least, an adjudication of the right to so use his name.

2. AMENDMENTS—ABSENT PARTIES—PROTECTION BY THE COURT.

It is the duty of the court to exercise its discretion over amendments for the full protection of those who are absent from the record and beyond the jurisdiction of the court.

On Motion to Amend Writ.

L. & E. Lehman and Elias Gates, for the motion.

HAMMOND, J. The previous application to amend the writ, issued some 10 days ago, by inserting the name of Mary Miller as plaintiff, suing for the use of herself and the said Godfrey Frank and others, was refused. The motion now is to allow the amendment, "expressly reserving to the said Mary Miller the right to make any and every objection or issue to this order which she might have made if the writ had been originally issued in the form in which the plaintiffs have now made it by amendment." I think the amendment in its new form also should be disallowed. Our statute of amendments (Rev. St. § 954 [1 U. S. Comp. St. 1901, p. 696]) is very broad in its terms, and very liberally construed, by no court more than this. But, while new parties may be thus made to a suit, and should be allowed to be made very liberally, it is the duty of the court to scrupulously guard the rights of all parties who are absent from the record, and to exercise its discretion over amendments for their full protection. When this application was made, the court inquired of counsel why the amendment was needed, and the purpose of it. It was learned by his statement that Mary Miller had made an assignment of a policy of life insurance issued by the defendant company on her own life to the plaintiffs, Godfrey Frank and others, who brought this suit in its present form. It is desired by the assignees to sue in her name as assignor for the use of these plaintiffs. The court inquired if there were any question of the

statute of limitations, or the like, affecting the bringing of a new suit in the form desired, and was told that the intention was to save costs; and it was insisted that, inasmuch as the plaintiff could have brought the suit without leave of the court in that form originally, they should now be allowed to make the amendment desired, and not be put to the expense of a new suit. This seems plausible enough, and almost conclusive at first, but being informed that Mary Miller is not within the jurisdiction, so that notice of this application for the use of her name could be served upon her, it occurs to me that, notwithstanding the reservation contained in the order, she is put to a disadvantage by allowing her name to be used by way of amendment, instead of using it by the arbitrary choice of the plaintiffs, if they have that right; because, notwithstanding the reservation, the granting of the order is, in a sense at least, an adjudication of the right of the plaintiffs to so use her name. It is true that she has, under the order, the right to object, but non constat that she will ever appear or hear of the amendment to take advantage of that reservation, and it may be in that aspect of no advantage whatever to her; whereas, if the plaintiffs choose to use her name arbitrarily, she at least has the advantage over the method of its use by amendment of not finding on the record any order of the court upon the subject to embarrass her, taken in her absence and without notice to her. This consideration, it seems to me, should control the wise and sound discretion of the court in her favor to refuse the amendment, and leave the plaintiffs to whatever right they have in the premises of bringing the suit in the proper form by new process, instead of amending the old. Making new parties by amendment after the suit has progressed by the appearance of the defendant and the filing of pleadings, so that it can be seen by the record what the relative rights of the parties may be in that matter, may be more liberally indulged under the statute than applications to amend by inserting the names of new parties in the writ before there is service of process or any record of the case by which the court may be guided in determining the matter of amendment. Here the application is to insert the name of a person as usor, by amendment, who is not within the jurisdiction to receive notice, without any formal consent of hers on the record, and when the facts presented in support of the application suggest a suspicion, at least, that the real litigation may be with her as to the validity of the assignment, a matter with which the defendant insurance company has nothing to do. It profits by the amendment, if anything, and the only disadvantage, if any, comes to the absent alleged assignor. Any determination of the right of an assignee, according to the law of this state, to use the name of the assignor in bringing suit, would be premature, and authorities on that question are not now pertinent. If the right exists, this refusal to allow the amendment does not affect it; but to allow the proposed amendment in a sense handicaps an alleged assignor, not before the court to contest the application, by giving the suit the form, at least, of an adjudication in favor of the right to so use her name.

Application refused.

BEVIS v. MARKLAND et al.

(Circuit Court, E. D. Washington. May 14, 1904.)

No. 983.

1. MINING CLAIMS—ADVERSE CLAIMANTS—QUESTIONS—ISSUES.

Where neither party to a suit to recover possession of land held under conflicting mining claims had acquired a perfect right to a conveyance from the United States, and the requirements of the statutes providing for adverse proceedings and suits for the determination of questions respecting conflicting claims had not been complied with, the only issue determinable in such suit was the right of possession.

2. SAME—BURDEN OF PROOF—TRESPASS.

Where plaintiff and defendants claimed land covered by conflicting mining claims, and defendants had not molested plaintiff, or interfered with his possession or that of his grantor, otherwise than by continuing to hold possession in the same manner as before the attempted laying out of plaintiff's claim, the burden was on plaintiff to prove that defendants were mere intruders, having no color of title or right to possession.

3. SAME—COLOR OF TITLE—RIGHT TO POSSESSION.

Where, prior to the time plaintiff's grantor staked out a placer claim on public land, defendants had taken steps to appropriate the same land as a lode claim, and there was some evidence of mineral-bearing rock on the surface, but an entire absence of proof that there was not a vein of metallic ore, such as might be located only as a vein or lode claim, defendants' right to possession was superior to that acquired by plaintiff.

Action at Law to Recover Possession of a Mining Claim. Tried on the merits by the court without a jury. Findings and judgment for the defendants.

E. M. Heyburn, for plaintiff.

John R. McBride, for defendants.

HANFORD, District Judge. The ground which is the subject of controversy in this case is situated about 10 miles from the city of Spokane, in a region of country which is generally agricultural in character, and not known to be mineralized. In the year 1897 the defendant S. S. Markland, together with J. H. Wilson and J. W. Angles, made a location of a vein or lode mining claim 1,500 feet by 600 feet in size, to which they applied the name of the "White Cap Lode," or "Placer Ground," and the defendants have since claimed title to said ground by virtue of the laws of the United States relating to the location of mining claims upon veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, and by reason of compliance on their part with the requirements of the law as to discovery, marking boundaries, posting and recording notices, and expenditure of money and labor during each succeeding year in the development of said claim, and holding continuous possession thereof. Within the boundaries of the White Cap claim there is a large deposit of quartz rock appearing above the surface, in the form of a sugar loaf, which, so far as it has been tested by assayers, contains only a trace of gold and silver, and is 98 per cent. pure silica. Whether it is a mere deposit on the surface, or an outcropping of a continuous vein or lode

penetrating vertically into the earth, and whether the substance is uniform in character, or a mere capping over a vein of ore holding gold, silver, or other metal of sufficient value to yield a profit over and above the expense of extracting it from the base substance which contains it, are queries which the evidence leaves unanswered. The defendants claim, however, that the indications which they have discovered justify them in expending labor and money in the hope that they will develop a valuable gold mine. The rock is very hard, and can be used advantageously in the construction of buildings and lining of smelter furnaces, and may be pulverized and used for the manufacture of glass; and for these purposes it has a commercial value, aside from any additional value which it may have by reason of precious metals contained therein.

The plaintiff claims part of the same ground, including the deposit of quartz, by an assignment to him of a mining claim which his grantor located in the year 1902, as a placer claim, under section 2329, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1432], and other statutes of the United States authorizing citizens to acquire title to placer mines, and lands containing deposits of rock and other substances commercially valuable as commodities. Said claim is called the "Pioneer Placer Mining Claim," and embraces 20 acres of land, being part of a legal subdivision according to United States surveys. By bringing this action to acquire legal and actual possession of the whole of the Pioneer claim, the plaintiff has assumed the burden of establishing a right of possession superior to the rights of the defendants evidenced by their prior actual possession. He must prove affirmatively that his grantor complied technically with all of the requirements of the law in locating a placer claim, and also that the land embraced in the claim was in fact public land of the United States which the law authorized him to locate and take into his exclusive possession as a placer claim. He acquired no right under the placer mining laws to claim or hold a vein of metallic ore; nor to locate ground which, under a prior location of a mining claim, not abandoned, relinquished, nor forfeited, the defendants were holding and claiming bona fide and peaceably. As section 910, Rev. St. U. S. [U. S. Comp. St. 1901, p. 679], prescribes that the "case shall be adjudged by the law of possession," the plaintiff cannot prevail against the defendants if they had prior possession under color of title, and did not by actual force oust him of actual possession. In this action the struggle is for possession only, and the parties cannot have a judicial determination of the question as to which shall ultimately prevail in a contest for the title. Neither party has now a perfected right to have a conveyance of title from the government, and, as the requirements of the statute providing for adverse proceedings and suits for the determination of questions respecting conflicting claims under the mining laws have not been met, the court is not authorized to adjudicate any question, save the one question whether the plaintiff has a lawful right to the exclusive possession of the land within the boundaries of the Pioneer placer claim. Neither the plaintiff nor his grantor have performed any labor in developing the claim, except sufficient to constitute formal compliance with a statute of the state of Washington, and the evidence on plaintiff's part proves nothing with respect to the char-

acter of the claim, other than the surface indications. The plaintiff does not pretend that there is any evidence to sustain the allegation in his complaint that he was wrongfully ousted of possession by the defendants. They have not by force or intimidation molested him, and they have not interfered with the possession of the plaintiff or his grantor otherwise than by continuing to hold possession in the same manner as before the attempted location of the Pioneer placer claim. Therefore it is essential to his success for the plaintiff to prove that the defendants are mere intruders, having no color of title or right to possession.

The court finds from the evidence that the locators of the White Cap claim were citizens of the United States authorized to locate mining claims within the unappropriated public land of the United States, and that they in good faith performed the acts required by law in making a valid location; that they have never abandoned said claim, but have each year performed labor upon and about it of sufficient value to entitle them to hold it, and they are legal owners of said claim, if the original location embraces a vein of rock in place, bearing gold or other precious metal. And it is the opinion of the court that the plaintiff has failed to prove a superior right to possession of the disputed ground. He has failed to prove by a preponderance of the evidence, or any affirmative evidence, that there is not within the disputed ground a vein of metallic ore such as may be located only as a vein or lode claim. I concede that it is impossible to prove to a certainty that any 20-acre tract of ground does not contain in its depths a vein of metallic ore, and that it would be unreasonable to deny the right to locate a placer claim for lack of such proof, where no prior claim conflicts. On the other hand, it would be equally unreasonable to deny the validity of a vein or lode claim, located in good faith and based upon a discovery of indications sufficient to justify the expenditure of labor and money in an effort to uncover a valuable mine, before development work has progressed sufficiently to disprove the surface indications. If lack of evidence to prove the existence of a vein of metallic ore of sufficient value to pay for extracting the metal were sufficient to entitle the locator of a placer claim to recover possession from a prior locator, then a subsequent discovery of a vein apparently valuable would entitle a second locator of a vein or lode claim to recover possession from the owner of a placer claim, without waiting to demonstrate that such vein is in fact valuable, but my attention has not been directed to any precedent or statute or sound reason for permitting a claim jumper to occupy the attention of the courts in litigation of actions to recover possession from a prior locator when there is not sufficient evidence to create a positive belief with respect to the facts essential to the validity of the prior location. In this case the quartz formation is unique, and the evidence does not prove that the faith of the defendants in their claim is unreasonable or groundless, nor prove any such facts as are necessary to justify the court in dealing with them as trespassers. The mountain of pure quartz within the disputed ground is of itself evidence of an unusual condition, and until an opening shall have been made into the earth beneath its base, by excavating, tunneling, or boring, it cannot be determined with certainty whether the quartz exposed to view does or does not cover a vein of metallic ore of

considerable value, and, while the nature of the ground is thus uncertain, the court cannot find that the plaintiff has discharged his obligation to prove the most essential fact of his case by a fair preponderance of the evidence.

I therefore direct that findings be prepared for my signature in accordance with this opinion, and that a judgment be entered that the plaintiff take nothing, and that the defendants recover costs.

RANKIN v. MILLER et al.

(Circuit Court, D. Delaware. May 11, 1904.)

No. 231.

1. EQUITY—PLEADING—DEMURRER—ANSWER.

It is within the sound discretion of a circuit court of the United States sitting in equity, when promotive of justice, to decline to decide a suit on demurrer to a bill and to overrule the demurrer and require an answer, reserving to the defendant the right to claim and take by answer whatever advantage might otherwise have been secured by the demurrer.

(Syllabus by the Court.)

In Equity.

Andrew C. Gray and Asa W. Waters, for complainant.
Saulsbury, Ponder & Curtis, for defendants.

BRADFORD, District Judge. George C. Rankin, receiver of The First National Bank of Alma, Kansas, has filed his bill against the executors and trustees under the will of Robert H. Miller, deceased, the surety in the testamentary bond of the executors, and the legatees and devisees of the decedent, to enforce an alleged statutory liability founded on the ownership by the decedent at the time of his death of shares of the capital stock of the above named bank. Each of the defendants separately has demurred to the bill and assigned twelve grounds which are identical in each and every demurrer. After careful consideration of the bill and the exhibits made part thereof, in connection with the various grounds of demurrer assigned, and the arguments of counsel, I am satisfied that this suit should not be finally or otherwise decided on demurrer, but only after answer and the production of evidence. The latter course is better calculated to secure an intelligent and just decision; the right being reserved to those properly made defendants to claim and take by answer the same advantage which otherwise they might have enjoyed under the demurrers. It is well settled that the adoption of such a course when promotive of justice, is within the sound discretion of the court. The bill, however, clearly cannot be sustained against The Equitable Guarantee and Trust Company, surety on the testamentary bond of the executors. No appropriate relief, if, indeed, any relief, is prayed against that company. Nor can the court in this suit, under the prayer for other and further relief, grant any against it. Wholly aside from the effect of the statutory limitation applicable in Delaware to suits on testamentary bonds, section 1, c. 123, Rev. Code Del. p. 888, it would not accord with the prin-

ciples regulating the exercise by this court of its jurisdiction in equity to enter, on the case as made by the bill, any decree against the surety. Leave will be granted to the complainant to amend his bill on or before the first Monday in June next by striking out The Equitable Guarantee and Trust Company as a party defendant; and in case the bill shall be so amended the demurrers will be overruled and the remaining defendants required to answer by the first Monday in July next, with the right by answer to claim and take the same advantage which they might otherwise have secured by demurrer. In case the bill shall not be so amended, the same will be dismissed with costs, but without prejudice.

In re GIFT.

(District Court, M. D. Pennsylvania. April 23, 1904.)

No. 340.

1. **BANKRUPTCY—OBJECTIONS TO DISCHARGE—AMENDMENT.**

A specification of objections to a bankrupt's discharge is in the nature of a pleading setting up matters of fact, and is required to be verified, but, being a matter of form, a verification may be supplied by amendment.

2. **SAME.**

An amendment of objections to the discharge of a bankrupt in matter of substance is only allowable (after the time within which objections are required to be filed) where the amendment is no more than an amplification, by the supplying of details, of charges which are substantially stated in the original.

3. **SAME—GROUNDS—FRAUDULENT TRANSFER OF PROPERTY.**

Specifications of objection to the discharge of a bankrupt, alleging that, within four months prior to the filing of his petition, in contemplation of bankruptcy, and with intent to defraud his creditors, he purchased certain household goods specified, which he transferred to a woman to whom he expected to be, and was afterward, married, and which were not included in his schedules, are legally sufficient, under Bankr. Act, § 4b (Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411]), as amended, which does not require an allegation in such case that the transfer was "knowingly and fraudulently" made, as is the case where the act charged is an offense punishable by imprisonment.

In Bankruptcy. On certificate from referee.

Charles P. Ulrich, for excepting creditors.

Charles M. Clement, for bankrupt.

ARCHBALD, District Judge. On February 26, 1904, within the time limited by the law, the First National Bank of Beaver Springs, a creditor of the bankrupt, filed the following objection to his discharge:

"That, at or about the time said bankrupt was preparing and arranging to file his petition in bankruptcy, he purchased household goods worth about \$200, and transferred said goods to his wife as a gift, thereby removing or concealing property with intent to hinder, delay, and defraud his creditors, and that said household goods thus given by said bankrupt to his wife were not scheduled by him as assets of his estate."

¶ 1. As to right to reverify, see *In re Vastbinder*, 126 Fed. 417.

The paper was signed in the name of the bank by the president, but was not verified, and exception has been taken to it on that ground. It is also claimed that it does not state with sufficient definiteness the ground of objection to the discharge, nor bring it within the law. Upon this the creditor moves to amend by filing properly verified specifications charging, in substance:

"That on or about June 26, 1903, the bankrupt purchased of certain parties—naming them—goods and merchandise of the value of \$115.11, to wit, 75 yards of Ingrain carpet; 30 yards of Brussels carpet; six Brussels rugs; a dozen and a half of window shades; four large and three smaller pictures; two tubs; one mirror; half a dozen knives and forks, a dozen teaspoons, and a dozen tablespoons, all of Rogers' silverware; a silver butter knife and a silver sugar shell; a clock; and 25 yards of stair carpet. That these goods were directed by the bankrupt to be shipped to Northumberland, Pa., where they were received by him, although his residence at the time was elsewhere, and were given by him to his present wife, to whom he had not yet been married, but was about to be, knowing at the time that he was insolvent, and being about to go into bankruptcy; thus knowingly and fraudulently transferring the said goods with intent to hinder, delay, and defraud his creditors; the said goods having since that time been in the joint control, use, and enjoyment of the bankrupt and his wife, and not having been included in the schedule of his assets. Also that within four months of filing his petition he had similarly purchased of other parties who are named household furniture, unspecified, of the value of \$110.88, which he also gave to his wife, at or about the same time, with similar fraudulent purpose."

The question is whether this amendment should be allowed.

All pleadings setting up matters of fact are required by the bankruptcy act to be verified. Act July 1, 1898, c. 541, § 18c, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]. And objections to a discharge, according to the better opinion, being of that nature, should be made under oath (*Collier's Bankruptcy*, 161; *Brandenburg's Bankruptcy*, § 348; *In re Brown*, 7 Am. Bankr. R. 252, 112 Fed. 49; *In re Baernkopf*, 9 Am. Bankr. R. 133, 117 Fed. 975; *In re Glass*, 9 Am. Bankr. R. 391, 119 Fed. 509), although, as pointed out in *In re Jamieson*, 9 Am. Bankr. R. 681, 120 Fed. 697, where it is held to be unnecessary, none is provided for in the form promulgated by the Supreme Court. *Collier*, 639, Form 58. The right to supply a verification where it has been omitted would therefore seem to be undoubted; it being, at best, a matter of form only.

But an amendment in matter of substance is considerably different, and, after the time within which objections are required to be filed, is only allowable where there is already of record sufficient to justify it. *In re Mercur*, 8 Am. Bankr. R. 275 (D. C.) 116 Fed. 655; *Id.*, 10 Am. Bankr. R. 505, 122 Fed. 384, 58 C. C. A. 472. The specifications as amended must merely amount to an enlargement of the original, and, if they exceed this, they are not entitled to come in. The question in the present instance is whether or not they do.

In the original objection given above, the charge made against the bankrupt, in substance, is that he had concealed certain of his property with intent to defraud his creditors, to wit, by purchasing household goods when in contemplation of bankruptcy, and transferring them as a gift to his prospective wife, omitting them subsequently from his schedules when he came to file his petition. In the specifications sought to be filed as an amendment the date of the purchases is given, the

parties from whom they were made, the particular goods referred to, and the means taken to remove or conceal, or, as it is now charged, to transfer them; repeating the allegation that the gift or transfer was made in contemplation of bankruptcy, with intent to defraud creditors. There is a slight variance in the charge, as it will be noted, concealment in the one case, and a fraudulent transfer in the other, being alleged; but the facts are the same, whatever character is ascribed to them, so that it is not material. Neither is the added suggestion that the bankrupt was at the time insolvent. Notwithstanding the criticism made upon these proposed changes, the amendment as a whole is, as it seems to me, a mere amplification of what had preceded it, and is therefore to be allowed. It simply presents in detail that which had been previously stated in outline, and, the object being to give notice to the bankrupt of what he has to meet and defend, he had that effectively by the original; the specifications as amended merely presenting it in fuller form.

It is urged, however, that even as restated the specifications are not legally sufficient, but this cannot be successfully maintained. By the amendment of 1903 (Act Feb. 5, 1903, c. 487, § 4b, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411]) the transfer or concealment of property at any time within four months prior to the filing of the petition, with intent to hinder, delay, or defraud creditors, is in so many words made a ground for withholding a discharge, and that is the basis of the opposition here. The argument that the transfer or concealment must be charged to have been knowingly and fraudulently made confuses the decisions based on the objection that there has been a false oath, and has no application here. The further suggestion is made that the alleged fraudulent disposition and concealment of property was nothing more than a purchase of goods with which to start housekeeping, taking the form of a wedding present to his wife; but this goes into the facts, which are not before me, and, even if that were the case, I am not prepared to say, if the intent was there, that it might not amount to a fraud.

The amended specifications are allowed.

TROY WAGON WORKS v. VASTBINDER.

(District Court, M. D. Pennsylvania. May 19, 1904.)

No. 366.

1. BANKRUPTCY—ACT OF BANKRUPTCY—EVIDENCE.

On an issue as to the commission of an act of bankruptcy by transferring notes with intent to give a preference, statements in the contract under which goods were furnished to the alleged bankrupt that he took the same for sale on commission, the notes to belong to the party to whom they were transferred, are not conclusive where the whole contract, taken together, shows that defendant became obligated to pay the invoice price of the goods, and the notes were taken in his name and indorsed by him.

2. SAME—INVOLUNTARY PROCEEDINGS—ISSUES.

Where the act of bankruptcy charged in an involuntary petition was the giving of a preference while insolvent, a denial in the answer that defendant committed such act of bankruptcy must be construed as a denial

of insolvency, at least where it has been so accepted by the petitioners and evidence taken on the issue.

3. SAME—PROOF OF INSOLVENCY.

Evidence examined, and *held* insufficient to show insolvency at the time of the commission of the act of bankruptcy alleged.

In Bankruptcy. Involuntary proceedings. Hearing on petition, answer, and proofs. See *In re Vastbinder*, 126 Fed. 417.

N. H. Ryan and E. H. Owlett, for petitioners.

David Cameron, for respondent.

ARCHBALD, District Judge. These are involuntary proceedings begun by creditors, the only act of bankruptcy sufficiently charged being that the respondent, within four months next preceding the filing of the petition, transferred, while insolvent, good and collectible promissory notes, to the value of \$500, to Charles H. Childs & Co., with intent to prefer them above his other creditors. The respondent contests the proceedings, and denies that he made any such transfer of notes "then held and owned by him"—an argumentative denial, as will appear by the sequel—or that he transferred any such notes with intent to create a preference. He also declares, in general terms, that he did not "at any time commit any act of bankruptcy alleged in the petition." It is, however, the conceded fact that, within a short time prior to the institution of the proceedings, he did transfer to Childs & Co. a number of promissory notes for the purpose of closing his account with them, and, whether this was done with the express intent of preferring them or not, it had that effect, and must be presumed, if the notes were his, to have been so intended. The transfer is sought to be justified on the ground that the existing relation between the parties was one of agency only, the respondent merely taking the goods to sell on account, and turning over the proceeds after deducting his commission. Written orders on Childs & Co. are produced to verify this, signed by the respondent, in which he declares that he so receives and holds them; but this is materially qualified by the other evidence, and the court will go behind mere forms to get at the real transaction. Indeed, the orders themselves—aside from the fine print at the bottom—bear on their face the proof that they represent actual purchases, and not consignments. The goods are disposed of to the respondent for a specific price, and on definite terms of credit, with provision on most of them for a discount if paid within a certain time. And while it may be true, as stated by the respondent, that he was only required to pay for each lot as fast as he disposed of it, accounting to Childs & Co. for whatever he received in the way of notes or other securities, yet in making sales he did so in his own name, and was held directly responsible, the securities obtained being taken to himself personally, and guaranteed by him when they were turned over. His obligations to Childs & Co. were plainly regarded as a debt, and he so speaks of them in his testimony. There are too many indicia in this of an ordinary purchase to warrant the conclusion that anything else was in fact intended. Childs & Co. must therefore be held to be creditors like the rest, and the notes, which he turned over to them, his own, notwithstanding his assertion to the contrary in his answer.

But it is essential to a preference that the debtor should have been insolvent at the time, and unless this appears there is no act of bankruptcy. It is claimed, however, by the petitioners that insolvency is not denied in the answer, and that it is not therefore put in issue. It must be confessed that the answer in this respect is not all that could be wished for, and that the denial of insolvency, at best, is inferential. It is to be found, if at all, in the general averment that no act of bankruptcy such as is charged has been committed. This, argumentatively at least, is a denial of whatever enters into the act relied on, including in the present instance the insolvency of the respondent. The petitioners evidently so regarded it, for they went on and took extended proofs on the subject, to which the respondent on his part made reply, and, the issue having been accepted in this way, it hardly lies in their mouth to now question it when the case is before the court upon the merits.

There is a wide difference between counsel as to the extent of the respondent's indebtedness at the time of the alleged preference as shown by the evidence; but while neither side has worked it out exactly right, it by no means amounts to what is claimed for it on the part of the petitioners. On the contrary, a careful examination of the evidence has convinced me, that, disallowing the \$479 paid to the Troy Wagon Works, which evidently went to meet a bill not now brought forward, and including an estimated indebtedness to Childs & Co., still remaining, of \$200 or \$300, the most that can be figured is \$3,500 in round numbers. On the other side of the account, as available assets to meet these liabilities, are, first, the respondent's stock of farming implements, valued at \$3,000 to \$3,500, outside the goods obtained from Childs & Co., which must be counted in, and amount to some \$200 or \$300 more; next, the leases and securities turned over to Mr. Broughton to collect for the benefit of creditors, which have a conceded value of \$1,000, on a face value of \$4,000; and, besides this, the property at Elmira, which was put in the hands of D. R. Thomas for sale, worth \$1,500 or \$1,600; making an aggregate of from \$5,700 to \$6,400 in all. On the highest of these estimates, which is not extravagant, there is a margin of \$2,900 above liabilities, and on the lowest there is \$2,200, the respondent being clearly solvent whichever one is taken. And even if the property at Elmira be thrown out, on the ground that it had been put out of his hands by the respondent for the purpose of defrauding creditors—of which I am far from persuaded—enough would still remain to produce the same result.

It will be noticed that this consideration of the case is based upon the evidence produced, without regard to who has the burden. It is claimed that it was upon the petitioners, on the ground that the respondent appeared at the hearing with his books and papers and submitted to an examination, fulfilling the requirements of the law, which thereupon relieved him from proving his solvency. But, on the other hand, it is said that the production was not voluntary, having been enforced by a subpoena duces tecum and the order of the referee, and that the respondent is not therefore entitled to the benefit otherwise to be accorded it. Also, that he was not frank in his disclosures, and that only after the closest inquiry, and at the very end of his examination, did he tell anything about the securities which he had put in the hands of Mr.

Broughton, or the property that had been taken to Elmira. Furthermore, that his accounts were incomplete, confused, and unsatisfactory, and afforded no material aid in getting at his true condition. But without stopping to discuss either of these contentions, I base my disposition of the case upon the undisputed evidence upon which it can be safely made to rest. Convinced by it as I am, of the solvency of the respondent, the proceedings are dismissed.

In re GASKILL et al.

(District Court, D. Washington, E. D. May 2, 1904.)

No. 309.

1. INSOLVENCY—TRUST FUND.

In dealing with the assets of insolvent debtors the courts will protect trust funds for the benefit of the beneficiaries when it is possible to trace such funds and segregate the same from the assets of the insolvent.

2. SALES IN BULK—STATUTES—COMPLIANCE—TRUST FUNDS—BANKRUPTCY—PREFERRED CLAIMS.

Where a sale of a stock of goods was made in bulk to buyers, who subsequently became bankrupt, and the seller fully complied with Laws Wash. 1901, p. 222, c. 109, § 1, requiring such sales to be accompanied by a list of the seller's creditors and payment of the price to be applied to their claims, a part of the price remaining unpaid at the time of the buyers' bankruptcy constituted a trust fund for the benefit of the seller's creditors, and was entitled to be paid in full as a preferred claim, less its pro rata share of the expenses of the bankruptcy proceedings, in so far as it represented a part of the stock remaining at the time of the bankruptcy, or was capable of being segregated from the other assets of the bankrupt.

In Bankruptcy. Heard on objections to claim of Mrs. Karen Fogh for balance of purchase price of a stock of merchandise sold in bulk.

The bankrupts, at the time of purchasing the goods, executed a contract in the nature of a chattel mortgage to secure deferred payments, which contract did not conform to the chattel mortgage law of the state, and because of such informalities was held to be void. Chapter 109, p. 222, Laws Wash. 1901; Supp. Ballinger's Ann. Codes & St. § 3102; Pierce's Code, § 5346—makes it the duty of the vendor at the time of disposing of a stock of merchandise in bulk to give to the vendee a sworn statement containing the names and addresses of all creditors to whom debts are due or to become due, with the amount of the vendor's liability to each, and that statute was complied with. Part of the purchase money being still unpaid at the time of the adjudication, and the trustee having received part of said stock of merchandise, and having disposed of the same for cash, Mrs. Fogh, the vendor, filed a claim for said balance, and petitioned the court to allow the same as a preferred claim to the extent of the proceeds from the trustee's sale of said stock. The trustee filed objections to the allowance of the preference claimed. Objections overruled, and claim allowed for the full amount as a general claim and as a preferred claim against the remainder of the proceeds of the particular goods which the bankrupts purchased from Mrs. Fogh, after paying therefrom a proportionate share of the costs of the bankruptcy proceedings.

Happy & Hindman, for Karen Fogh.

Danson & Huncke, for trustee.

HANFORD, District Judge (after stating the facts as above).
The memorandum decision heretofore filed in this case only disposed

of the question raised as to a vendor's lien claimed by Mrs. Karen Fogh, based upon the written contract executed by the bankrupts at the time of their purchase of her stock of merchandise, and reserved for further consideration the question whether the statute of 1901 (Laws Wash. 1901, p. 222, c. 109) created a trust for the benefit of her creditors; and since the filing of that decision a new claim has been presented in her behalf, supported by an affidavit of one of her attorneys, and the case has been again submitted for decision. The court adheres to its former decision adverse to the lien so far as its validity depends upon contract, but the question as to a trust remains to be decided. In accordance with the principles of equity, the courts of this country, in dealing with estates of insolvent debtors, protect trust funds for the benefit of the beneficiaries, when it is possible to trace such funds and segregate the same from the assets of the insolvent. See *The Spokane County and City Cases against the Receiver of The First National Bank of Spokane* (C. C.) 61 Fed. 538, and 68 Fed. 979-983, 16 C. C. A. 81. In this case it is not disputed that Mrs. Fogh made a sale of her stock of merchandise in bulk to Gaskill & Sutton, and that in compliance with the statute of 1901 she gave them a sworn statement containing a list of her creditors, specifying the amounts due to each, etc., and that part of the debts so listed are still unpaid; and the claim now under consideration is for the balance of the purchase price which Gaskill & Sutton agreed to pay for the stock of merchandise. It is also a fact in the case that part of the identical merchandise which Mrs. Fogh sold was on hand when the trustee took possession of the assets of Gaskill & Sutton, and the exact amount which he has received as proceeds from the sale thereof can be ascertained. The statute of 1901, above referred to, was undoubtedly intended to provide for the security of creditors in cases where an entire stock of merchandise is sold in bulk. The Supreme Court of this state in the case of *FitzHenry v. Munter & Johnson* (Wash.) 74 Pac. 1003, has declared that the object of the statute is "to hold the goods of debtors, under such circumstances, as a trust fund for the benefit of all creditors, and to hold the purchaser in possession as a trustee for such creditors." In that case the owner of a small stock of merchandise had commenced to dispose of it by an auction sale. After the most valuable goods had been sold in that manner, she accepted an offer of 50 per cent. of the invoice price for the remainder, and gave possession to the vendees. She then refused to give a list of her creditors, as the law requires in cases of sales in bulk, and payment of the purchase money was withheld. She then made a second sale for a nominal consideration to FitzHenry, who commenced an action against Munter & Johnson, the vendees in possession, to recover the amount which they had agreed to pay for the remnants of the stock. Creditors of the vendor who had obtained judgments against her and garnished Munter & Johnson were made parties by the consolidation of their actions with FitzHenry's action. Munter & Johnson deposited the purchase price for which they were liable in the registry of the court, to be disbursed to the party or parties entitled thereto, as the court should adjudge. The vendor filed a disclaimer. Then a new party as assignee of other creditors

of the vendor intervened, claiming that the money should be distributed pro rata among all the creditors of the vendor. The superior court denied the right of the intervener to any share of the fund, and dismissed him from the case. That judgment was reversed by the Supreme Court, which decided, upon the trust-fund theory, that the money paid into the registry of the superior court should be distributed pro rata among all the creditors who were parties to the suit, including the intervener. In going to the extent of depriving judgment creditors of the advantage gained by their garnishment proceedings the Supreme Court necessarily gave full effect to the theory contained in the above excerpt from the opinion, and actually determined that by force of the statute the vendees became trustees for all the creditors of the vendor before they were garnished by some of the creditors. The words "such circumstances" in the opinion indicate a cautious intention to limit the effect of the decision to the case decided and cases involving similar circumstances. In the case which this court is now considering the circumstances are similar, except that the vendor and vendees observed the requirements of the statute at the time of the sale. That difference, however, to deprive the vendor's creditors of the benefit of the trust-fund theory, requires a construction of the statute which will make disobedience effective to create legal rights in favor of creditors unknown to the vendees, and leave the law ineffectual for the security of creditors who are listed and made known to the vendees in the manner prescribed. It is my opinion that to so construe the law would be unfair both to the creditors and the vendees. I hold, therefore, that the net proceeds of the goods formerly owned by Mrs. Fogh, now in the hands of the trustee, is a trust fund for the security of the balance due to her creditors, specified in the schedule which she gave to Gaskill & Sutton, and I direct that the amount of said fund be paid to them pro rata. By "net proceeds" I mean the amount realized by the trustee from the sale of said goods after deducting therefrom a proportionate share of the expenses of the bankruptcy proceedings payable out of the assets of the bankrupts.

ISRAEL v. ISRAEL.

(Circuit Court, E. D. Pennsylvania. May 20, 1904.)

No. 24.

1. FEDERAL COURTS—JUDGMENTS—JURISDICTION.

Rev. St. § 905 [U. S. Comp. St. 1901, p. 677], providing that the record of a judgment after due notice in one state shall be conclusive evidence in the courts of another state or of the United States of a matter adjudged, etc., prescribes a rule of evidence rather than one of jurisdiction; and hence, where an action is brought in the federal courts on a judgment of a state court, the federal court will look to the original cause of action to ascertain whether it is such a judgment as the federal court has jurisdiction to enforce.

¶ 1. Conclusiveness and effect of judgments as between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank of Memphis v. City of Memphis*, 49 C. C. A. 468.

2. **SAME—FULL FAITH AND CREDIT.**

Where plaintiff obtained a judgment for alimony in a state court, so much of the claim as had been reduced to final judgment was entitled to be given full faith and credit in an action to enforce the same in the federal courts.

3. **SAME—FUTURE ALIMONY.**

A claim for future alimony under a judgment of a state court is an action of a civil nature within the jurisdiction of the federal courts, other jurisdictional requisites being present.

Beck & Robinson, for plaintiff.

David Wallerstein, for defendant.

HOLLAND, District Judge. The plaintiff, Tillie B. Israel, a citizen of the state of New York, brought suit against Abraham Israel, a citizen of Pennsylvania, residing in the city of Philadelphia, for the sum of \$2,353.85, with interest, upon the following cause of action: In May, 1899, Abraham Israel began an action in the Supreme Court of New York to secure an absolute divorce from his wife, Tillie B. Israel. His wife filed an answer, denying the charges made, and set up a counterclaim, in which she asked for a separation from her husband, Abraham Israel, and for maintenance. In July, 1902, the Supreme Court of New York made a decree dismissing Abraham Israel's complaint, sustaining Tillie B. Israel's counterclaim, and decreeing to her a separation from bed and board of the plaintiff, her husband, and a separate abode and maintenance from the plaintiff, by reason of his abandonment of and refusal to support her; regulating the custody of the children of the marriage; and awarding Tillie B. Israel alimony in the following terms:

"That plaintiff (Abraham Israel) pay to the defendant (Tillie B. Israel) weekly on Monday of each week commencing on the 30th day of June, 1902, and until the further order or judgment of this court, the sum of thirty dollars for the support and maintenance of defendant and the said children; such payment, however, not to be in lieu of dower or right of dower of the defendant in plaintiff's real estate, or any interest in his personal estate in case of his death intestate."

Also adjudging that Abraham Israel should pay the costs, which were subsequently settled by the decree of the court at the sum of \$223.85.

The plaintiff claims in her statement that none of the weekly payments due her under this decree have been paid. The defendant filed a demurrer to this statement, and sets up a lack of jurisdiction in the Circuit Court of this district, for the reason that article 4, § 1, of the Constitution of the United States, which requires that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, does not include an order of a state court for alimony, such as is set up in this case, because it is not a final judgment or a final decree for a fixed sum. If the demurrer's contention that the weekly alimony, due at the time suit was instituted here, amounting to \$2,130, with interest, decreed to the plaintiff, cannot be made the basis of a suit here, the claim in this case would be reduced below the sum of \$2,000, giving the Circuit Court jurisdiction on the ground of adverse citizenship. The full faith and credit clause of the Constitution, above referred to, together with Rev. St. § 905 [U. S.

Comp. St. 1901, p. 677], establishes a rule of evidence, rather than one of jurisdiction. "While they make the record of a judgment rendered after due notice in one state conclusive evidence in the courts of another state or the United States of the matter adjudged, they do not affect the jurisdiction. A judgment rendered in one state does not carry with it, in another state, the efficacy of a judgment upon property or person, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there; and can only be executed in the latter as its law may permit. The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it, and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examining into the validity of the claim), from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it." *Wisconsin v. Pelican Insurance Company, etc.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239. The court therefore will look into the original cause of action, where such a judgment is offered in evidence, to ascertain whether it is such a judgment as will be enforced in the new jurisdiction. If it should appear, as in the case of *Wisconsin v. Pelican Insurance Company*, that the judgment had been obtained in the other state in the enforcement of its criminal laws, the court will refuse to enforce it, because the federal courts have no jurisdiction over controversies between citizens of different states in suits to recover penalties for a breach of the municipal laws of the state where the judgment was obtained. Such laws have no extraterritorial effect, and a judgment obtained for a penalty cannot be made the basis of a claim in the federal courts, notwithstanding the fact that it has been reduced to judgment, as these courts only take cognizance of controversies of a civil nature between citizens of different states.

Should it appear, then, that the United States will enforce a final judgment of another state, where the cause of action is a decree awarding alimony, which has been reduced to judgment, it is obvious that such a cause of action is not regarded as of a criminal nature, but rather a controversy of a civil nature, of which the Circuit Courts have jurisdiction; and their refusal to carry into effect that part of the decree awarding future alimony is not upon the ground of a want of jurisdiction, but for the reason that it has not been reduced to judgment in the other state. It does not follow, however, that it cannot be made the basis of a cause of action cognizable in the Circuit Court, provable as any other claim or demand is proven. It will not, however, receive the same evidential effect as though it had been reduced to a final judgment, and any defense which could be made to it in the other state can be raised in the new jurisdiction.

The effect of the decisions in *Lynde v. Lynde*, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810, and *Laing v. Rigney*, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. Ed. 525, is to establish the fact that alimony is a cause of action cognizable in a federal court, and that so much of the decree of another state, in a cause of this class, as has been reduced

to final judgment, shall receive full faith and credit in the courts of the United States as conclusive evidence of the matters adjudged; but all future payments of alimony must be proven as any other ordinary demand or claim, and reduced to judgment, before recovery upon them can be had; and, if the claim should amount to more than \$2,000, as in this case, it can be made the basis of a suit in a Circuit Court, with a right to the defendant to set up any defense he may have. It is a controversy between citizens of different states of a civil nature. "A controversy is involved, in the sense of the statute, whenever any property or claim of the parties capable of pecuniary estimation is the subject of litigation, and is presented by the pleadings for judicial determination. * * * It matters not that by a showing in the statement the defendant would have a good defense to the cause of action. It does not diminish the amount the plaintiff claims, nor determine what is the matter in dispute; for who can say in advance that the defense will be presented by the defendant, or, if presented, sustained by the court? Suppose an action were brought on a negotiable note for \$2,500, the consideration for which was fully set forth in the statement, and which was a sale of a lottery ticket, or any other matter distinctly prohibited by statute, can there be any doubt that the Circuit Court would have jurisdiction? There would be presented a claim to recover the \$2,500; and, whether that claim was sustainable or not, that would be the real sum in dispute." *Schunk v. Moline, etc., Co.*, 147 U. S. 500, 13 Sup. Ct. 416, 37 L. Ed. 255. The case of *Barber v. Barber*, 21 How. 582, 16 L. Ed. 226, sustains this view, and has never been overruled. It is there stated: "Such a judgment or decree for alimony, rendered in any state of the United States, the court having jurisdiction, will be carried into judgment in any other state, to have there the same binding force that it has in the state in which it was originally given." If, however, this be restricted, by subsequent decisions, to such part of the decree as has been reduced to final judgment, it nowhere appears that suit cannot be brought for the alimony to be paid in the future, and reduced to judgment. This, however, can be fully considered upon the trial of the cause. It is only determined now that the court has jurisdiction.

The demurrer is overruled.

UNITED STATES v. ONE DARK BAY HORSE.

(District Court, D. Vermont. April 25, 1904.)

No. 29.

1. CUSTOMS DUTIES—FORFEITURE—IMPORTATION WITHOUT PAYMENT OF DUTY—LIMITATION TO PROSECUTION.

In proceedings for the forfeiture of certain merchandise imported without the payment of duty it appeared by the averments in the pleadings that the claimant of the property had owned it for more than five years, without knowing or having reason to suspect that it had been imported, that he had never concealed it, and that neither he nor it had since been out of the United States, and that the importation of the merchandise was not known to the customs officers until about six years after the forfeiture accrued. *Held*, that the proceedings were barred, under Rev. St.

§ 1047 [U. S. Comp. St. 1901, p. 727], and Act June 22, 1874, c. 391, § 22, 18 Stat. 190 [U. S. Comp. St. 1901, p. 727], which prescribe, respectively: (1) That proceedings for forfeiture shall be brought within five years after the forfeiture accrued, provided the offender or the property shall, within the same period, be found within the United States; and (2) that proceedings for forfeiture accruing under the customs revenue laws shall be commenced within three years after the forfeiture accrued, provided the time of the absence from the United States of the person subject to such forfeiture, or of any absence or concealment of the property, shall not be reckoned within the period of limitation.

2. SAME—INNOCENT BUYER OF SMUGGLED MERCHANDISE.

The innocent buyer of smuggled merchandise is under no liability to enter it for the payment of duty. Such payment would not relieve a forfeiture already incurred, nor would failure to pay revive it when once barred.

At Law. Information for forfeiture. On claimant's demurrer to replication.

James L. Martin, U. S. Atty.

G. F. Ladd and S. R. Boright, for claimant.

WHEELER, District Judge. This is an information for condemnation of the horse as forfeited by being brought into this country from Canada in avoidance of entry, or declaration for or payment of duties. A claimant has appeared, and pleaded that he purchased the horse on the 21st day of December, 1897, at Berkshire, in the county of Franklin, without knowing or having reason to suspect it had been imported, where he ever since kept it, and has never concealed it, and that he has not himself since been out of the United States, and that the forfeiture did not accrue within three years before seizure. To this plea the government has replied that the forfeiture accrued in 1897, and was unknown to any officer of the government until December, 1903, when the claimant was informed thereof by a deputy collector of customs, and requested to make entry of the horse and pay the duties thereon, which he refused to do; whereupon it was seized as set forth in the information. To this replication the claimant has demurred.

Acts of Congress brought into and forming section 1047 of the Revised Statutes [U. S. Comp. St. 1901, p. 727] barred proceedings for forfeiture after five years, provided the person of the offender or the property should, within the same period, be found within the United States, so that the proper process might be brought against either. Section 22 of an act of June 22, 1874 (18 Stat. 190, c. 391), bars suits or actions to recover forfeitures "accruing under the customs revenue laws" after three years, but provides that time of absence of the person from the United States, or "of any concealment or absence of the property, shall not be reckoned." 1 U. S. Comp. St. 1901, p. 727. The forfeiture was absolute and complete, without any alternative of value, immediately upon the importation in avoidance of the customs office. Rev. St. § 3099 [2 U. S. Comp. St. 1901, p. 2026]; *Caldwell v. United States*, 8 How. 366, 12 L. Ed. 1115; *In re Henderson's Distilled Spirits*, 14 Wall. 44, 20 L. Ed. 815. The allegations of the plea seem to bring the case within both of these sections, except that there is no direct allegation that the forfeiture did not accrue within five years,

to bring it under section 1047 [U.S. Comp. St. 1901, p. 727]. This is perhaps supplied by the allegation in the plea, and also in the replication, that the illegal importation was in 1897, which would be more than five years before seizure. However that may be, the denial that the forfeiture did not accrue within three years, and of any concealment or absence of the property for any time, to be excluded in reckoning, bring the case clearly within the act of 1874. The demurrer would reach back to the first defect, but none is made to appear in the plea itself. The case must turn, therefore, on the sufficiency of the replication as an avoidance of the plea. This is to be governed by the statute itself, which sets forth what shall avoid the effect of the lapse of time. The ignorance of the officers is not made of itself of any effect, but only the concealment or absence of the property is as to that. No absence of the smuggler to be reckoned is in any wise made to appear, if it would be at all material against the innocent claimant, while the presence of the claimant and of the horse is well made to appear. The refusal of the claimant to enter the horse for duty would not, without new importation, work a new forfeiture. The claimant was not, and never was, importer of the horse, and had no occasion to enter it for duties. He was under no liability for the duties, and payment of them would not relieve the forfeiture already incurred, nor failure to pay revive it. So the plea stands good, and the replication does not appear to avoid the effect of it, as now considered, under either section 1047, or the act of 1874.

Demurrer sustained, replication adjudged insufficient, and judgment for claimant.

EDWARDS et al. v. BAY STATE GAS CO. OF DELAWARE et al.

(Circuit Court, D. Delaware. May 17, 1904.)

No. 202.

1. CORPORATIONS—STOCKHOLDERS' ACTION—COSTS.

Where an action was brought by stockholders for the benefit of the corporation and such other stockholders as might come in and make themselves parties, the plaintiffs were parties in their individual capacity, and were liable for costs and disbursements per capita, and not *pro rata* according to the number of shares each held in the corporation.

In Equity.

Geo. Putnam Smith, for petitioner.

C. Godfrey Patterson and Henry Major, opposed.

DALLAS, Circuit Judge. The petition of Henry W. Le Roy for leave to withdraw as an intervening party plaintiff has been argued by George Putnam Smith, Esq., counsel of the petitioner, and C. Godfrey Patterson, Esq., of counsel for complainants. The petitioner admits the correctness of the statement of costs and expenses which has been presented by complainant's counsel, and offers to pay so much thereof as is properly chargeable against him, but he claims "that his *pro rata* share should be proportioned among the interveners per capita, and not per ratio," while, upon the other hand, it is contended that the petitioner is

liable "pro rata according to the number of shares he holds in the company." After reading the affidavits, and carefully considering the statements and briefs submitted, which will be filed herewith, I have reached the conclusion that the position taken by the petitioner should be sustained. It is true that the suit was brought by and on behalf of stockholders for the redress of wrongs alleged to have been perpetrated against a corporation, and, no doubt, if it had been instituted by the corporation itself, the expense involved would have fallen, indirectly at least, upon all the stockholders, in proportion to their respective holdings of stock. But the case must be dealt with as it is. It is in fact the suit of those only by whom it was originally brought, and of those who have since made themselves parties to it. No others have assumed, or could be held to, any liability with respect to it. There cannot, therefore, be any pro rata apportionment among all the stockholders. This intervener is simply one of several plaintiffs in a joint suit, and as such he is bound equally with each of his coplaintiffs, but not as a stockholder, to contribute for liquidation of the disbursements which have been made in its prosecution.

Let an order be prepared granting the prayer of the petition, upon payment by the petitioner of his proportion of the costs and expenses heretofore incurred, which may be ascertained and assessed by the clerk in conformity with this opinion.

WHITEHEAD & HOAG CO. v. O'CALLAHAN.

(Circuit Court, E. D. Pennsylvania. May 19, 1904.)

No. 3.

1. EQUITY—TAKING TESTIMONY BEFORE EXAMINER—OBJECTIONS.

In taking testimony before an examiner for use on a trial, where there is a doubt as to the relevancy or propriety of a question asked on cross-examination, the witness should be required to answer.

In Equity. On application for order directing witness to answer question on cross-examination.

Andrew Wilson, for complainant.

Michael J. Ryan, for respondent.

HOLLAND, District Judge. This is a matter certified to this court by Samuel Bell, special examiner, to compel John O'Callahan, a witness called by the defendant, to answer question No. 95, to wit: "Where is James O'Brien now—where is he employed, or where does he reside?" Counsel for the respondent directed the witness not to answer that question, which direction was observed by him, and witness refused to answer. Counsel for respondent contends that it was not proper cross-examination, as there were no questions asked in direct examination to which this cross-examination is germane.

The rule as to the discretion of the trial court in permitting defendant, at the time of cross-examination of a witness for plaintiff, to examine him as to matters of defense, seems to be different in differ-

ent circuits. It is held in the Sixth Circuit that cross-examination must be confined to the matters testified to upon direct examination (*Montgomery et al. v. Aetna Life Insurance Company*, 97 Fed. 913, 38 C. C. A. 553), and in the Fifth Circuit that the trial court may, in its discretion, permit a plaintiff's witness to be cross-examined by the defendant on matters of defense (*Merchants' Life Association of the United States v. Yoakum*, 98 Fed. 251, 39 C. C. A. 56). The discretion, however, allowed by the courts in Pennsylvania is a very narrow one, and, as a rule, the cross-examination is confined to questions which are germane to the direct examination. In *Brown v. Worster*, 113 Fed. 20, Judge McPherson, in this district, in passing upon a similar question, ruled as follows:

"The witness must answer. * * * If irrelevant or otherwise improper cross-examination is indulged in, it can ordinarily be dealt with satisfactorily as a question of costs. In doubtful cases this, I think, is the proper course. Where the offense is clear, the court has ample power to stop it summarily."

The case at bar comes within the rule in *Brown v. Worster*, and the witness John O'Callahan is directed to answer question No. 95.

WIEMER v. LOUISVILLE WATER CO.

(Circuit Court, W. D. Kentucky. March 18, 1903.)

1. FEDERAL COURTS—PLEA TO JURISDICTION—BURDEN OF PROOF.

Where a bill properly alleges the requisite facts to give a federal court jurisdiction, the burden rests on the defendant to both allege and prove facts relied on to defeat the jurisdiction.

2. SAME—CITIZENSHIP OF COMPLAINANT—REMOVAL TO ANOTHER STATE.

That a complainant removed from one state to another for the purpose of acquiring the right to sue in a federal court in the state of his late residence is neither unlawful nor wrongful, and will not defeat the jurisdiction of such court if the removal was with the bona fide intention of remaining permanently, and acquiring citizenship in the new state.

On Plea to the Jurisdiction.

See 130 Fed. 246, 251.

Lane & Harrison and John Roberts, for complainant.

Burnett & Burnett and George Du Relle, for defendant.

EVANS, District Judge. The plea of the defendant that the court has not jurisdiction of the action is based upon two grounds. The first is that the complainant, when he brought the action, was not a citizen of Indiana, but was a citizen of Kentucky, and that he is still a citizen of the latter state. The second is that the matter in dispute does not exceed the sum of \$2,000 besides interest and costs. By agreement of the parties, the evidence on the issues raised by the replication to the plea was heard orally before the court, and at the outset the question of the burden of proof was raised. In view of the explicit

† 2. Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullagham*, 27 C. C. A. 298.

See Courts, vol. 13, Cent. Dig. § 854.

averments of the bill, the court was of opinion, and so ruled, that it rested upon the defendant, and read from 1 Bates, Fed. Prac. § 252, as follows:

"When the plaintiff in his bill avers the jurisdictional facts in conformity to the Constitution and laws of the United States, the jurisdiction must be taken as *prima facie* existing; and, if the defendant desires to object to the jurisdiction, the burden is upon him to both allege and prove the facts which are relied upon to defeat the jurisdiction; and, under the act of 1875 (Act March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508]), the defendant must show by proof to a 'legal certainty' that the suit does not really and substantially involve a dispute or controversy within the jurisdiction of the court."

The decisions of the courts abundantly sustain the propositions thus stated.

No testimony was offered by the defendant in support of the second ground of objection to the court's jurisdiction set out in the plea, and as to the first ground the court finds from the evidence, as a conclusion of fact, that when the action was instituted the complainant was, and that he is now, a citizen of the state of Indiana; it appearing that previously thereto he had actually removed from Kentucky to Indiana with intent permanently to remain in the latter state, and with the intention to at once become a citizen thereof. Without going into a discussion of the testimony in detail, that is the conclusion which it leads the court to reach. A change of citizenship may be, and usually is, made instantaneously, one being taken on precisely when the other ceases; and, even if this change were made with a view to acquire, among other things, the right to sue in this court, that result was not affected if the change was in fact made, and with the intention to permanently remain in Indiana, and become thenceforward a citizen of that state, which complainant swears was the case in this instance. Such an object is open to the citizens of the several states, and is within the rights of any person, and is neither unlawful nor wrongful. *Robertson v. Carson*, 19 Wall. 106, 107, 22 L. Ed. 178; *Rice v. Houston*, 13 Wall. 66, 20 L. Ed. 484. Of course, if there was no such intention as has been indicated, and if the party in fact simply meant to sojourn temporarily in the new state, he would not acquire citizenship there, and would not and could not impose upon the federal court by a sham pretense. *Morris v. Gilmer*, 129 U. S. 328, 9 Sup. Ct. 289, 32 L. Ed. 690.

To say the least, the *prima facie* case made by the averments of the complainant's bill has not by any means been overcome by the testimony. The court accordingly overrules and denies the plea to the jurisdiction filed by the defendant as not having been sustained by the evidence.

WIEMER v. LOUISVILLE WATER CO.

(Circuit Court, W. D. Kentucky. March 19, 1903.)

1. EQUITY JURISDICTION—REMEDY AT LAW—MANDAMUS.

A Circuit Court having no power to grant a writ of mandamus except as ancillary to some other proceeding, the fact that such remedy might be appropriate to the facts alleged in a bill will not oust the court of equity of jurisdiction.

2. SAME—ADEQUACY OF LEGAL REMEDY.

A right of action at law for the recovery of damages will not oust the jurisdiction of equity where the remedy would apparently not be as prompt and efficacious as in equity; as where it appears from the allegations of the bill that a court of equity, by compelling defendant to perform a plain duty, may prevent complainant from being subjected to a multiplicity of actions by third persons for the breach of contracts which he has entered into, and which the wrongful action of defendant, sought to be enjoined, will make it impossible for him to perform.

In Equity. On demurrer to bill.

See 130 Fed. 244, 251.

The bill of complaint is as follows:

To the Honorable the Judges of the Circuit Court of the United States in and for the Sixth Circuit and Western District of Kentucky:

Robert Wiemer, of the city of New Albany, and a citizen of the state of Indiana, brings this, his bill, against the Louisville Water Company, a body corporate, organized and existing at and during all the times hereinafter mentioned under the laws of the state of Kentucky, having its chief office and place of business in the city of Louisville, and is a citizen of the state of Kentucky, and thereupon your orator complains and says he has for more than a year last past traded and done business under the name and style of the Louisville Sprinkling Company; that his said business is now, and has been for a year past continuously, that of sprinkling the streets and public ways of the city of Louisville in front of the lots, residences, and houses of such persons as employ him to do so and pay him therefor the contract price for such service; that he has invested a large amount of money in the purchase, and that he now has on hand a large number of carts constructed and built at great expense for the purpose of sprinkling such streets, and which are valuable and useful only for such purpose, and cannot be made and are not valuable or useful for any other purpose; that at great expense he has equipped said carts with the harness and furniture necessary for their use in the business aforesaid, and that such harness, furniture, and equipments, as above mentioned, used in connection with said sprinkling carts, are valuable and useful in such service, but are practically of no value—of no service—in any other business; that in the acquisition and purchase of such sprinkling carts, furniture, harness, and equipments he has paid and laid out more than five thousand dollars, and that said sum so invested by him is valuable only in the event that he can make such property so acquired available to him in the further prosecution of said business, otherwise said investment will be an entire loss to him; that the defendant, the Louisville Water Company, is a body corporate, organized under and in pursuance of an act of the General Assembly of the commonwealth of Kentucky approved March 6, 1854, entitled "An act to incorporate the Louisville Water Company" (2 Acts 1853-54, p. 121, c. 507), and the various amendments thereto, and under and in pursuance of which act the defendant, the Louisville Water Company, long since acquired the necessary lands, and constructed thereon reservoirs, and furnished and equipped with all the requisite appliances and machinery a complete plant or waterworks, and connected the same with all parts of the city of Louisville by means of pipes, aqueducts, and mains laid and constructed under, in, and

¶ 2. See Equity, vol. 19, Cent. Dig. §§ 151, 152, 167, 169.

along the public ways of and in the city of Louisville, and through such pipes, mains, and aqueducts has continuously and does now supply and furnish water to the city of Louisville, to the inhabitants thereof, and to all persons doing business therein, in amounts sufficient to satisfy all needs and demands, public and private, therefor, and for which the said defendant is authorized to demand and charge a sum not exceeding the average price charged in the cities of Pittsburg, Cincinnati, and St. Louis for water furnished there by the water companies supplying such cities with water.

Your orator says that the defendant, the Louisville Water Company, is invested with all of the powers and charged with all of the duties imposed upon it and required of it by the charter act aforesaid, and that by the provisions of said charter act it is the duty of the defendant, the Louisville Water Company, to furnish and supply him with all the water necessary for the purpose of enabling him to carry on and conduct the business aforesaid; that it is the duty of the defendant, the Louisville Water Company, to furnish to all persons, natural and artificial, the water required by such persons sufficient to satisfy all lawful needs therefor; and that the defendant, the Louisville Water Company, has no rightful authority to prefer one consumer of water to another, but by said statute it is the duty of the defendant, the Louisville Water Company, to treat all consumers alike, and to furnish and supply water at uniform rates to all consumers.

Your orator says that he has been supplied by the defendant, the Louisville Water Company, with the necessary amount of water to enable him to carry on and conduct his business aforesaid in the city of Louisville, and throughout the year 1902 the defendant, the Louisville Water Company, did supply him with all the water required by him for the successful prosecution of his said business in the city of Louisville, and that he has always heretofore relied upon the defendant, the Louisville Water Company, for water to enable him to carry on and conduct his said business, and he says that he will be unable, that he cannot carry on, conduct, and prosecute his said business, without a supply of water furnished to him by the defendant, the Louisville Water Company.

Your orator says that the defendant hereto, the Louisville Water Company, with an intent of breaking up his said business, and with an intent of driving him out of the business of sprinkling streets and public ways of the city of Louisville, has wrongfully and without cause refused to furnish or supply him with water with which to carry on and conduct his said business of sprinkling streets in the city of Louisville.

Your orator says that the defendant, the Louisville Water Company, now has on hand, and the capacity of keeping on hand, all the water that will be needed or required by your orator to carry on and conduct the said business and to supply and furnish all and every demand by every other person on it for water; and your orator says that by reason of such action upon the part of the defendant, the Louisville Water Company, the said defendant, the Louisville Water Company, has determined and decided that your orator shall not hereafter carry on, conduct, or prosecute his business of sprinkling streets and public ways in the city of Louisville.

Your orator says that he cannot obtain water for said purpose from any other source than the Louisville Water Company.

Your orator says that he is now under contract with the owners of lands, lots, and houses fronting on the following streets in the city of Louisville to sprinkle the streets and public ways in front thereof for the spring, summer, and fall of 1903 for the contract price agreed upon by and between your orator and such owners, to wit: Main street from Preston to Fourteenth streets, Market street from Jackson to Eighth streets, Jefferson street from First to Fifth streets, Fourth street from Main to first alley south of Broadway, Third street from river to Confederate Monument, Second street from river to Market, Second street from Oak to Burnett, First street from Main north to Water, First street from Oak to Burnett, Ormsby avenue from Floyd to Sixth street, Burnett avenue from First to Third, St. Catherine street from Second to Fifth, Washington street from Second to Preston, Preston street from Jefferson to Water, Seventh street from Main to Jefferson, Eighth street from first alley south of Main street, Broadway from Second to Eleventh, Eleventh

street from Broadway two squares south, Ninth street one square north and south of Broadway, Tenth street one square north and south of Broadway. That he did on the 2d day of February, 1903, and at frequent intervals thereafter, petition and request the Louisville Water Company that it should furnish and supply him with water with which to sprinkle the streets aforesaid during the spring, summer, and fall of the year 1903, but that the said defendant, without any excuse or reason therefor, refused to furnish or supply your orator with water for the purposes aforesaid or for any purpose. Your orator says that he will sustain a loss and damage of two thousand five hundred dollars by the refusal and failure on the part of defendant to furnish and supply him with water with which to sprinkle the streets aforesaid in and during the spring, summer, and fall of the year 1903. Your orator says that unless he is at once, without delay and forthwith, furnished and supplied with water by the defendant, the Louisville Water Company, with which to carry out and comply with said contracts to sprinkle the streets aforesaid in the spring, summer, and fall of 1903, he will suffer and sustain a loss and damage which will be irreparable, and for which he can have no adequate relief or remedy at law.

Your orator says that he is able and willing to, and has heretofore and does now offer to pay and to secure to the defendant, the Louisville Water Company, the full amount, price, and value for all water required or needed or demanded by your orator in the prosecution of said business in the spring, summer, and fall of 1903, and that he is able and willing to and will execute, and he now offers to execute, to the defendant, the Louisville Water Company, bond with good, sufficient, and ample surety, conditioned that your orator will not waste any of such waters, or suffer any waste thereof to be committed, and that he will faithfully, well, and truly perform every duty required of him by law or the rules of the defendant, the Louisville Water Company, in the use made by him of such water in and during the spring, summer, and fall of 1903; and your orator further says that he is able and willing to and will comply with and perform all of the duties and obligations incumbent upon him and growing out of his use of the water furnished to him by the Louisville Water Company for the purposes aforesaid, and that he will not use such water or any part thereof for any other purpose than sprinkling the before-named streets in the spring, summer, and fall of 1903.

Your orator says that the defendant, the Louisville Water Company, is abundantly able to furnish and supply him with all the water required to sprinkle the streets aforesaid in and during the spring, summer, and fall of 1903, and that such supply by the defendant of water to him will not inconvenience it to any extent, or disable it from performing or discharging any duty or obligation it is under or will be under to any other person to furnish or supply water for any other purpose whatever.

Your orator further states that the said defendant, for the purpose of ascertaining the quantity of water used by street sprinklers, and to prevent the waste of water, attached meters to the tanks on sprinkling carts, and during the spring, summer, and fall, the sprinkling season of 1902, the said defendant attached to your orator's three tanks on his three sprinkling carts meters, which remained attached to the same until within the last ten days, when the said defendant removed said meters, and has not since restored them.

Your orator has made arrangements to have and to put in use in the business aforesaid three or more sprinkling carts in addition to the three carts which he now has.

Your orator has over six hundred citizens who have contracted to and with him to pay him for sprinkling the streets in front of their respective premises in and during the spring, summer, and fall, the sprinkling season of 1903, and he has no doubt but that he will be able to contract with many other citizens and residents to have the streets sprinkled in front of their respective premises.

Your orator has established the business of sprinkling streets in the city of Louisville with the intention of following and continuing that business. He has established a valuable good will with those for whom he sprinkled the streets in the spring, summer, and fall, the sprinkling season of 1902, and that most of them have contracted and agreed with him to have him sprinkle

the streets in front of their property in the spring, summer, and fall, the sprinkling season of the year 1903.

Your orator says that the defendant has established post hydrants at convenient places for sprinkling streets, and to obtain water for other purposes, and that, notwithstanding the defendant well knew that your orator had established himself in the business of sprinkling streets, and had prosecuted such business in the spring, summer, and fall, the sprinkling season of the year 1902, and to the satisfaction of those employing him so to do, and of his customers in that business, and notwithstanding the defendant has an abundant supply of water for all useful and lawful purposes, including an ample supply for the purpose of watering and sprinkling the streets, and knew and now knows that your orator had and has contracts with the owners of premises fronting on the streets aforesaid to sprinkle the streets in front of their property, and that your orator had paid to the defendant in full all of its charges and demands for water furnished and supplied by it to this plaintiff for the purposes aforesaid in the spring, summer, and fall, the sprinkling season of 1902, yet the said defendant has refused and still refuses to furnish to your orator water for the purposes aforesaid; and your orator says that, unless the defendant be compelled to furnish him water at once for the purposes aforesaid, and in an amount sufficient to answer his demands therefor, that his good will will be destroyed, and his said business ruined.

Your orator says that by the terms of his contract with the owners of said lots, houses, and residences he came under obligation on the 1st of March, 1903, to commence the sprinkling of the streets aforesaid, and he says that the defendant hereto has, without any excuse therefor, and wrongfully, and for the sole purpose of compelling this plaintiff to give up and abandon his said business of sprinkling streets in the city of Louisville, refused to furnish or supply, and will continue to refuse to furnish and supply, your orator with water to sprinkle said streets, unless it be immediately enjoined and restrained from further refusal so to do.

In consideration whereof, and inasmuch as your orator is without any remedy at and by the strict rule of the common law, and is only relievable in a court of equity, where matters of this kind are properly cognizable and reviewable, he brings this action in this court to the end, therefore, that your orator may have that relief which he can only obtain in a court of equity, and that the said defendant may answer the premises, but not upon oath and affirmation, the benefit of which is expressly waived by your orator. He now prays the court that the defendant be at once and forthwith enjoined and restrained from any further refusal to furnish and supply your orator with water with which to sprinkle the streets aforesaid, and each of them, in and during the spring, summer, and fall of the year 1903; that the defendant be compelled to restore said meters taken off of his tanks, and furnish such other meters as your orator's business from time to time may require; and that said defendant afford him access to and the use of the post hydrants for the purpose of drawing water for the purposes aforesaid; and that the defendant be enjoined and restrained from removing said meters and put on your orator's tanks, and forever enjoined and restrained from not affording your orator access to and the use of the post hydrants for the purpose of drawing and obtaining water for the purposes aforesaid; and that such orders of injunction and restraint be made on the final trial of this action final and perpetual; and that your orator have judgment against the defendant for all costs incurred herein; and that your orator may have such other and further relief in the premises as the nature of the circumstances of the case may require.

May it further please your honor to grant your orator a writ of subpoena to be directed to the said Louisville Water Company, thereby commanding said defendant at a certain time and under a certain penalty therein to be limited personally to appear before this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises, and to stand, perform, and abide by such order, direction, and decree as may be made against said defendant in the premises as shall seem meet and agreeable to equity; and as your orator will ever pray.

Lane & Harrison and John Roberts, for complainant.
Burnett & Burnett and George Du Relle, for defendant.

EVANS, District Judge. The defendant has demurred to the bill of complaint, and for cause of demurrer insists that complainant's remedy at law is plain, adequate, and complete. In support of the demurrer it is urged that the writ of mandamus is the appropriate legal remedy as against the defendant, and that the right of the complainant to the remedy on the case made by the bill is plain and manifest; but the court is clearly of opinion that it must be ruled otherwise under section 716, Rev. St. U. S. [U. S. Comp. St. 1901, p. 580], as construed by the Supreme Court in the case of *Rosenbaum v. Bauer*, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743, and many earlier cases.

It is also insisted that an action at law for damages against the defendant would afford the complainant a complete remedy. The rule appears to be that to oust the jurisdiction in equity the remedy at law must be as prompt and efficacious as that in equity. *Springfield, etc., v. Barnard & Leas Co., etc.*, 81 Fed. 265, 26 C. C. A. 389; *Dow v. Berry* (C. C.) 18 Fed. 125. Judged by this test, it seems to the court that the averments of the bill present a case where the remedy at law might be unsatisfactory and vexatious. It might be much delayed if every one of the evidently numerous persons with whom complainant has contracted should see fit, as they might, to sue him for a breach of this contract—a breach made inevitable by the defendant's own act. All this may be well avoided by the equitable remedy now invoked, which would not only compel the defendant to perform what, on the face of the bill, appears to be a plain duty, but would also obviate the possibility of a multiplicity of suits against the complainant. If there were nothing in the case except the loss of a few water carts and mules, it might be quite different. But there are many other things, and some strictness of ruling against a defendant who appears to owe a very plain duty (if the averments of the bill are true) might well be excused at this stage of the proceeding, whatever may be proper when all the facts are developed. The probability that any multiplicity of suits which might be brought against the complainant would be the direct result of defendant's own wrongdoing in the premises would seem to enforce this view. Besides, both the plainness and the adequacy of the remedy at law may be greatly doubted in view of the decision of the Court of Appeals of Kentucky in the case of *Louisville Water Co. v. Hamilton*, 81 Ky. 517, to the effect that the defendant's property cannot be seized by collecting officers, but that its liabilities must be enforced in equity.

At all events, the court is of opinion that the demurrer to the bill of complaint should be and it is overruled.

WIEMER v. LOUISVILLE WATER CO.

(Circuit Court, W. D. Kentucky. March 28, 1903.)

1. WATER COMPANIES—DUTIES—DISCRIMINATION BETWEEN CONSUMERS.

A water company chartered for the purpose of supplying a city and its inhabitants with water is a quasi public corporation, and it is its duty to supply water to all who apply therefor and offer to pay the rates, without discrimination.

2. SAME—CONSTRUCTION OF CHARTER.

A water company chartered for the purpose of supplying a city "and its inhabitants" with water is not justified in arbitrarily refusing to supply water to one who is engaged in the business of street sprinkling in the city, and who has contracted with owners of property therein to sprinkle the streets in front of their respective lots, on the ground that the contractor himself is not an "inhabitant" of the city, nor because the water for such purpose is not supplied directly from its pipes to the inhabitants for whose benefit it is to be used.

3. SAME.

A water company has no right to refuse to supply water to one who applies therefor in good faith, and is able and willing to pay the rates charged, on the ground that in making his application he failed to comply with certain technical rules, without giving him the opportunity to supply alleged omissions or informalities in his application, and where, under substantially similar circumstances, water is furnished to a business competitor of such applicant.

4. SAME.

It is the province of a water company to supply water impartially to its customers, and it is not charged with any duty nor given the power to direct its use after its delivery, nor to make rules regulating its use on the streets, or to prevent nuisances thereon, which is a function of the municipal government.

5. FEDERAL COURTS—STATE LAWS AS RULES OF DECISION.

A decision of the highest court of a state denying a writ of mandamus to compel certain action on the part of a water company is not an authoritative adjudication of the statutory duties and powers of the company which is binding on a federal court in a suit in equity arising under similar circumstances, where, under the statutes of the state as previously construed, the court must necessarily have held that a proceeding in mandamus would not lie against a corporation of the character of the defendant.

6. MANDATORY INJUNCTION—POWER TO GRANT.

A court of equity has power to grant a mandatory injunction restraining a water company from refusing to supply water to a complainant on the same terms it is supplied to others, where it clearly appears from the facts that such refusal is an unlawful discrimination, and that the injunction is the only adequate remedy available to complainant.

In Equity. On motion for preliminary injunction.

See 130 Fed. 244, 246.

Lane & Harrison and John Roberts, for complainant.

Burnett & Burnett and George Du Relle, for defendant.

EVANS, District Judge. Although the court has given this case very attentive consideration, it is too much pressed for time just now

¶ 1. See Waters and Water Courses, vol. 48, Cent. Dig. § 275.

¶ 5. State laws as rules of decision in federal courts, see notes to Griffin v. Overman Wheel Co., 9 C. C. A. 548; Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.

to do more than state its conclusions generally without going into details. By his bill and the pending motion the complainant, Wiemer, seeks an injunction, mandatory in character, to compel the defendant to supply him with water; he offering full security for the payment of the price thereof. The learned counsel for the defendant do not contest the general proposition that the defendant is a corporation which owes certain duties to the public, and the court is of opinion that those duties are, in general terms, very accurately defined in the following language, found in section 931, 3 Cook, Corp., viz.: "A waterworks company is also a quasi public corporation. It must supply water to all who apply therefor and offer to pay the rates." Indeed, the latest authorities seem very definitely to establish the rule that water supply companies like the defendant are required to supply water impartially to all consumers, and that they cannot act capriciously, nor discriminate against any one who is able to pay for the water supplied. In short, to phrase it in familiar terms, the law does not allow such companies to unduly advantage any customer by doing for him what it will not do for others under circumstances substantially the same. *Griffin v. Goldsboro*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240; *Haugen v. Albina*, 21 Or. 411, 28 Pac. 244, 14 L. R. A. 424. Whether so intended or not by defendant, the court is of opinion that the effect of what was done in this case, as shown by the testimony, was to unduly discriminate against the complainant and in favor of the Louisville Tramway Sprinkler Company, a rival in the business of street sprinkling. Perhaps there can be no two opinions upon this proposition of fact when all the testimony is attentively considered, but it is very earnestly urged for the defendant that the complainant has, in no event, any right to claim a supply of water from the defendant, because he is not an "inhabitant" of Louisville, Ky., and the language of the first section of the charter of the defendant is quoted and relied upon to support the contention. That language is that Thomas E. Wilson and others are hereby made a corporation "with power and authority to construct and establish within the city of Louisville or elsewhere for the purpose of supplying said city and its inhabitants with water." 2 Acts 1853-54, p. 121, c. 507. It appears alike from the bill of complaint and from the testimony heard that the sole purpose for which the water sought to be obtained by the complainant is to be used by him is that of sprinkling the streets in front of the houses of "inhabitants" of this city, and the court, in the absence of any authority to the contrary, is clearly of opinion that the construction contended for is very much too narrow. The charter does not demand that the "inhabitants" of Louisville, in obtaining water for the useful, and, indeed, necessary, purpose of sprinkling the streets, shall be allowed to get it only through the medium of an "inhabitant" of the city. The beneficial thing—the essential purpose—in this instance is at last to supply water for the use of "inhabitants" of Louisville alone, and that fact seems to bring the case clearly within the intention and the equity of the statute creating the defendant. The relations between the complainant and the defendant are much more accurately described by what has just been said than they are by the suggestion that the defendant is simply a wholesale dealer in water

and the complainant a mere retailer thereof. The duties of the defendant to the public imply very much more than it is a mere vender of its own property to those to whom it sees fit to sell it. And so it may be said that the cost to the complainant of the water is a very small part of the cost of what is required to sprinkle the streets for property holders or their tenants.

2. It is also contended by the defendant that this case does not come within the terms of the charter in another respect, and that the defendant is not required to furnish water to any one except directly from its pipes and aqueducts for drinking, bathing, washing, and similar purposes. But the court is of the opinion that this contention also insists upon an interpretation of the charter which is much too restricted. It may be assumed from the testimony that the water sought by the complainant must in fact come through the pipes and aqueducts of the defendant. Although that water is probably not directly supplied by the defendant immediately to the persons who get the real benefit of it, still those persons, as already indicated, are the ones whose wants are ultimately and really supplied through the complainant as their representative for that purpose. Hence it seems to the court that the construction contended for is not such as should govern it in ascertaining the duties the defendant owes to the public. Those duties are to be tested by rules a little broader and more comprehensive.

3. It is also insisted that the complainant did not, in making his application, comply with certain rules of the company offered in evidence. Assuming that the defendant has power to make reasonable rules in the premises, the reasonableness of those rules must be tested not only by what appears on their face, but also by their practical operation and interpretation. Certainly the operation of the rules in this instance was to exclude the complainant from obtaining water, and his customers from employing whom they pleased to obtain it for them and use it for their benefit. Under circumstances substantially quite similar, another sprinkling company is favored to the entire exclusion of the complainant, and that, too, without giving him any real opportunity to supply alleged omissions or informalities in his application for water, which application was obviously and certainly made in the utmost good faith, and was backed by manifest ability to secure to the company the price of the water. If the defendant is authorized to proceed in such a manner, the rights of the public, as we have shown them to be, will be most easily defeated under the guise and operation of a rule which may be interpreted in the most arbitrary way to the exclusion of any applicant for water, and without his knowing the grounds of the exclusion, or being given any opportunity to supply omissions or correct informalities after the defendant has found them to exist. In view of the rights of the public, as shown by the authorities referred to and others which might be cited, we think this cannot be done to the injury of any competing applicant for water. The duty of the defendant and the rights of the complainant are very much simpler.

4. It is also insisted that the rules of the defendant were made in the interest of the public, so as to prevent double sprinkling of the streets, contentions between water-cart drivers as to precedence, nuisance at

the hydrants, etc., but the court is of opinion that these and kindred suggestions refer to matters of little or no concern in the legal sense to the water company, inasmuch as they appertain mainly, if not altogether, to the jurisdiction of the city of Louisville over its streets. Any possibility of waste of water would appear to be a very slight and insignificant matter; and the streets can be cared for and protected only by the municipality, and not by the defendant, whose duty is limited to supplying water, and it is not charged with the duty nor given the power to take care of the streets, nor to preserve order or prevent nuisances thereof. These are objects outside of the purposes of the defendant's creation, and are altogether municipal in character. Any other view must proceed upon the assumption that a water supply company has power to control or direct the use of the water it has supplied after its delivery to the applicant. But the court is of opinion that the matter admits of a much simpler solution so far, at least, as the issues in this case call for it. The law makes it the duty of a water company to supply water to applicants generally, and when that is done its whole duty is performed. Assuming that the applicant was entitled to the water, then what is done with it after he gets it is, in the legal sense, a matter of no concern to the company. If, by any use of the water, the person who receives it violates any law or ordinance, his liability therefor is not to the water company but to the local or state government.

5. While the defendant may make reasonable rules for conducting such business as may be within its powers, it is by no means clear that the rules actually made by it do not go beyond those powers, and trench upon those of the city. It may be quite doubtful whether, in view of its duty to supply water to all the public, the defendant can lawfully say that any property owner may not get water to sprinkle on the street in front of his home through anybody whom he chooses to employ, whether a majority of his neighbors prefer some other person for that service or not. It may well be doubted whether the defendant can put any such restriction upon a citizen under the guise of any rule it is lawfully authorized to make.

6. The court has been referred by counsel to a MSS. opinion of the Court of Appeals of Kentucky rendered in 1879 in the case of Elizabeth Fuhring against the Louisville Water Company, in which the appellant had sought a mandamus to compel the company to supply her with water under circumstances somewhat, but not exactly, similar to those disclosed in this case, and the Court of Appeals held that a denial of the remedy by the lower court was proper. Section 721, Rev. St. U. S. [U. S. Comp. St. 1901, p. 581], requires that in "actions at common law" the laws of the state shall furnish the rule of decision in the federal courts sitting in such state, and it is not doubted that the judicial decisions of the highest court of the state, as well as the statutes, are evidence of what the law of the state is, but in its opinion in the case of *Bucher v. Cheshire R. Co.*, 125 U. S. 582, 8 Sup. Ct. 977, 31 L. Ed. 795, the Supreme Court said:

"The language of the statute limits its application to cases of trials at common law. There is therefore nothing in the section which requires it to be

applied to proceedings in equity or in admiralty; nor is it applicable to criminal offenses against the United States (see *U. S. v. Reid*, 12 How. 361, 13 L. Ed. 1023), or where the Constitution, treaties, or statutes of the United States require other rules of decision. But with these and some other exceptions, which will be referred to presently, it must be admitted that it does provide that the laws of the several states shall be received in the courts of the United States, in cases where they apply, as the rules of decision in trials at common law."

Although the pending suit is not an action at common law, still if the Court of Appeals had settled the construction and interpretation of the defendant's charter as to pending questions, this court would almost certainly, and upon obvious grounds, follow that construction. It will be seen, however, that in the Case of *Fuhring* the Court of Appeals, while saying that the appellant did not claim to do business in Louisville, only held that she was not entitled to a certain remedy, namely, a writ of mandamus. Whether she did or did not carry on the business of a street sprinkler in this city, as complainant has done for several years, does not certainly appear. The court is therefore of opinion that the following language of the Supreme Court of the United States in the case of the *Town of Venice v. Murdock*, 92 U. S. 501, 23 L. Ed. 583, is not only applicable, but is controlling, so far as the effect of the opinion in the *Fuhring* Case is concerned. That language is as follows:

"It is argued, however, that the New York decisions are judicial constructions of a statute of that state, and therefore that they furnish a rule by which we must be guided. The argument would have force if the decisions in fact presented a clear case of statutory construction. But they do not. They are not attempts at interpretation. * * * There is therefore before us no such case of the construction of a state statute by state courts as requires us to yield our own convictions of the right, and blindly follow the lead of others, eminent as we freely concede they are."

A further suggestion may place this phase of the case in a light even clearer. As has been intimated, the Court of Appeals, in the *Fuhring* Case, was probably not called upon to define the rights of *Fuhring*, nor the duties of the defendant under its charter. The petition in that case sought nothing except a writ of mandamus to compel the company to furnish water to her. To a certain extent it is true that, if nothing else had appeared, that would have called for an interpretation of the charter, but there was a necessary preliminary question to be determined, namely, was the plaintiff in that case, in any possible event, entitled to the remedy by mandamus? Neither it nor its officers were "executive or ministerial officers" within the meaning of section 477 of the Kentucky Code. That section, and one or two others, regulate the Kentucky practice with respect to the remedy by mandamus, and it appears even upon the face of the Code provisions that the judgment of the inferior court denying the writ was necessarily right, inasmuch as, under the Code, the remedy by mandamus was not available in a case against either a private individual or a private corporation such as the defendant in the strict legal sense is, although its duties may make it a quasi public body like a railroad company and certain other corporations. However, we are not left in any doubt as to the proper construction of the provisions of the Code. That the remedy

by mandamus was not authorized by the Kentucky Code in such a case as that of *Fuhring* had been theretofore expressly decided by the Court of Appeals in the case of *Cook v. The College of Physicians*, 9 Bush, 541, Judge (later Senator) Lindsay writing the opinion of the court. It is true that the case was decided when the former Code (formerly called *Myers' Code*) was in force, but the provisions of the present Code (that of 1877) are, in substance and effect, precisely the same as those of the former. The opinion in the *Fuhring* Case was not prepared for publication, and was not reported. The result reached was manifestly proper, whether or not the reasons given for it took a wider range than was necessary. Why it did not put the court's judgment upon grounds similar to those in the *Cook* Case is not apparent, especially as in the much later case of *Schmidt v. Abraham Lincoln Lodge*, 84 Ky., at page 494, 2 S. W. 156, the rule in the *Cook* Case was expressly reaffirmed. So that it is quite obvious that we have no authoritative interpretation by the Court of Appeals of the defendant's charter in respect to the matters involved in this suit. The result is to leave the court at liberty to construe the defendant's charter and determine its duties in harmony with the modern rule as to the obligations of corporations of a similar character.

7. It remains to be determined whether the remedy by mandatory injunction is available to the complainant upon the facts of the case. In its opinion in the case of *Ex parte Lennon*, 166 U. S. 556, 17 Sup. Ct. 661, 41 L. Ed. 1110, the Supreme Court, in speaking of the relief there sought, said:

"Perhaps, to a certain extent, the injunction may be termed mandatory, although its object was to continue the existing state of things, and to prevent an arbitrary breaking off of the current business connections between the roads. But it was clearly not beyond the power of a court of equity, which is not always limited to the restraint of a contemplated or threatened action, but may even require affirmative action, where the circumstances of the case demand it."

That a mandatory injunction is often resorted to in modern practice is abundantly shown by the following authorities: *Pokegama v. Klamath*, etc. (C. C.) 86 Fed. 528; *C., B. & Q. R. R. v. Burlington*, etc. (C. C.) 34 Fed. 481; *Toledo*, etc., v. *Pennsylvania Co.* (C. C.) 54 Fed. 730, 19 L. R. A. 387; *Coe v. L. & N. R. R.* (C. C.) 3 Fed. 775; *Wells*, etc., v. *N. P. R. R.* (C. C.) 23 Fed. 469; *Parsons v. Marye*, Id. 113; 1 High on Inj. § 2; 2 Spelling, *Ex. Relief*, § 1021; 1 Spelling, *Ex. Relief*, §§ 234, 412; 10 Ency. Pldg. and Prac. p. 879. This character of relief will not, however, be allowed, unless in very clear cases; but, tested by all the rules referred to, it seems to the court that it is the only adequate remedy available in this case. This is emphasized by the absence of power in this court to award a mandamus in a case like this. *Rosenbaum v. Bauer*, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743.

It follows that the motion for a mandatory injunction pendente lite should be sustained, with the condition only that, should it at any time become impossible for defendant to supply the water, it should have leave to apply for a modification of the order requiring it to do so.

LOUISVILLE WATER CO. v. WIEMER.

(Circuit Court of Appeals, Sixth Circuit. March 28, 1904.)

No. 1,210.

1. WATER COMPANIES—POWERS—REGULATIONS IN RESPECT TO STREET SPRINKLING.

A water company chartered for the purpose of supplying a city and its inhabitants with water has power to make reasonable regulations in respect to furnishing water for sprinkling streets in the city; and regulations requiring persons engaged in the business to obtain a license from the company, and providing that more than one license would not be granted covering the same street or part of a street, which should be granted to the applicant having the largest list of petitioning owners of abutting property, are reasonable, and within the company's powers.

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

See 130 Fed. 244, 246, 251.

The Louisville Water Company was incorporated by an act of the Legislature of Kentucky approved March 6, 1854, and granted "power and authority to construct and establish waterworks within the city of Louisville or elsewhere, for the purpose of supplying said city and its inhabitants with water." Sections 6 and 7 of the charter contain the following provisions:

"Sec. 6. In the laying and construction of the pipes and aqueducts in the city of Louisville, the same shall be so laid and constructed, that an abundant supply of water can be drawn therefrom for the extinguishment of fires; and said corporation shall furnish water to the city of Louisville, for the extinguishment of fires and cleaning streets, upon such terms as may be agreed between it and the authorities of said city; and it shall have the exclusive right to furnish water to the inhabitants of said city, by means of pipes or aqueducts, if the authorities of said city shall agree thereto, and upon such terms, and for such time, as may be agreed.

"Sec. 7. The said corporation is hereby empowered to sell the privilege of using the water which may be conducted through its pipes or aqueducts to any corporation or person; and the said corporation may make all reasonable rules and regulations as to the manner and the times in which said water may be taken and used."

For a long time prior to the origin of the present controversy the expense of sprinkling the streets of the city had been borne by the owners or occupants of the abutting lots, and the water was sprinkled on the streets by different persons in different localities, who were required to obtain a license to do the work from the water company. The rule of the company was to the effect that, when there were several applicants for a license to do the sprinkling in the same street or locality, it should be given to the one who produced the largest list of petitioning owners of abutting lots within the length of street to which the application extended. On January 24, 1903, an amendment of this rule was adopted whereby the determination in respect to the granting of the license was referred to the board of directors of the company. The original rule was adopted by the board as its guide in the present instance. The appellee, Wiemer, in February, 1903, made application to the president of the company for a license to sprinkle about 140 squares in the city, but, upon being requested to file his list of petitioners, declined to do so, claiming it was a private paper. Shortly thereafter the company granted a license to sprinkle the same streets to the Tramway Sprinkling Company, which had filed a list of petitioners, and the appellee was informed that his application was refused. The appellee removed from Louisville to New Albany, in Indiana, and on March 9, 1903, filed in the Circuit Court of the United States for the Northern District of Kentucky this, his bill, praying for a mandatory injunction to compel the company to supply him with water, and to afford him access to its hydrants, to enable him to sprinkle the streets and squares named in

his application. The defendant's plea to the jurisdiction that the complainant was not a bona fide citizen of Indiana was overruled. It then filed a demurrer for want of equity, and because the complainant had an adequate remedy at law. The demurrer was overruled. Thereupon the complainant moved for a preliminary injunction compelling the defendant to grant him the license he had demanded pending the suit. The company contested this motion, but upon a showing of facts, of which the foregoing are all that we regard as material, the court granted the motion, and the preliminary injunction was issued as prayed, restraining the defendant from refusing to furnish complainant with water to sprinkle the streets. The company has appealed.

Lane & Harrison and John Roberts, for complainant.
Burnett & Burnett and George Du Relle, for defendant.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge, having stated the case as above, delivered the opinion of the court.

There is no assignment of error in overruling the plea to the jurisdiction or in overruling the demurrer. On the present appeal those matters are not directly before us, and can only be considered to the extent of their bearing on the propriety of the order granting a preliminary injunction, except, of course, that we might, if the circumstances required it, direct the cause to be dismissed for the reason that the citizenship of the complainant in Indiana is not bona fide. We conclude, however, to dispose of the appeal on its merits. In doing this we shall pass by the grave question whether in the Circuit Courts of the United States, in equity, a bill can be maintained for the purpose of compelling one person to perform a duty owed to another, in such circumstances as these.

We think the court below erred in holding that the appellant owed to the appellee the duty of which the latter demands performance. Passing by another question, namely, whether the appellee has such an interest in the sprinkling of the streets in Louisville as would entitle him to maintain a legal action of any sort, we are of opinion that the appellant, owing, as it did under its charter, a duty to the city, and perhaps to its inhabitants, of supplying water to be used in sprinkling the streets, had the power, nevertheless, to make reasonable regulations in regard to the agency by which its duty should be discharged. It could not lawfully so exercise its authority in that regard as to unnecessarily embarrass or impair its service to the public; and, if it did, it would expose itself to a liability to any person injured thereby for which there would be some legal remedy. But, subject to this condition, it might make such regulations as its own convenience and the proper conduct of its business might require. The granting of a license to any person to take water from its hydrants would seem to involve the right on the part of the company to have a voice in determining the person by whom it should be done. Certainly it cannot be said that there would be any propriety in granting licenses to any and all comers who should demand it to do the same thing. In this particular service it is obvious that this would lead to chaos, would embarrass the service to the public, and would be inconvenient and prejudicial to the company. We see nothing, therefore, that could be injurious to any lawful right of others in

the restricting the grant of the license to one person for a definite locality, so long as that person accomplished the duty of the company to the public in a proper way. The concession of this place to the one who could bring the largest approval of those of the other party who were most interested, seems fair. We are therefore unable to find any satisfactory ground for holding the rule adopted by the appellant for determining to what person the license should be granted to be void as either beyond its powers or unreasonable. The appellee did not entitle himself under it to demand the license, and, assuming that the appellee was one who had legal standing to compel the observance of it—which we greatly doubt—he failed to avail himself of it.

Similar, if not the same, questions were involved in the case of *Fuhring* against the Louisville Water Co. (a case decided by the Court of Appeals of Kentucky in 1879, but not reported). That was the case of a petition for a mandamus to compel this same company to furnish water to the petitioner wherewith to sprinkle the streets of Louisville. The Court of Appeals, waiving all question of the propriety of the remedy sought, and assuming that the company was bound to furnish an adequate supply of water for sprinkling the streets of the city, held that the plaintiff, it not appearing that she resided or did business or owned property on any of the streets which she proposed to sprinkle, had no such special interest as would entitle her to the relief sought; and, further, that, because of the confusion and waste that would otherwise ensue, the company might lawfully restrict its choice to one person, and that such choice was left to the company, no tribunal being expressly appointed for that purpose. In that case it does not appear that another had been already licensed, and the case goes upon the broad grounds that a person having no special interest by reason of residence or ownership had no right to coerce the choice of the company by compelling the selection of himself. The case goes further than the present, for here the company gave the plaintiff a chance to qualify himself of which he would not avail himself. The court below thought itself not bound by the decision referred to for the reason that the case might have been decided upon the fitness of the remedy. But as we think it sound in respect to the questions involved, we accept it as confirmatory of our own views, without deciding whether we should be bound by it or not.

The order appealed from must be reversed, with costs.

GUNNISON et al. v. CHICAGO, M. & ST. P. RY. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. April 12, 1904.)

No. 1,009.

1. LIMITATION—SUIT TO ENFORCE RAILROAD MORTGAGE—ADVERSE POSSESSION.

Defendant railroad company purchased a line of road in Wisconsin in 1867, under a decree ordering it sold to satisfy a judgment rendered in 1857. The decree directed the sale of, and the marshal's deed purported to convey, all the right, title, and interest of the company against which

the judgment was rendered, and which was at the time of its rendition the owner of the property, together with its franchise, subject to certain stated prior liens. Defendant took possession and thereafter retained and operated the road, incorporating it with its system, making large improvements, and paying off the stated incumbrances prior to the judgment, amounting to \$3,000,000. In 1859 the road had been sold under a mortgage subsequent to the judgment, and the purchasing company in 1864 issued bonds secured by mortgage. Defendant never recognized the validity of such mortgage as against its own title, and no part of either principal or interest of the bonds was ever paid. In 1898 complainants, claiming to be owners of most of such bonds, brought suit to enforce the mortgage. The Wisconsin 10-year statute of limitations (Rev. St. 1898, § 4211), in force since 1858, provides that "where the occupant, or those under whom he claims, entered into the possession of any premises under claim of title, exclusive of any other right founding such claim upon some written instrument as being a conveyance of the premises in question or upon the judgment of some competent court, and there has been a continual occupation and possession of the premises included in such instrument or judgment under such claim for ten years the premises shall be deemed to have been held adversely." *Held*, that under such statute defendant held adversely to the mortgage from the time it went into possession in 1867, and the right of action to enforce such mortgage became barred in 10 years thereafter.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

For opinion below, see 117 Fed. 629.

In the year 1858 the La Crosse & Milwaukee Railroad Company owned and operated a railway extending from Milwaukee, by way of Beaver Dam and Horicon, to Portage City, and thence to La Crosse, the railway from Milwaukee to Portage City being denominated the "Eastern Division," and the road from Portage City to La Crosse being called the "Western Division." The incumbrances upon the property on June 1, 1858, were as follows:

Upon the Eastern Division:

- | | |
|--|---------------|
| (1) A mortgage to Palmer, as trustee, to secure an issue of bonds to the amount of..... | \$ 950,000 00 |
| (2) Two mortgages to the city of Milwaukee to secure issues of bonds to the amount of..... | 314,000 00 |
| (3) A mortgage to Bronson and Soutter to secure an issue of bonds to the amount of..... | 1,000,000 00 |

Upon the Western Division:

- | | |
|--|--------------|
| (1) A mortgage to Bronson, Soutter, and Knapp, trustees, known as the "Land Grant Mortgage," to secure an issue of bonds to the amount of..... | 4,000,000 00 |
| (2) A mortgage to Helfenstein, trustee, to secure an issue of bonds to the amount of..... | 200,000 00 |

The entire road was also subject to two judgments:

- | | |
|---|------------|
| (1) A judgment in favor of Selah Chamberlain, in the Circuit Court of the United States for the District of Wisconsin, rendered October 2, 1857, for..... | 629,089 72 |
| (2) A judgment in favor of Newcomb Cleveland, in the Circuit Court of the United States for the District of Wisconsin, October 7, 1857, for..... | 111,727 31 |

On June 1, 1858, the company executed another mortgage to William Barnes, trustee, upon the entire line of railway, to secure the payment of an issue of \$2,000,000 of bonds. At this date the entire railway was in the possession of and operated by receivers of the La Crosse & Milwaukee Railroad Company, appointed in suits brought in the United States Circuit Court for the District of Wisconsin to enforce prior liens. Upon default in payment of the first installment of interest, a statutory foreclosure of this mortgage was had, and on the 21st of May, 1859, the railway was purchased by Barnes, as trustee.

The bondholders thereupon organized the Milwaukee and Minnesota Railroad Company (herein for brevity designated the "Minnesota Company"), to which company William Barnes, as trustee and purchaser, conveyed the railway. On October 24, 1864, the Minnesota Company executed a mortgage to James H. Fonda and G. Hilton Scribner, as trustees, to secure an issue of bonds to the amount of \$600,000, maturing July 1, 1884, with interest semiannually at the rate of 8 per cent. per annum. This mortgage was upon the railway of that company extending from the city of Milwaukee to Portage City, a distance of 95 miles, being the Eastern Division of the La Crosse & Milwaukee Railroad Company. The Western Division in April, 1863, was sold, upon foreclosure of the land grant mortgage, to purchasers who organized the Milwaukee & St. Paul Railway Company, now the Chicago, Milwaukee & St. Paul Railway Company (herein for brevity called the St. Paul Company). On January 20, 1866, the Eastern Division was turned over to the Minnesota Company, under an order of the Circuit Court of the United States for the District of Wisconsin, in a suit to foreclose the Bronson and Soutter mortgage, which order provided that upon payment of the interest due on the bonds issued under that mortgage, amounting to \$462,057.80, the Minnesota Company should be let into possession of the railroad from Milwaukee to Portage.

On April 18, 1866, Frederick P. James, then the owner of the Cleveland judgment, filed his bill in the Circuit Court of the United States for the District of Wisconsin against the Minnesota Company to enforce the lien of that judgment, and praying, among other things, that the Eastern Division of the railway might be decreed to be sold under the order and direction of the court, subject to the mortgages to Palmer, trustee, the city of Milwaukee, Bronson and Soutter, trustees, and the judgment of Selah Chamberlain. The Minnesota Company answered to the suit, and on January 7, 1867, a decree passed adjudging the sum of \$98,801.51 to be due on the Cleveland judgment, and that such judgment was a lien, as of the date of October 7, 1857, upon the right, title, and interest of the La Crosse & Milwaukee Railroad Company in and to the railway from Milwaukee to Portage City, together with its rolling stock, franchises, and appurtenances, and directing a sale of the railway, its rolling stock, franchises, and appurtenances then in the possession of and claimed by the Minnesota Company, unless, prior to the sale, the amount adjudged to be due upon the judgment should be paid; directing the sale to be made subject to the stated mortgages and judgment liens; that, upon confirmation, the marshal execute a deed to the purchaser; that the Minnesota Company and all persons claiming under it be barred and foreclosed from all equity of redemption; that the purchaser be let into possession; and that the Minnesota Company deliver possession to the purchaser. On March 2, 1867, the property was duly sold by the marshal to the St. Paul Company for \$100,920.94, which sale was confirmed and a deed executed by the marshal, whereupon that company entered into possession of the railroad property and franchises, claiming to be the owner thereof under that decree, sale, and deed, subject to the stated prior mortgages and judgments, and since then has continued in possession, without in any manner accounting to the trustee or bondholders under the Fonda and Scribner mortgage, or in any way recognizing it or the debt thereby secured as a lien upon the railway property or franchises, and has claimed to be in the actual, open, notorious, and adverse possession of the railway and of the franchises of the La Crosse & Milwaukee Railroad Company. On March 2, 1867, Albert C. Gunnison and Aaron S. Bright, claiming to be stockholders in the Minnesota Company, petitioned the court, in the suit brought by Frederick P. James, that an appeal might be allowed from the decree to the Supreme Court of the United States, and that they be allowed to use the name of the Minnesota Company in taking such appeal. This petition was granted, and the appeal was taken by Gunnison and Bright. This appeal was heard by the Supreme Court, and on March 16, 1868, the decree was affirmed, the court stating: "By the statute law of Wisconsin, judgments are liens on real estate, and we do not doubt but that this judgment became a lien on the road from the time of its rendition, and that a sale under a decree in chancery, and conveyance in pursuance thereof, confirmed by the court, passed the whole of the interest of the company existing at the time of its rendition to the purchaser." *Railroad Company v. James*, 6 Wall. 750, 18 L. Ed. 854.

On January 31, 1868, a bill was filed in the Circuit Court of the United States for the Eastern District of Wisconsin, in the name of Scribner, as surviving trustee under the mortgage executed by the Minnesota Company to Fonda and Scribner as trustees (being the mortgage in suit), against the St. Paul Company and the Minnesota Company, reciting the foreclosure of the land grant and Barnes mortgages, the organization of the St. Paul Company and the Minnesota Company, the execution of the Fonda and Scribner mortgage by the Minnesota Company, the proceedings in the James suit, the sale to the St. Paul Company thereunder, and the possession by the purchasing company of the Eastern Division. The bill charged that the Cleveland judgment upon which the decree was rendered was not a charge upon the Eastern Division, and that such division could not lawfully be subjected to the payment of that judgment; that the decree was without force against Scribner, trustee, or the bondholders, because they were not parties to the James suit; that the right to contest the judgment and to redeem from the incumbrances upon the property remained unaffected by the decree and sale; that the St. Paul Company, being in the exclusive possession and control of the Eastern Division, had received its earnings and income, and had not applied any part of them to the interest upon the prior incumbrances; and prayed for an account of the earnings and for a receiver, and, if the Cleveland judgment should be decreed to be a valid lien, superior to the lien of the Scribner mortgage, that the earnings of the road during the possession by the St. Paul Company might be applied to the redemption of that judgment, and, if such earnings should prove insufficient, Scribner, trustee, might be permitted to pay the deficiency to the St. Paul Company, and be let into possession of the Eastern Division. The process under this bill was served and a rule to plead entered, but, without further proceedings, the suit remained pending for nearly four years, when, on February 26, 1872, on motion of the complainant's counsel, the bill was dismissed. It is possibly doubtful if Scribner had knowledge of this suit until long after its discontinuance, but it is not doubtful that Gunnison and Bright knew of it, sanctioned and directed it. No further proceedings by the trustees under the Fonda and Scribner mortgage, or of the holders of the bonds secured thereby, was had until May, 1893, when Richard Carmen Combes, under some arrangement with Albert C. Gunnison and Aaron S. Bright, who claimed to own and control \$336,000 of bonds issued under the Scribner mortgage, attempted to bring an action at law against the Minnesota Company in the Circuit Court of Milwaukee County, Wis., on \$332,000 of such bonds. An order of the publication of the summons under the state practice was procured. Dwight W. Keyes, claiming to be a stockholder of the Minnesota Company, if it existed as a corporation, moved to set aside the order for the service of the summons by publication, upon the ground that the company had long before that order voluntarily surrendered its corporate franchises and was then non-existent. The motion was denied, but upon appeal the Supreme Court of Wisconsin, on February 5, 1895, reversed the action of the court below, holding that by the judicial sales the corporation had been divested of all its property, and for 26 years thereafter had not owned any property, or done any business, or elected any officers, or kept any office in the state, and thereby had voluntarily surrendered all of its corporate franchises and had ceased to exist, and therefore could not be sued. *Coombes v. Keyes*, 89 Wis. 297, 62 N. W. 89, 27 L. R. A. 369, 46 Am. St. Rep. 839. No further action was had respecting the Scribner mortgage, or the bonds issued thereunder, until March 30, 1897, when the bill now under review was filed. The bill recites the execution of the Fonda and Scribner mortgage, the Cleveland judgment, the decree thereon, and sale thereunder; asserts that the judgment was not a lien upon the franchises of the La Crosse Company, notwithstanding the decree; that the franchises were not sold or conveyed, or, if sold, were sold and conveyed subject to the prior lien on them of the Fonda and Scribner mortgage; that the latter mortgage was still a lien upon the franchises in the hands of the St. Paul Company; that Albert C. Gunnison, and George A. Bright as administrator of Aaron S. Bright, were the lawful owners of 500 of the 600 bonds secured by the Fonda and Scribner mortgage, which are due and unpaid, with interest from the time of their issuance. The bill states the appointment of Forker as trustee, in the place of Fonda, deceased, and that Scribner, trustee,

was made a defendant because he had failed and neglected to join in the bringing of the suit when requested so to do. The bill prayed for an accounting of the amount due for principal and interest on the bonds; that the mortgage be decreed a lien upon the roadbed and franchises of the railway then in the possession of the St. Paul Company; that the mortgage might be foreclosed, and the order of its priority as a lien decreed; that the St. Paul Company might be decreed to have obtained its title to the railroad property and franchises subject to the mortgage; and that the complainants might have the right to foreclose their mortgage as if the decree upon the Cleveland judgment and the sale and deed thereunder had not been made, and as if the Minnesota Company were still an existing corporation; and that the railway and its appurtenances might be sold to pay the amount due, subject to such conditions as the court should see fit to impose upon the complainants' right to relief. The answer, *inter alia*, sets forth a voluntary surrender by the Minnesota Company prior to the year 1872 of its corporate franchises, which in that year was accepted by the state, and sets forth and pleads section 8, c. 78, of the Revised Statutes of Wisconsin for the year 1858, and that the trustee in the Fonda and Scribner mortgage brought no suit to foreclose the mortgage within three years from and after the surrender and acceptance, and did not, nor did any creditor or stockholder of that company, within three years in any manner apply to any court of Wisconsin or of the United States for the appointment of a receiver under the provisions of that statute, and that by failure so to do the debt evidenced by the bonds and mortgage became extinguished and the lien of the mortgage destroyed. The answer also pleads section 15 of chapter 138 of the Revised Statutes of Wisconsin for the year 1858, requiring civil actions to be commenced upon an instrument under seal, when the cause of action accrued within the state, within 20 years from the time of the accruing of the action, and that by the surrender of its franchises the Minnesota Company became disabled from the performance of the conditions of the bonds and mortgage, and its personal obligation became extinguished, and that upon the dissolution of the company the cause of action accrued by operation of law in the year 1875 and that this bill was not filed within 20 years from that date; and this is pleaded in bar of the maintenance of the suit. The answer also pleads that the bill was not filed within the time prescribed by subdivision 2 of section 15 of chapter 138 of the Revised Statutes of the State of Wisconsin of 1858, now known as subdivision 2 of section 4220 of the Revised Statutes of Wisconsin for the year 1878. The answer also asserts that the first installment of interest under the Scribner mortgage became due January 1, 1865, in the payment of which and of all succeeding installments of interest there was default; that by the terms of the mortgage, in case such default should exist for the space of 30 days, the trustees were authorized to take possession and sell the property conveyed by the mortgage, and to execute deeds to the purchasers; that after default Scribner, the then surviving trustee, exercised that discretion by the bill filed in January, 1868, hereinbefore stated, and that by the exercise at that time of such discretion the whole principal sum secured by the mortgage became due and payable, and that more than 20 years have elapsed since the principal so became due, and that this bill was not filed within 20 years from and after the accrued cause of action; and thereupon pleads, in bar of the maintenance of this suit, subdivision 2 of section 15 of chapter 138 of the Revised Statutes of Wisconsin for the year 1858. The answer further pleads that, by sections 4219 and 4221 of the Revised Statutes of Wisconsin for the year 1878, it was provided that an action which on or before February 28, 1857, was cognizable by the Court of Chancery, should be commenced within 10 years from and after the cause of action accrued; that this is a suit to redeem, cognizable by the Court of Chancery prior to February 28, 1857; that the St. Paul Company went into possession of the railway on March 6, 1867, as a purchaser under the Cleveland judgment, and has since continued in the actual, open, and notorious possession of the property, not recognizing in any way the Fonda and Scribner mortgage, or the debt secured thereby, as a lien upon the railway or the franchises in said mortgage mentioned, or recognizing the trustees, or those holding the bonds, as having any right by virtue thereof; that the cause of action to redeem, if any, arising to the complainants, accrued more than

10 years before the filing of the bill. The answer further asserted the proceedings under the Cleveland judgment, and the possession of the St. Paul Company thereunder; that the trustees and Gunnison and Bright had full knowledge of those proceedings and of the purchase of the railway by the St. Paul Company; and that, except by the filing of the trustees' bill on January 31, 1868, and of the bill in suit, none of them ever disclosed or made claim to the property by virtue of the mortgage; that they knew that the property could not be operated without the expenditure of large sums of money; that they knew of the prior incumbrances, which were equal to, if not in excess of, the actual value of the property, and which prior incumbrances had been paid by the St. Paul Company with the full knowledge of the trustees and of Gunnison and Bright; that the St. Paul Company, immediately following the purchase and possession of the railway, connected the same with its system of railroads, making the same a part thereof, and expended large sums of money in putting the railway into suitable condition for use, and in maintaining, bettering, and improving the property and connections thereunder, and in making it a part of its system of railways, without which the railroad could not have been operated profitably, and has so expended many millions of dollars, of which the trustees and Gunnison and Bright, and each of them, had knowledge; that notwithstanding the interest upon the mortgage matured semiannually since January 1, 1865, neither the trustee, nor Gunnison and Bright, ever disclosed to the St. Paul Company any claim against it, or against the property in its possession based on the bonds, or made any effort to assert any right or claim based upon the bonds or mortgage against the company; that by reason of the lapse of time, being more than 30 years, it has become impossible on account of the age, death, and removal of witnesses, the radical change in the condition of the railroad and property, the destruction and loss of evidence, records, and books of account, to make proof of the earnings of the railroad and property, and the expenditure laid out in its operation, maintenance, betterments, and improvements; that the mortgage was not made to secure any sum of money borrowed or owing by the Minnesota Company; that the bonds were not issued, negotiated, or sold, but were divided up among certain persons, and, among others, Gunnison, Bright, and one Fleming, who were directors of the Minnesota Company, and without any payment or consideration to the Minnesota Company; and that those facts were known by divers persons, and were capable of proof, but that, by reason of the lapse of time since said transactions, and the age, death, and removal of witnesses to the said facts, the loss and destruction of records and documents since that time, it is now difficult, if not impossible, of proof; and they assert that the lapse of time and laches on the part of the trustees and Gunnison and Bright was such that the complainant should have no standing in a court of equity and no right to the relief prayed. The answer further asserts that it entered into possession of the railway on the 6th of March, 1867, under claim of title, exclusive of any other right, founding such claim of title upon a written instrument, namely, the marshal's deed upon the sale under the Cleveland judgment and James decree, as being a conveyance of the premises in question; and that there has been a continual occupation and possession of the premises and property included in such instrument by the St. Paul Company under such claim for 30 years and upwards, prior to this suit, and that the premises and property during that period were, and still are, held adversely to the complainants and all the world; and that such possession and occupation has been open, notorious, exclusive, and adverse, and constitutes, under the statute of the state of Wisconsin, a bar to this suit.

There was evidence strongly relied upon as showing that the bonds under the Fonda and Scribner mortgage had not been issued for value; that Bright and Gunnison were officers and large stockholders in the Minnesota Company, and as such officers had the custody of these bonds for the company, and appropriated them to themselves without consideration, and that the bonds were in fact the property of the Minnesota Company, and that the small number of them claimed to be owned by the other individual complainants were received from Gunnison without consideration, and that the claimed ownership of them was pretentious. The decision of the court being rested upon other

grounds, it is deemed unnecessary to restate the evidence here upon the question of the ownership of the bonds.

At the hearing a decree passed dismissing the bill upon the merits for want of equity, and the cause is brought here for review upon an appeal allowed by the court below.

William F. Vilas and A. L. Sanborn, for appellants.

Burton Hanson and C. H. Van Alstine, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above), delivered the opinion of the court:

Among the questions of interest presented at the argument were these: Whether the Cleveland judgment was a lien upon the railway and the franchises of the La Crosse Company from the date of its rendition, October 7, 1857; whether the St. Paul Company derived its title solely from the James decree of January 7, 1867; whether the trustees of the Fonda and Scribner mortgage, and the bondholders under the mortgage, are concluded by that decree, which determined that the sale to the St. Paul Company passed the whole of the interest of the La Crosse Company existing at the time of the rendition of the judgment; and whether that decree was other than an equitable execution rendered necessary from failure of statute law to give a complete remedy by sale upon execution. The Fonda and Scribner mortgage was subsequent in date to the Cleveland judgment, and subject to it; but if the trustees or the bondholders in that mortgage were not parties to or in some way concluded by the James decree, and the St. Paul Company derived its title only through that decree, the representatives of, or the parties interested in, the Fonda and Scribner mortgage might not be bound by it. If, on the other hand, the proceeding which culminated in the sale under the James decree may be treated as merely an equitable execution upon the Cleveland judgment, and as a substitute for the execution provided by statute in ordinary cases, and the title of the St. Paul Company is derived from and based upon the Cleveland judgment, then it may be that, as in the case of the sale under a statutory execution, all having a subordinate interest in the property sold might be concluded. It is clear from the evidence that Gunnison and Bright, who by the bill claim to be the owners of 500 of the 541 bonds issued under the Fonda and Scribner mortgage, by leave of the court, upon their own petition, prosecuted the appeal from the James decree to the Supreme Court in the name of the Minnesota Company, and are therefore concluded by the decree. We do not, however, find it essential to consider these questions at large, or to pass judgment upon them, since upon another branch of the case we are constrained to affirm this decree.

It is provided by section 4211 of the Revised Statutes of Wisconsin of the year 1878, as has been the law of that state since the year 1858, that "where the occupant or those under whom he claims entered into the possession of any premises under claim of title, exclusive of any other right, founding such claim upon some written instrument, as being a conveyance of the premises in question, or upon

the judgment of some competent court, and that there has been a continual occupation and possession of the premises included in such instrument or judgment, or of some part of such premises, under such claim, for ten years, the premises so included shall be deemed to have been held adversely." The St. Paul Company acquired possession of the Eastern Division of the railway in March, 1867, under and by virtue of a deed to it from the marshal of the district of Wisconsin, which recited that in pursuance of the James decree, and also by virtue of the statutes in such cases made and provided, the marshal "hath granted, bargained, sold, aliened, released and confirmed, and by these presents doth grant, bargain, sell, alien, release and confirm unto the said party of the second part, its successors and assigns forever: All and singular the railroad formerly known as the La Crosse and Milwaukee Railroad, from Milwaukee to Portage City, its depots, station-houses, and buildings, together with its rolling-stock, franchises and appurtenances, now in the possession of or claimed by the defendant, The Milwaukee and Minnesota Railroad Company, including all the locomotive-engines, cars and rolling-stock, and all the materials, tools, implements and utensils, and other property belonging to said road from Milwaukee to Portage City, subject however to the following liens and encumbrances thereon, to-wit: A mortgage to Francis A. Palmer for \$950,000.00, with interest thereon at eight per cent. per annum since May 1st, 1866; two mortgages to the city of Milwaukee for \$314,000.00 with interest thereon from the first day of September, 1866; a mortgage to Green C. Bronson and James T. Soutter for \$1,000,000.00 with interest at eight per cent. per annum from March 1st, 1866, and a judgment rendered in favor of Selah Chamberlain, in the district court of the United States for the district of Wisconsin, on the second day of October, 1857, for \$629,105.22, and a certain lease given to said Chamberlain as security for the amount of said judgment."

The purchaser, the St. Paul Company, entered into this possession in antagonism to the title of the Minnesota Company, claiming title under the Cleveland judgment and the sale thereunder, pursuant to the James decree, subject only to the incumbrances stated in the marshal's deed, which were prior in time to the Cleveland judgment. That company has since continued in exclusive possession, in no way recognizing, but at all times denying, the right of the Fonda and Scribner mortgage. It is insisted for the appellants that the Fonda and Scribner mortgage is stated in the bill in the James suit, and that it was so stated as a specific ground of relief upon which the decree was based, and it is claimed that that decree is the foundation of the title of the St. Paul Company, and that therefore it is now estopped to question the mortgage and the debt. But counsel overlook the fact that the bill was founded upon the Cleveland judgment and prayed a sale subject only to the incumbrances specified in the marshal's deed. It is true that it states the execution by the Minnesota Company of the Scribner and Fonda mortgage, but it expressly charges that that mortgage is junior and subsequent to the Cleveland judgment, and the allegation respecting that mortgage is made only as the basis for the appointment of a receiver, it being

charged that the Minnesota Company, being in possession of the revenues of the road, was diverting them to the payment of the principal and interest of that mortgage, while fraudulently failing to pay interest on the prior incumbrances. We find no element of estoppel as asserted by counsel. The possession of the St. Paul Company during the 30 years prior to the filing of the bill in this cause was actual, open, notorious, exclusive, and adverse. It has treated the property as its own in antagonism to every other interest or claim, except the prior incumbrances specified in the marshal's deed. It has paid those prior incumbrances, amounting to nearly \$3,000,000; it has paid the taxes assessed against the property by the state of Wisconsin; it has largely improved the physical condition of the property; so that we have no difficulty in finding as a fact that the St. Paul Company entered into possession of this property and has remained in possession for 30 years, claiming title under the Cleveland judgment and the deed upon the sale under the James decree, and that such possession has been adverse to any claim of the complainants. We had occasion to consider this statute of Wisconsin in the case of the City of La Crosse v. Cameron, 80 Fed. 264, 25 C. C. A. 399, and it has often been spoken to by the Supreme Court of Wisconsin, as well since that decision as by the cases therein referred to. *Heinselman v. Hunsicker*, 103 Wis. 12, 16, 79 N. W. 23; *McCann v. Welch*, 106 Wis. 142, 148, 81 N. W. 996; *Pitman v. Hill*, 117 Wis. 318, 322, 94 N. W. 40; *Hatch v. Lusignan*, 117 Wis. 428, 432, 94 N. W. 332. The resultant of these decisions is that the statute applies where one has entered under claim of title, founded upon written instruments as being conveyances of the premises, and has held adverse possession for more than 10 years. It is immaterial that the instrument does not convey a good title. It is immaterial that the instrument is invalid. It is immaterial that the claim is made in bad faith. It is the hostile, exclusive possession under the instrument that satisfies the statute. It is said that all that the St. Paul Company derived from the judgment was a conveyance from the Minnesota Company of the property held in fee by it, with an assignment of the Cleveland judgment, which was a prior incumbrance. This we conceive to be an incorrect statement of the situation. The St. Paul Company was not a grantee of the Minnesota Company. The effect of the James decree was to direct a sale of the interest of the La Crosse Company in the land to satisfy the Cleveland judgment, which was prior to any title of the Minnesota Company, the latter company being made a party because it was in possession and claimed adversely to the St. Paul Company, and it was therein decreed that the Cleveland judgment was a lien upon the property and the franchises of the La Crosse road as of the date of the judgment, and directed a sale to satisfy that judgment. The St. Paul Company entered into possession under the marshal's deed, claiming title under, through, and by virtue of the Cleveland judgment and the decree in the James suit, and adversely and not under or in right of the Minnesota Company. The title that was obtained and that was sought to be obtained was not the title of the Minnesota Company, but the title of the La Crosse Company at the date of the judgment. Nor

did the St. Paul Company enter into possession under or in subordination to the Scribner mortgage. The marshal's deed purported to make an absolute conveyance of the property, subject only to the incumbrances therein specified, namely, the mortgages to Palmer, to the city of Milwaukee, to Bronson and Soutter, and the judgment in favor of Selah Chamberlain. Its claim of possession under that deed was hostile to the Scribner mortgage, as is abundantly shown by this record. We think that the Supreme Court of Wisconsin has determined that under such circumstances possession is adverse and that the statute applies. In *North v. Hammer*, 34 Wis. 425, one Sampson was the owner of homestead premises, and while so occupying them a judgment was recovered against him by one Delaney in a justice's court, which was docketed in the proper court of record on December 12, 1850. There was a sale by the sheriff under that judgment to Delaney in November, 1851. The deed following thereon from the sheriff to Delaney only purported to convey the interest which Sampson held at the date of filing the transcript of the judgment in the county where the land was situated, stated to be December 12, 1851, but a second or corrected deed correctly stated the date as December 12, 1850. On August 19, 1851, Sampson conveyed to North the premises in question as security for a debt, taking back a defeasance in the form of a bond under seal for a reconveyance, the grantor remaining in possession. Delaney conveyed to Hammer for full value, the purchaser taking possession claiming title under the deed, exclusive of any other right, and occupied the same continuously for more than 10 years. The bill was filed by North to foreclose Sampson's supposed equity of redemption. The court ruled that the suit was barred by the statute, observing, at page 432:

"Various objections are taken to the sale on the execution, and to the title derived through the sale, and it is claimed that the interest of the judgment debtor was not divested by it. But we shall not dwell upon these objections to determine whether they are valid or not, because, in the view we entertain of the case, the bar is effectual although the defendant Esther may not have acquired a rightful title under the execution sale. In order to constitute adverse possession under the statute, it is not necessary that the title under which the party claims should be a good one. It is sufficient that a party enters into possession under claim of title exclusive of any other right, founding such claim upon some written instrument. It is not essential that the claim upon which an adverse possession is founded is made upon an instrument which conveys a valid title. If adverse possession could only be based upon an instrument which conveyed a good and perfect title, it is apparent that the statute would be of little value."

The court further observes:

"She [Hammer] took the deed as conveying to her the full title, and entered into possession claiming the land as her own absolutely, and justifies and maintains her possession by virtue of this conveyance. Her possession has been hostile from the first, not acknowledging any right of the plaintiff or of Sampson, or of any other person, in the land; and, if there is any efficacy in the statute, her title has ripened into a perfect one, whatever defect there might have been in the execution sale. If she knew of the plaintiff's claim to the land, either at the time or after she purchased of Delaney, she denied that this claim was of any validity, and never acknowledged it in any manner. It is assumed that she only purchased an equity of redemption, and subject to the plaintiff's mortgage. But it seems to us that this assumption is opposed to all the facts

and proofs in the case. For the evidence conclusively shows that she supposed she was getting a perfect title—that the interest of Sampson had been divested by the sheriff's sale; or, at all events, that the conveyance from Delaney to her carried the fee, and not merely the equity of redemption. And since the character of her possession has been hostile and adverse from its inception, under this deed, the statute of limitations has run in her favor, even if there was a defect or irregularity in the sale upon the execution against Sampson."

It is supposed that the case of *Maxwell v. Hartmann*, 50 Wis. 660, 668, 8 N. W. 103, is opposed. There Maxwell, the holder of a mortgage dated January 9, 1857, made by one Gessner, brought suit to foreclose. The defendants, Hartmann, asserted adverse possession under warranty deed from Gessner, the mortgagor, to them. The court held that the mortgage being duly recorded, and the deed by the mortgagor to Hartmann being long subsequent to such record, it must be presumed to have been taken with full knowledge of the mortgage, and, so taking title, her rights were subject and subordinate to the mortgage, until it is shown by some act that such possession is inconsistent with the rights of the mortgagee. We do not understand that this case in any way impugns the force of *North v. Hammer*. Of course, one taking a deed from the mortgagor and entering into possession is, as against a prior recorded mortgage, presumed to take in subordination thereto, and, in the absence of acts showing claim of title and possession hostile to such mortgage, holds in subordination thereto. The recent case of *Pitman v. Hill*, 117 Wis. 318, 94 N. W. 40, fully supports the doctrine of *North v. Hammer*. The land in dispute in that case was selected and entered in June, 1859, by one Pitman, as the agent of one Stetson and in the latter's name, and a patent issued to Stetson in August, 1860. In August, 1861, Stetson assigned the certificate of entry to Pitman as security for a debt, under an agreement by Pitman to reconvey upon payment, and the note and agreement were found after Stetson's death among his papers. Pitman entered into possession under the assignment of the certificate, exercised acts of ownership by taking wood from the premises, and upon his death the property, or his interest in the property, passed by will to the plaintiff, who continued to use the property substantially as had Pitman, paying the taxes during the time of the exercise of acts of ownership, the land being wild and unoccupied territory during all the time subsequent to the entry, except as it was used as a wood lot. The court held that adverse possession was established, saying:

"The assignment of the certificate of entry, in terms conveying the same and the land therein described to respondent's predecessor, was a sufficient written instrument upon which to found adverse possession under sections 4211, 4212, Rev. St. 1898. Grant that the purpose of the parties was to make a mortgage and not a conveyance of the title, and grant, also, that the mortgage indebtedness had been paid; still there is evidence from which the court was warranted in coming to the conclusion that respondent's predecessor held adverse possession under the instrument for the full statutory period necessary to give him full title to the property. A mere mortgagee of land has no right to the possession thereof. In this case respondent's father, under the written instrument mentioned—let it be a mortgage or full conveyance, it makes no difference which we call it—took possession of the property and treated it as his own for more than 20 years, and his conduct during the whole time was consistent only with the idea that his possession was adverse. Ten

years would have been sufficient. Such conduct by a mortgagee is sufficient to give him title by adverse possession. *Knowlton v. Walker*, 13 Wis. 264; *Waldo v. Rice*, 14 Wis. 286. The acts of ownership were open, continuous, hostile, and of a nature to satisfy all the essentials of adverse possession under or independently of the statute. *Lampman v. Van Alstyne*, 94 Wis. 417, 69 N. W. 171. They consisted of using the premises for a wood lot, the adverse possessor taking the wood therefrom for his ordinary use annually for the full statutory period. That satisfies to the letter subdivision 3, § 4212, Rev. St. 1893. To that we have added the significant circumstance of the payment of the taxes, which is inconsistent with any other theory than that the payor claimed the property as his own. Whether his claim was in good faith or bad faith, of course makes no difference. *Lampman v. Van Alstyne*, supra. The continued use of the property as indicated, by force of the statutes (sections 4210, 4211), displaced the presumption that it was subordinate to the rights of a superior owner, and substituted in its place the presumption that the use was characterized by all the elements of adverse possession necessary to cut off the title of a once superior owner, if there were such, and vest a complete title in fee in the hostile claimant."

We think that the law of Wisconsin is settled, and that the facts disclosed by the record bring the case before us fully within the purview of the statute. The St. Paul Company entered adversely. It claimed that the title which it had obtained was the title of the La Crosse Company as of the date of the rendition of the Cleveland judgment, and that this interest so acquired was prior in time and superior to any title by the Minnesota Company, or of the trustees under the mortgage in suit executed by the Minnesota Company. That claim was made in good faith. It was fortified by the decree of the Supreme Court so adjudging as between the St. Paul Company and the Minnesota Company. The deed purported to convey an absolute title, subject only to the stated prior incumbrances not here involved. In every way its possession, whether it be referred to the Cleveland judgment, to the James decree, or to the marshal's deed, was hostile and adverse to the Scribner mortgage, and exclusive of any right by virtue of that mortgage. We think the case comes clearly within the statute, and we are bound to follow the statute.

It is said that to hold this statute of limitations to be applicable would deny to the complainants opportunity to contest the right and possession of the St. Paul Company; that, as the trustees of the Fonda and Scribner mortgage were not parties to the James suit, they could not be concluded by the decree in that suit; and that at no time thereafter, within 10 years of the suit, could they or the bondholders have contested the right of the St. Paul Company, because the mortgage debt did not mature until the year 1884, and the provision of section 3186 of the Revised Statutes of 1878, that "any person not having such title or possession, but being the owner and holder of any lien or encumbrance on land, shall also have the same right of action as the owner in fee to contest the legality and validity of any other claim, lien or encumbrance on such land, or any part thereof," was not in force until the year 1878, and until after the expiration of the 10 years' adverse possession. If this were so, and however inequitable it may be, it is difficult to see how the fact could avail to toll the running of the statute. *Amy v. Watertown* (No. 1), 130 U. S. 301, 9 Sup. Ct. 530, 32 L. Ed. 946. As was there said, we

are bound by statute, and are obliged to obey the state law, even if it lead to an inequitable result. But is it true that the complainants were without remedy? The Minnesota Company had defaulted in the payment of the bonds under the Scribner mortgage on January 1, 1865, prior to possession taken by the St. Paul Company under the marshal's deed, and defaulted in the payment of every semiannual installment after that date. Over \$120,000 of interest was due, assuming the bonds to have been issued and sold for value, at the time the St. Paul Company took possession. Just prior to the expiration of the 10 years' adverse possession over \$550,000 of interest was due and unpaid, exceeding in amount the principal sum of the bonds now claimed by the complainants to have been outstanding and held by them for value. The trustee had during all that time, by the terms of the mortgage, the right to foreclose and to sell the property; a right equal to his right to foreclose after maturity of the debt, for the mortgage provided that in the case of default for the space of 30 days in the payment of any interest warrant coupon, as it should fall due, the trustee was authorized to take possession of the railroad and the property conveyed, to receive the income and profits, and to sell it with all the rights and franchises of the Minnesota Company, and to execute conveyances thereof. The trustee and the bondholders knew, at the time of the sale under the James decree, that the Minnesota Company was wholly irresponsible, and that recourse could be had for payment of the mortgage debt to no other property than this Eastern Division; yet during that 10 years' adverse possession they rested supinely, making no effort to obtain the possession or to dispute the right and claim of the St. Paul Company. We say they made no effort, because they assert that the Scribner bill, filed in 1868, was filed without authority of the trustee, and they repudiate that proceeding. It is also to be observed that the St. Paul Company was in exclusive and adverse possession for 30 years prior to this suit, and for nearly 13 years after the maturity of the principal of the bonds of the Scribner mortgage and before the filing of this bill. So that, if the enforcement of the statute law of the state with respect to adverse possession should seem to operate harshly upon the complainants, they have only themselves to blame, for, if they had rights as against the St. Paul Company, they had opportunity to contest their right in the courts.

The decree must be affirmed.

GUFFEY v. ALASKA & P. S. S. CO.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1904.)

1. SHIPPING—MARITIME LIEN.

Where, at the time complainant delivered goods on the wharf of a transportation company under a bill of lading reciting that the goods were to be shipped on board defendant company's vessel or vessels "now" lying at the port of S., complainant had knowledge that defendant's chartered vessel, the R. D., by which it was expected to ship the goods, was then either on the high seas or in a distant port, and the goods were never delivered to the master or officers of such vessel, the vessel was not

subject to a maritime lien for defendant's breach of the contract of affreightment.

2. SAME—STATUTES—CONSTRUCTION.

Ballinger's Ann. Codes & St. § 5953, providing that all steamers, vessels, etc., are liable for the nonperformance or malperformance of any contract for the transportation of passengers or property between places within the state, or to or from places within the state, made by their respective owners, masters, agents, or consignees, does not create a lien on a vessel for breach of a contract of affreightment made by her charterer.

3. SAME—APPEAL—COSTS—OBJECTION TO TRIAL.

In the absence of a showing in the record that an objection to the allowance of certain costs was brought to the attention of the trial court by appeal from the clerk's taxation or otherwise, such objection will not be reviewed.

Appeal from the District Court of the United States for the Northern Division of the District of Washington.

Wm. Martin and W. A. Keene, for appellant.

Hoyt & Haight, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The Alaska & Pacific Steamship Company, a corporation organized under the laws of the state of Washington, was engaged in operating the steamships Brunswick and Robert Dollar as carriers of freight and passengers between the ports of Seattle, Wash., and Nome, Alaska. It was operating the Robert Dollar under a charter party which was a demise thereof from the owner. On or about October 5, 1900, the libellant placed upon the dock used by the steamship company at Seattle certain freight to be shipped to Nome, and received therefor from the company a bill of lading. By the terms of the bill of lading, the vessel was relieved from liability from certain causes, among which were stranding, disasters or dangers of the sea, unavoidable detention or delay, stress of weather, inability to procure lighterage, or other unavoidable circumstances or casualty. It mentioned no vessel on which the goods were to be shipped, but it recited that they were shipped on board the appellee's vessel "employed or operated by it, and now lying at the port of Seattle and bound for Nome City * * * to be carried at the option of said company upon said vessel or upon any other of said company's vessels." At that time the Robert Dollar, on which it was understood that the shipment would be made, was on her round trip from Seattle to Nome and return, and was supposed to be nearly due to return to Seattle. Owing to extremely stormy weather at Nome and at St. Michaels, she was delayed, and did not return to Seattle until October 29, 1900; and then, owing to the storms and ice of winter, it was too late to make another trip that season. About November 1, 1900, the Robert Dollar sailed from Seattle to San Francisco, and was delivered to her owner. The appellant's goods were never placed on board the Robert Dollar, or in charge of her

† 2. Maritime liens created by state laws, see note to *The Electron*, 21 C. C. A. 21.

master or of any of her officers. They lay upon the dock until October, 1901. The charter party, by its terms, denied to the charterer the power to subject the vessel to liens, required it to pay all charges against her, and stipulated that neither the owner nor the vessel should be liable to any party whatsoever for either delivery or loss or damage to cargo, or for breach of any contract of affreightment or transportation, and that all liability for any and all such matters should be borne by the charterer. It stipulated further that, while the owner should have the right to nominate the captain and chief engineer of the vessel, they and the crew should be the servants and agents of the charterer, and not the servants or agents of the owner. The appellant had no knowledge that the vessel was chartered, but supposed her to belong to the steamship company; nor did any fact come to his notice, so far as the evidence shows, to put him upon inquiry to ascertain whether or not she was chartered. The appellant brought his libel against the ship to subject her to his claim of lien for damages for breach of the contract. The District Court denied the lien on the ground that the goods had never been placed on board the ship, or in the custody of her master, and dismissed the libel.

We think that the court committed no error in holding that under the general maritime law the contract of affreightment created no lien upon the vessel. In 1 Parsons on Shipping & Admiralty, 183, it is said:

"The reception of the goods by the master on board of the ship, or at a wharf or quay near the ship, for the purpose of carriage therein, or by any person authorized by the owner or master so to receive them, or seeming to have this authority by the action or assent of the owners or master, binds the ship to the safe carriage and delivery of the goods."

The delivery in the present case responds to all the requirements of this proposition of the text-writer, except that the goods were not delivered in the presence of or near the ship. The ship at that time, the appellant well knew, was either at Nome or on the high seas. The recital in the bill of lading that the goods were shipped on board the Alaska & Pacific Steamship Company's vessel or vessels employed or operated by them, "and now lying at the port of Seattle," does not have the effect to contradict the known facts. The case is not embarrassed by the acquisition of rights under the bill of lading by a bona fide purchaser or transferee. Coupled with the known facts, the bill of lading was, in effect, a receipt by the steamship company of the goods on their wharf, for which freight had been paid, and an obligation to ship them on the Robert Dollar on her next trip. The lien imposed upon a vessel by a contract of affreightment and delivery of the goods to the vessel is *stricti juris*, and cannot be extended by analogy or by inference. The *Kiersage*, 2 Curt. 424, Fed. Cas. No. 7,762; *Vandewater v. Mills*, 19 How. 90, 15 L. Ed. 554. There is no case holding that the owner or agent of a vessel can, by a mere contract of affreightment made at her port while the vessel was on the high seas, thereby subject her to a lien. There are some decisions and dicta of the Supreme Court which indicate the trend of its opinion to the doctrine that the lien is to be

restricted to narrow ground, and is to be recognized only in cases of actual delivery to the ship, or to her master or officers. In *The Schooner Freeman v. Buckingham*, 18 How. 182, 15 L. Ed. 341, Mr. Justice Curtis said:

"Under the maritime law of the United States a vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment; but the law creates no lien on the vessel as a security for the performance of a contract to transport cargo until some lawful contract of affreightment is made, and a cargo shipped under it."

This was said in a case which involved the validity of bills of lading of property not shipped on the vessel, but designed to be instruments of fraud.

In *Vandewater v. Mills*, 19 How. 82-90, the court said:

"If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the nondelivery in good order of goods never received on board. Consequently, if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his personal action for damages."

In *Bulkley v. Naumkeag Steam Cotton Co.*, 24 How. 386, 16 L. Ed. 599, it was held that the requirement that there be a delivery to the vessel was complied with in a case where the delivery of bales of cotton was made to a lighterman employed and paid by the master of the vessel, and who was in the act of conveying the bales to the vessel, for the purpose of putting them on board, when an explosion of the boiler threw them into the water; that the delivery of the cotton to the lighterman was a delivery to the master; and that the transportation by the lighter to the vessel was the commencement of the voyage in execution of the contract, the same, in judgment of law, as if the bales had been placed on board of the vessel instead of the lighter. In *King v. The Lady Franklin*, 8 Wall. 325, 19 L. Ed. 455, the bill of lading had been given by one who was the agent of several vessels, all engaged in transporting goods from Milwaukee to Port Sarnia, but having separate owners, and not connected by any joint undertaking. The bill of lading, by mistake of the agent, acknowledged that certain goods had been shipped on the *Lady Franklin*, when in fact they had been previously shipped on another vessel, for which a bill of lading had been given accordingly. It was held that the *Lady Franklin* was not responsible for the loss of the goods by the other vessel. Mr. Justice Davis said:

"In this case the bill of lading acknowledges the receipt of so much flour, and is prima facie evidence of the fact. It is, however, not conclusive on the point, but may be contradicted by oral testimony. The doctrine that the obligation between ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board, or in the custody of the master, has been so often discussed, and so long settled, that it would be useless labor to restate it, or the principles which lie at its foundation."

These views were reaffirmed in *The Keokuk v. Robson*, 9 Wall. 517, 19 L. Ed. 744. In *The Delaware v. Oregon Iron Co.*, 14 Wall. 579-602, 20 L. Ed. 779, the court said:

"Bills of lading, when signed by the master, duly executed in the usual course of business, bind the owners of the vessel, if the goods were laden on

board, or were actually delivered into the custody of the master; but it is well-settled law that the owners are not liable, if the party to whom the bill of lading was given had no goods, or the goods described in the bill of lading were never put on board, or delivered into the custody of the carrier or his agent."

In this dictum of the court it is implied that a good delivery may be made not only to the master, but to the carrier or his agent; but, in view of other utterances of the court, we have no reason to think the language so used was intended to be understood as saying that a mere delivery to the carrier or his agent, evidenced by a bill of lading, would, in the absence of the vessel, and in the absence of knowledge on the part of her master or officers of such delivery, be a constructive delivery to the ship, such as to bind her to the safe carriage of the goods. In *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998, a bill of lading was issued by the general agents of the owner of a steamboat, when in fact the goods referred to therein were not shipped on the steamboat, or delivered at its wharf or to its agents for shipment; the statement in the bill of lading to that effect being untrue. The court, by Mr. Justice Miller, said:

"Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper, and only then could there be goods shipped. In saying this, we do not mean that the goods must have been actually placed on the deck of the vessel. If they came within the control or the custody of the officers of the boat for the purpose of shipment, the contract of carriage had commenced, and the evidence of it, in the form of a bill of lading, would be binding; but without such a delivery there was no contract of carrying, and the agents of it had no authority to make one."

Conceding that some of these deliverances of the court announce propositions not necessarily involved in the cases that were before it, and that they are dicta, they are nevertheless dicta of eminent jurists, learned in the law, sitting in the highest court of the land, and, as such, they are entitled to the highest consideration. They have been so regarded in the decisions of the inferior federal courts.

In *Campbell v. The Sunlight*, 2 Hughes, 9, Fed. Cas. No. 2,368, it was held that delivery of freight to a lighter moored alongside and in charge of the vessel for the shipment on the vessel, where it was the custom of trade to deliver in that way, and where a receipt was given by the master, is a good delivery, and binds the vessel. Said the court:

"It is well-settled law that the reception of the goods by the master on board the ship, or at a wharf or quay near the ship, for the purpose of a carriage therein, or by any person authorized by the owner or master so to receive them, binds the ship to the safe carriage and delivery of the goods."

In *Scott v. Ira Chaffee* (D. C.) 2 Fed. 401, Mr. Justice Brown—then district judge—held that the owner of a cargo has no lien upon a vessel for the breach of a contract of affreightment until the cargo, or some portion of it, has been laden on board or delivered to the master. The *Caroline Miller* (D. C.) 53 Fed. 137, was a case in which the steamer was running under a charter party to a steamship line from Brunswick to New York. The bill of lading was signed, not by the master of the steamer, but by the agent of the charterer.

The master had nothing to do with the loading of the steamer or with the appointment of the agent. The cotton referred to in the bill of lading was never put on board. It was held that the steamship was not liable in rem for the missing bales, because they were never put on board the steamer, and never came into the possession of the master, or under his control. The court said:

"But here the master did not sign any bill of lading or undertake to bind the ship, and the missing cotton never came under his control. The agent of the New York & Brunswick Steamship Line who signed this shipping document was not the agent of the shipowner, nor of the master. The delivery of goods to that agent was therefore neither a delivery to the master, nor a delivery to the ship."

In *The Guiding Star* (D. C.) 53 Fed. 936, the owners of certain steamboats had formed an association, and, by a writing signed by the masters of each boat, had appointed a common agent, with authority to sign bills of lading, under an arrangement by which the bills were frequently signed on delivery of the goods at the landing; the goods to be taken by the first boat of the association which passed. The name of the particular boat was usually entered in the bill when the goods were received on board. The court, recognizing the distinction between a common-law delivery to a carrier and a delivery to a vessel, ruled that the bills so signed were binding upon the principal, and that a delivery of the goods at the landing was a valid delivery, but that there was no lien upon a vessel in respect to goods for which her agents had issued a bill of lading, but which were destroyed while in the custody of the keeper of the landing, before being received on board or coming under the control of the master. In *The Vigilancia* (D. C.) 58 Fed. 698, it was held that there can be no delivery to a ship, in the maritime sense, either of supplies or cargo, so as to bind her in rem, until the goods are either actually put on board the ship, or else brought within the immediate presence or control of her officers. The court in that case pointed out the distinction between a common-law delivery to the company sufficient to bind the company in personam, and a delivery to the ship so as to bind the ship in rem. *The Protection* (decided by this court) 102 Fed. 516, 42 C. C. A. 489, was a case in which the owner of a steam sled sawing machine and sled runners, at Seattle, contracted for the transportation of the same on the steamship *Protection* from Seattle to Skaguay. The machine and sled runners were delivered to the ship's tackle on the dock at Seattle, freight and wharfage thereon having been paid; and a bill of lading was issued by a duly authorized agent of the company, reciting that the machine and sled runners had been shipped in apparently good order on board the steamship *Protection*. In that case, although no question was made of the jurisdiction in admiralty to enforce a lien on the vessel for failure to carry out the contract, this court sustained the lien. Under the circumstances, the delivery to the ship's tackle on the dock was, without doubt, a delivery to the vessel. In *The S. L. Watson*, 118 Fed. 945-952, 55 C. C. A. 439, the Circuit Court of Appeals for the First Circuit, through Putnam, Circuit Judge, said:

"The rule of admiralty, as always stated, is that the cargo is bound to the ship, and the ship to the cargo. Whatever cases may have been decided other-

wise disregarded the universal fact that no lien arises in admiralty, except in connection with some visible occurrence relating to the vessel or cargo, or to a person injured. This is necessary in order that innocent parties dealing with vessels may not be the losers by secret liens, the existence of which they have no possibility of detecting by any relation to any visible fact."

There are some early decisions which it may be conceded go to the full extent of sustaining the doctrine contended for by the appellant. Such were *The Flash*, Abb. Adm. 67, Fed. Cas. No. 4,857, and *The Pacific*, 1 Blatchf. 569, Fed. Cas. No. 10,643. In the latter case, Nelson, Circuit Justice, held that it was not necessary, in order to give jurisdiction over a maritime contract, that the ship must have entered upon the performance thereof, and said:

"The owner is bound as soon as he or the master settled the terms upon which the ship is to enter upon the service, and it is difficult to perceive why the liability of the latter should be postponed until the inception of the performance."

Both of these decisions were rendered prior to that of *Freeman v. Buckingham*. In *The Hermitage*, 4 Blatchf. 474, Fed. Cas. No. 6,410, Mr. Justice Nelson, probably in view of intervening decisions of the Supreme Court, used language to indicate that his former ruling in the case of *The Pacific* was unsound. As early as the case of *The Monte A.* (D. C.) 12 Fed. 331, Brown, District Judge for the Southern District of New York, said—and of that there can be no doubt—that *The Flash* and *The Pacific* must be deemed overruled by subsequent decisions. But in the case of *The Towboat James McMahon*, 10 Ben. 103, Fed. Cas. No. 7,197, Judge Benedict seems to have reaffirmed the doctrine of *The Pacific*. In that case an agreement had been made by the owner of a canal boat with the towboat to tow the former, and the consideration therefor was paid. The canal boat was ready at the appointed place to be taken in tow. There was a breach of the contract. It was held that there was a cause of action in rem against the towboat. The court said:

"The contract sued on is the maritime contract itself—maritime because it was an agreement to transport a vessel upon navigable waters, and perfected as a contract by the payment and receipt of the towage money. The liability of the owner was complete."

The court remarked that *Vandewater v. Mills* had been commented upon by the Supreme Court in *Bulkley v. Naumkeag Steam Cotton Co.*, and that pains had there been taken to limit its effect, "for," continued the court, "it is treated as laying down no different rule from that declared in *Freeman v. Buckingham*." Of similar import is *Pearce v. The Thos. Newton* (D. C.) 41 Fed. 106. In that case goods were shipped by the Clyde Line from Philadelphia to South Mills, N. C. The Clyde Line regularly ran a vessel to Norfolk, and there transferred to its connecting carrier, the *Thomas Newton*. The vessel on which the goods were received at Philadelphia carried them to Norfolk, and there by an agent of the Clyde Line they were placed and stowed upon a wharf where the *Newton* regularly received her freight. Before the arrival of the *Newton* they were injured by a flood. It was held that the lien upon a vessel for the safe custody and due transfer of goods to be shipped in her attaches

at the time of delivery of such goods to her agents and owners, and that the *Newton* was liable in rem. Other cases are cited by the appellant, such as the *City of Alexandria* (C. C.) 28 Fed. 202, and *The Oregon*, *Deady*, 179, Fed. Cas. No. 10,553, but they are all believed to be reconcilable with the doctrine of the Supreme Court decisions above alluded to.

But it is urged that, if there be no lien upon the vessel under the general maritime law, a lien is afforded by the statute of Washington (2 Ballinger's Ann. Codes & St. § 5953), which, by subdivision 5, declares that all steamers, vessels, and boats, their tackle, apparel, and furniture, are liable "for the non-performance or mal-performance of any contract for the transportation of persons or property between places within this state or to or from places within this state made by the respective owners, masters, agents or consignees." We need not enter into a discussion of the interesting and somewhat difficult question whether a state Legislature has the power to so far derogate from the general maritime law as to create a lien enforceable in the courts of admiralty upon a vessel for breach of a contract of affreightment in a case where there is no actual delivery of the cargo to the vessel or her master or other officers. It is sufficient, we think, to refer to the fact that the statute in question does not by its terms include a contract of affreightment made by a charterer. The contract in this case was made, not by an owner or master, agent or consignee. It was made by the Alaska & Pacific Steamship Company, the charterer. It is unnecessary to cite authorities to the point that such a lien law is to be strictly construed. It is true that in some contracts and in some relations the charterer by a demise is to be deemed the owner *pro hac vice*. But in construing a statute which specifies only that the lien may be created by the owner, master, agent, or consignee, we know of no rule or principle of construction which authorizes us to read into it the word "charterer." The facts that the appellant contracted with the charterer, and delivered his goods to it, in ignorance of the charter party, and under the supposition that the appellee was owner, and without the knowledge of facts sufficient to put him upon inquiry to ascertain whether such was the case, can have no bearing upon the construction of the statute. They are circumstances that might be of controlling importance in a case where the owner, having parted with the possession of his vessel to a charterer, asserts a lien under the general maritime law for the freight (*Drinkwater v. The Spartan*, 1 Ware, 149, Fed. Cas. No. 4,085), or in a case of damages to goods in transportation by a charterer (*The Euripides* [D. C.] 52 Fed. 161), or where supplies have been furnished a chartered vessel in a foreign port at the instance of the charterer (*The India* [D. C.] 14 Fed. 476; *The Bombay* [D. C.] 38 Fed 512), or in a case of liability for negligence resulting in a collision of a chartered vessel in possession of the charterer (*The Barnstable*, 181 U. S. 464, 21 Sup. Ct. 684, 45 L. Ed. 954). The question here is not one of the right of a person who has dealt with a charterer on the supposition that he is the owner, and there is no question of apparent authority or of estoppel involved. It is one purely of the construction of the letter of a lien

statute. The Legislature has seen fit to extend the lien only to contracts made by the owner, or those to whom he has confided authority. We held in *The South Portland*, 100 Fed. 494, 40 C. C. A. 514, in a case where a lien was asserted under section 3 of the act of the Washington Code above referred to, that it was immaterial whether one who procured necessary equipment for a steamer, of which he was in the possession, were the charterer in possession or the owner; but that section of the statute provides a lien for one who furnishes such equipment to vessels "at the request of their respective owners, masters, agents, consignees, contractors, sub-contractors or other person or persons having charge in whole or in part of their construction, alteration, repair or equipment and every contractor, sub-contractor and builder, or person having charge either in whole or in part of the construction, alteration, repair or equipment of any vessel, shall be held to be the agent of the owner for the purposes of this chapter." We know of no case in which it has been held that the word "owner," so used in a statute creating a lien, is sufficiently comprehensive to include a charterer. The contrary has been held by Seaman, District Judge, in *The C. W. Moore* (D. C.) 107 Fed. 957, in a case in which the statute of Illinois created a lien against vessels for rental of wharfage privileges, and prescribed that those who may subject a vessel to such lien are "the owners or part owners, master, clerk, steward, agent or ship's husband."

The appellant, in his brief, makes the point that the court erred in taxing costs in the sum of \$100, the premium paid on the claimant's bond for the release of the vessel, and \$12.50 premium paid on the claim and stipulation for costs. Objection was made by the appellant to these items of the cost bill, but no appeal to the court was taken from the ruling of the clerk thereon. Nor is the allowance of these items of costs by the lower court assigned as error. In the absence of a showing in the record that this matter was brought to the attention of the lower court by appeal or otherwise, or submitted to its decision, this court has no power to review the ruling of the clerk, or that portion of the decree thereon rendered. *The Robert Graham Dun*, 70 Fed. 270, 17 C. C. A. 90.

The decree of the District Court will be affirmed.

OWENS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 23, 1904.)

No. 978.

1. HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

Where, in a prosecution for homicide, defendant claimed that the killing was done in self-defense, an instruction that the jury should say from the evidence whether it was necessary for defendant to kill deceased to protect himself, in order that the killing should be justified, was erroneous, since defendant was entitled to defend himself against attack by deceased, to the extent of killing deceased, if it appeared to defendant at

¶ 1. See Homicide, vol. 26, Cent. Dig. §§ 159, 161, 165.

the time of the encounter, acting as a reasonable man, that it was necessary for him to kill deceased to prevent injury to himself.

2. SAME—REASONABLE DOUBT—DEFINITION.

An instruction that a reasonable ground of doubt is one which is reasonable from the evidence or want of evidence, and must be a ground of doubt for which a reason can be given, based on the evidence or want of evidence, was objectionable, since a doubt arising out of the evidence is a mental operation for which it may be difficult or impossible to assign a reason.

3. SAME—EXCEPTIONS.

Where, in a criminal case, the court gave a long, written charge to the jury, and, immediately after sending the jury out, defendant's counsel notified the judge that he wished to except to portions of the charge, and asked the court if he had any rule as to the manner of taking exceptions to instructions, and the judge responded that he had no such rule, and directed counsel to adopt such practice as he might be advised was proper, whereupon, on the succeeding day, which was Sunday, defendant's attorney prepared a motion in arrest of judgment and for a new trial, with written exceptions to the charge, which he handed to the judge and the clerk on that day, with instructions to file the papers on the succeeding day, which was accordingly done, and the judge considered such exceptions and overruled the same, they would not be disregarded on appeal on the ground that they were not filed in time to allow the trial judge to reconsider his charge and give different instructions.

Gilbert, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Third Division of the District of Alaska.

Louis K. Pratt, for plaintiff in error.

Marshall B. Woodworth and Nathan V. Harlan, U. S. Attys.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The plaintiff in error was charged by indictment with having killed one Carl Christensen, "purposely and of his deliberate and premeditated malice," by cutting and stabbing him with a knife, and, after trial, was convicted of murder in the second degree, upon which conviction he was sentenced to imprisonment. The homicide was the result of a combat with knives between the deceased and the plaintiff in error, in a cabin occupied by the latter, at a remote spot in the territory of Alaska. No one was present but the participants. At the trial the plaintiff in error testified in his own behalf to the effect that the deceased commenced the fight by attacking and cutting him with a knife, and that, to protect his own life, he was compelled to, and did, inflict the wounds resulting in the death of Christensen. In considering the instructions given by the court below, to which exceptions were taken by the plaintiff in error, it must, of course, be assumed that the jury may have believed that testimony of the defendant; and upon that point of self-defense, which was, indeed, the only defense interposed, the court below instructed the jury as follows:

"The defendant in this case alleges that the killing of Carl Christensen, for which he is now on trial, was done as an act of self-defense. The jury is instructed that the dwelling house where a man lives is his home or castle, and that he may repel force by force in the defense of his person against one

who manifestly intends and endeavors by violence to commit a felony upon him in such home or castle, and in such case he is not bound to retreat, but may pursue his adversary until he has secured himself from all danger; and, if he kills his adversary in so doing, it is justifiable defense.

"Applying the foregoing principles of law to this case, if you find from the evidence, or entertain a reasonable doubt whether or not it is true, that at the time mentioned in the indictment the deceased, Christensen, attacked the defendant in his cabin or dwelling place with a butcher knife, and the same being a dangerous weapon, with which death or great bodily harm could have been inflicted upon the defendant by Christensen, and that Christensen then and there endeavored to kill or do great bodily harm to the defendant with such knife, then defendant was not obliged to retreat, but had the lawful right to stand his ground and defend himself against such attack, and had the right to continue such defense and pursue Christensen until he (defendant) was entirely out of danger; and if, in making such defense, Christensen met his death, it was justifiable homicide, and you should find the defendant not guilty.

"The court instructs the jury that, when a person is attacked by another with a deadly weapon, he has the right to act upon the appearance of things as they appear to him at the time, and, as long as he honestly and in good faith believes that his antagonist is about to inflict death or great bodily harm upon him, he has the right to continue his defense.

"The law of self-defense, however, will not permit the one attacked to pursue the attacking opponent further than is necessary to protect himself, and, if you shall find and believe from the evidence in this case that Christensen did attack the defendant, this would not justify the defendant in killing him, without such killing was necessary to protect himself; and of the necessity thereof you are to judge, and not the defendant, and you are to judge from the evidence in the case.

"The law of self-defense does not imply the right to attack, except in self-defense, nor will it permit acts to be done in retaliation or for revenge; and therefore if you shall find and believe from the evidence in this case, beyond a reasonable doubt, that the defendant brought on and voluntarily entered into the difficulty with the deceased for the purpose of wreaking vengeance upon him, and if you shall find and believe from the evidence, beyond a reasonable doubt, that he killed the deceased when he had no reasonable apprehension of injury from him, or of any present impending injury to himself from deceased, or that it was done in a spirit of retaliation and revenge, then the defendant cannot avail himself of the law of self-defense, and you should not acquit him on that ground. And the court instructs you that in case you find that the defendant voluntarily brought on and voluntarily entered into the fight with the deceased, Carl Christensen, and was the assailant therein, it does not matter, under the law of self-defense, how great the danger or imminent the peril to which the defendant may have believed himself to be exposed during said difficulty, it would not justify or excuse the killing.

"You are instructed that the law of self-defense was as much the right of the deceased, Christensen, as it was that of the defendant; and if you shall find and believe from the evidence in this case, beyond a reasonable doubt, that the deceased was attacked by the defendant when the deceased was attempting to retreat to and through the open door of the house where the homicide happened, and would have so retreated but for the attack of the defendant, then I instruct you that the defendant is not entitled to be acquitted on the ground of self-defense.

"It is for you to determine, gentlemen of the jury, from the evidence in this case, and upon these instructions, whether or not the accused killed the deceased in self-defense, or whether he killed him without justification or excuse.

"Previous threats or acts of hostility of the deceased, Carl Christensen, toward the defendant, however violent they may have been, were not of themselves sufficient to justify the defendant in slaying the deceased, or to excuse or justify him. He must have acted under an honest belief that it was necessary at the time to take the life of the deceased in order to save his own. It must appear that there was a reasonable cause to excite this apprehension

on his part. So that, if you find that the deceased at the time he was killed did nothing to excite in the mind of the defendant the fear that the deceased was about to execute his threat, then the threats and bad character of the deceased, whatever you may find them to have been, are unavailing, and should not be considered by you. But if the evidence leaves you in doubt as to what the acts of the deceased were at the time, you may consider the threats and character of the deceased, in connection with all the other evidence, in determining who was probably the aggressor.

"You are instructed that no mere threats made by the deceased before or at the time of the killing, unaccompanied at the time of the killing with any attempt to carry them into execution, are sufficient to justify the killing, or reduce it to a lower degree of homicide than murder; and if you find that the defendant cut and stabbed and killed the deceased because of such threats, and because the defendant thought such threats would justify him in killing the deceased, and that when he cut and killed him he was in no immediate or imminent danger, he is guilty of murder.

"The law of self-defense will justify one in killing another in the protection of his own life, but it will not justify him in killing another where there is no reasonable danger to himself, nor will it justify or excuse him in using greater force than is reasonably necessary to protect himself; and if you shall find and believe from the evidence in this case that the accused was not acting in self-defense when he killed the deceased, Carl Christensen, and was acting as an unjustifiable assailant, and not in the defense of his own person, he would not be excused on the plea of self-defense."

Much that was there said by the trial court was correct. The difficulty is that in at least one place in these instructions the court ignored the well-settled doctrine that, where one is attacked by another with a deadly weapon, the party attacked may, if he does so honestly and in good faith, safely act in the light of his surroundings, and on the appearances to him at the time, for the court distinctly and specifically instructed the jury that of the necessity of the defendant's protecting himself "you are to judge, and not the defendant, and you are to judge from the evidence in the case"; that is to say, upon the evidence given at the trial the jury was to determine whether or not it was necessary for the defendant to kill the deceased in order to protect himself, without reference to the appearances to the defendant of existing conditions at the time of the encounter. The law upon the subject is well stated in the case of *State v. Ferguson*, 9 Nev. 106, 116, where the court said:

"In order to justify the homicide, it must appear to the defendant's comprehension as a reasonable man that he was actually in danger of his life, or of receiving great bodily harm, and that to avoid such danger it was absolutely necessary for him to take the life of the deceased. 'The inquiry,' as was said by Cole, J., in *State v. Collins*, 32 Iowa, 39, 'is not whether the harm apprehended was actually intended by assailant, but was it actual and real to the accused, as a reasonable man, as compared with danger remote or contingent?'

"By the frequent use of the words 'absolutely necessary,' as found in the instructions and charge, the jurors may have drawn the inference that, before they would be justified in acquitting the defendant, it must appear to them that the killing of deceased was absolutely necessary. This view of the case would virtually deprive a defendant of a reasonable exercise of his own judgment in determining from all the circumstances what was necessary to be done for the protection of his person or his life—a right which the law confers upon every individual, but one that must always be exercised at his peril, subject to revision by a jury of his peers. Bishop states the rule as follows: 'Whenever a man exercises his right of self-defense, he must be understood to act on facts as they appear to him. And if, without fault or carelessness, he is misled concerning them, and defends himself correctly according to what

he supposes the facts to be, he is justifiable, though they are in truth otherwise, and he has really no occasion for the extreme measure.' 1 Bishop on Crim. Law, § 384. This principle was announced by Judge Parker, afterwards chief justice of Massachusetts, in *Selfridge's Case*; indorsed by the Supreme Court of New York in *People v. Shorter*, 4 Barb. 477; affirmed in the Court of Appeals (*Shorter v. People*, 2 N. Y. 197, 51 Am. Dec. 286); and is sustained by the weight of reason and a decided preponderance of the authorities (*Oliver v. State*, 17 Ala. 587, 599; *State v. Harris*, 46 N. C. 193; *State v. Sloan*, 47 Mo. 604; *Meridith v. Commonwealth*, 18 B. Mon. 49; *Logue v. Commonwealth*, 38 Pa. 267, 80 Am. Dec. 481; *Campbell v. People*, 16 Ill. 19, 61 Am. Dec. 49; *Pond v. People*, 8 Mich. 150).

"This being the law, it follows that if Ferguson was without fault, and had reasonable ground to believe, and did believe, that he was in danger of his life, or of receiving great bodily harm, from Ash, and that this could only be prevented by his using such means of defense as were within his power, and he acted under such belief, and not in a spirit of revenge, then the killing of Ash was justifiable. Whether there was an absolute necessity for a resort to such means was a question for him to decide at the time; and although he may have erred in his judgment as to the existence of such necessity, still, if, from all the attending facts and circumstances, he in good faith believed, and had reasonable grounds for believing, that his only safety was in using the means then in his power to prevent Ash from killing him, or inflicting great bodily harm, the use of such means was justifiable. Whether, from the testimony, such state of facts existed, was a question for the jury to determine."

As, for this reason, the judgment must be reversed and the case remanded for a new trial, it is not necessary to decide any other question presented on the appeal, although we think it proper to suggest that one of the two definitions of a reasonable doubt given by the court below to the jury should be omitted upon the new trial, namely:

"A reasonable ground of doubt is one which is reasonable from the evidence or want of evidence. It must be a ground of doubt for which a reason can be given, which reason must be based upon the evidence or want of evidence."

A doubt arising out of evidence is a mental operation for which it may often be very difficult, and, indeed, impossible, to assign any reason, and yet, if honestly entertained by the jury in a criminal case, must be acted upon, for they are only authorized to bring in a verdict of guilty when satisfied and convinced beyond a reasonable doubt of the guilt of the accused. Such a doubt has been often and correctly defined as a doubt which is reasonable in view of all of the evidence, and such as arises upon an impartial comparison and consideration of all of it, and prevents the jury from being able candidly and truthfully to say that they have an abiding conviction of the defendant's guilt.

No point is made by counsel for the government either as to the sufficiency of the exceptions to the instructions, or as to the time when they were made; but objection is made by one of the members of the court to a consideration of such exceptions on the ground that they were not filed until two days after the rendition of the verdict.

The record shows that the instructions of the court to the jury were in the form of a written charge, covering 18 pages of the printed transcript. We do not at all question the general rule that, in the absence of a statutory provision or a valid rule of the court to the contrary, exceptions must be taken and entered prior to the return of a verdict, in order to entitle them to consideration by an appellate court.

The Criminal Code of Alaska prescribes the order of proceedings for

the trial of a criminal case, and by the seventh subdivision of section 137 of that Code it is provided that:

"The court, after the argument is concluded, shall immediately, and before proceeding with other business, charge the jury; which charge, or any charge given after the conclusion of the argument, shall be reduced to writing by the court, if either party request it before the argument of the trial is commenced; such charge or charges, or any other charge or instructions provided for in this section, when so written and given, shall in no case be orally qualified, modified, or in any manner explained to the jury by the court; and all written charges and instructions shall be taken by the jury in their retirement, and returned with their verdict into court, and shall remain on file with papers of the case."

Sections 164, 165, and 166 of the same Code relate to exceptions in such cases, declaring what an exception is, how it shall be stated, taken, settled, and allowed, and in what instances no exception need be taken. They are as follows:

"Sec. 164. Definition of Exception. That an exception is an objection taken at the trial to a decision upon matter of law, whether such trial be by jury or court, and whether the decision be made during the formation of a jury, or in the admission or rejection of evidence, or in the charge to the jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision.

"Sec. 165. Exceptions, How Taken. That the point of the exception shall be particularly stated, and may be delivered in writing to the judge or entered in his minutes, and, at the time or afterwards, be corrected until made conformable to the truth.

"Sec. 166. When Exceptions not Taken or Allowed. That the statement of the exception, when settled and allowed, shall be signed by the judge and filed with the clerk, and thereafter it shall be deemed and taken to be a part of the record of the cause. No exception need be taken or allowed to any decision upon a matter of law when the same is entered in the journal or made wholly upon matters in writing and on file in the court."

The bill of exceptions in the case in hand recites:

"The trial commenced on August 13, 1902, and terminated on Saturday, August 16, 1902. After the attorneys for the respective parties had closed their arguments to the jury, the court instructed the jury in writing; and, as the members of the jury were filing out of the courthouse, the attorney for defendant stepped forward to the judge of the court, and said to him that he wished to except to portions of the charge, but that it was impossible for him to intelligently do so until he could take the instructions and examine them, and thereupon inquired of said judge whether he had any rule of court as to the manner of taking exceptions to instructions—that is, whether such exceptions should be taken orally or in writing—to which the judge responded that he had no rule on the subject, and for counsel to adopt such practice as he might be advised was proper. The next day (August 17th) was Sunday, and defendants' attorney prepared a motion in arrest of judgment, a motion for a new trial, and written exceptions to the charge to the jury, and on that day handed to the judge a copy of the exceptions, and to the clerk of the court originals of the exceptions to the charge and the motions in arrest and for a new trial, with instructions to the clerk to file the three papers on Monday, the 18th of August, which was done accordingly."

The record further shows that the trial court entertained the exceptions in question, reciting, in its order overruling the motions made therein for a new trial and in arrest of judgment, that it had "duly considered the exceptions to the charge of the court to the jury in this action, which exceptions were filed with the clerk on the 18th day of

August, 1902, and a copy thereof handed to the judge of this court on the 17th day of August, 1902." The trial judge therefore remained satisfied with his charge, notwithstanding the exceptions, and, of course, would not have changed it, had they been actually filed at the time the charge was delivered. The attorney for the defendant in this case did not withhold his exceptions for the purpose of entrapping the court. On the contrary, he made known to the judge at once that he desired to except to portions of his charge, which, as has been said, was a very lengthy one, stating that it was impossible for him to do so intelligently until he could have an opportunity of examining the instructions given, and inquiring whether there was any rule of the court in respect to the manner of taking such exceptions. If the court, instead of responding, as it did, that there was "no rule on the subject, and for counsel to adopt such practice as he might be advised was proper," had said that it was necessary for him to take such exceptions as he desired then and there, it cannot, we think, be doubted that counsel would have done so. Relying, as he did, on the response of the court, and handing to the court, as he did the next day, his exceptions in writing, which the latter entertained and considered on the motions for a new trial and in arrest of judgment, we do not think that they ought here to be disregarded on the ground that they were not filed in time to allow the trial judge to reconsider his charge and "give new and different instructions." In the somewhat similar case of *Ah Lep v. Gong Choy*, 13 Or. 211, 9 Pac. 483, the Supreme Court of Oregon applied the maxim that "an act of the court shall prejudice no man."

The judgment is reversed and the cause remanded to the court below for a new trial.

GILBERT, Circuit Judge (dissenting). Although a portion of the charge to the jury, when taken by itself, is erroneous, it is doubtful whether the error is such as to justify a reversal of the judgment, when the instruction is considered in connection with other portions of the charge, in which the court twice properly instructed the jury upon the law applicable to the proposition involved in the objectionable paragraph. But I think that we are precluded from considering the alleged error, for the reason that no exception was taken to the charge at the time of the trial. The bill of exceptions shows that after the court had instructed the jury, and as the latter were retiring from the courtroom, the attorney for the defendant stepped forward to the judge and said to him that he wished to except to the charge, but that it was impossible for him intelligently to do so until he could take the instructions and examine them, and that he thereupon inquired of the judge whether he had any rule of court as to the manner of taking exceptions to instructions—that is, "whether such exceptions should be taken orally or in writing"—to which the judge responded that he had no rule on the subject, and directed him to adopt such practice as he might be advised was proper. The jury, on the day on which they went out, returned a verdict against the plaintiff in error, but no exceptions were filed or presented to the court until two days later, when written exceptions were filed, together with a motion for a new trial. There was nothing

in the remark of the judge to the counsel to mislead the latter as to the practice of the court. The object of the inquiry was not to ascertain at what time the exceptions should be taken, but whether they should be oral or written. The answer of the judge was, in substance, that counsel might take either course, or such course as he deemed proper. The Code of Alaska (section 164, c. 17) defines an exception as follows:

"An exception is an objection taken at the trial to a decision upon matter of law, whether such trial be by jury or court, and whether the decision be made during the formation of the jury or in the admission or rejection of evidence, or in the charge to the jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision."

This statute plainly provides that the exception can only be taken at the trial, and before the verdict is returned. It is adopted from the laws of Oregon of October 11, 1862 (B. & C. Comp. Or. § 169). It has been construed by the Supreme Court of Oregon in *Scott v. Cook*, 1 Or. 24, *O'Kelly v. Territory*, 1 Or. 51, *State v. Foot You*, 24 Or. 62, 32 Pac. 1031, 33 Pac. 537, and other cases, in which it has been held that it is the invariable rule in Oregon that no exception to the rulings or proceedings of the trial court in either civil or criminal cases will be considered on appeal, unless there was an objection, a ruling thereon, and an exception at the trial, all properly incorporated into a bill of exceptions. The case of *Ah Lep v. Gong Choy*, 13 Or. 211, 9 Pac. 483, referred to in the opinion of the majority of the court herein, goes no farther than to sustain the rule, of which there can be no question, that one who has regularly taken exception at the trial, and duly tendered a statement thereof to the judge, is entitled to have it settled and allowed. It affirms, rather than denies, the doctrine that the exceptions, in order to be of avail in an appellate court, must be taken while the jury are at the bar. And this is undoubtedly the universal rule, applicable alike to civil and criminal cases. In *Thiede v. Utah Territory*, 159 U. S. 521, 16 Sup. Ct. 62, 40 L. Ed. 237, the court said that one object of an exception is to call the attention of the circuit judge to the precise point as to which he is supposed to have erred, that he might then and there consider it, and give new and different instructions to the jury, if, in his judgment, it should be proper to do so. In *Phelps v. Mayer*, 15 How. 161, 14 L. Ed. 643, the court said that an exception taken to instructions on the day following the rendering of the verdict was not properly before an appellate court. In *Barton v. Forsyth*, 20 How. 533, 15 L. Ed. 1012, the court said:

"It has been repeatedly ruled by this court, as will appear by the cases reported, that no instruction to the jury, given or refused by the court below, can be brought here for revision by writ of error, unless the record shows that the exception to it was taken or reserved while the jury were at the bar."

In *United States v. Carey*, 110 U. S. 51, 3 Sup. Ct. 424, 28 L. Ed. 67, Mr. Chief Justice Waite said:

"The rule is well established and of long standing that an exception, to be of any avail, must be taken at the trial."

In *Stewart v. Wyoming Ranch Co.*, 128 U. S. 390, 9 Sup. Ct. 104, 32 L. Ed. 439, the court, referring to an objection taken to an instruc-

tion given to the jury in the absence of counsel, and after the jury had retired to consider of their verdict, said:

"It is a conclusive answer to this objection that no exception was taken to this instruction at the time it was given, or before the verdict was returned. The fact that neither of the counsel was then present affords no excuse."

In *Michigan Insurance Bank v. Eldred*, 143 U. S. 298, 12 Sup. Ct. 452, 36 L. Ed. 162, the court again affirmed the rule, by saying:

"By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court unless they were taken at the trial."

This court, in *Stone v. United States*, 64 Fed. 677, 12 C. C. A. 451, declined to review an assignment of error based upon an instruction to the jury, "wherein the record fails to show affirmatively that timely exceptions were taken thereto while the jury was at the bar."

It is no answer to the doctrine of these authorities to say that the ruling of the trial court in denying the motion for a new trial demonstrated that the misleading instruction would not have been corrected if attention had been directed to it by an exception. It might well be that a judge would, before verdict, correct an imperfect instruction, and yet might thereafter deny a new trial, for the reason that he was not convinced that the jury could have been misled by it. But this is all aside from the true inquiry here, which is whether an appellate court has the power to entertain an exception not taken in apt time. I submit that the trial court was powerless, even if it had attempted to do so, to extend the time. But it did not attempt to do so, nor is there any warrant for saying that counsel for plaintiff in error relied on the words of the judge in postponing the filing of his exceptions. It was proper for that court, on the motion for a new trial, to consider the exceptions, irrespective of the time when they were taken, but such is not the rule in an appellate court.

LEONHARD v. PROVIDENT SAVINGS LIFE ASSUR. SOC.

(Circuit Court of Appeals, Eighth Circuit. April 15, 1904.)

No. 1,983.

1. INSURANCE—SURRENDER—NONPAYMENT OF PREMIUMS—FORFEITURE—ESTOPPEL.

Where plaintiff's husband, acting as her agent, surrendered a policy on his life, in which plaintiff was named as beneficiary, providing for forfeiture for nonpayment of premiums, receiving in place thereof a policy on a different plan for plaintiff's benefit, and defendant had no knowledge that the husband was not authorized to act for his wife in such surrender, the fact that defendant thereafter failed to give notice of the maturity of subsequent premiums on the surrendered policy, which was an essential prerequisite to insured's default in the payment thereof, did not estop defendant from claiming a forfeiture of the surrendered policy for nonpayment of premiums.

2. SAME—PREMIUMS ON OTHER POLICIES—APPLICATION.

Where plaintiff claimed that the original policy on her husband's life had been surrendered by him without authority, and other policies taken in their stead, which she repudiated, she was not entitled to have premiums paid on the subsequent policies applied in satisfaction of premiums

accruing on the original policy after surrender, in order to prevent a forfeiture thereof for nonpayment of premiums.

3. SAME—ACTS OF AGENT—LIABILITY OF PRINCIPAL.

Plaintiff's husband, without her knowledge or authority, surrendered a policy on his life, in which plaintiff was named as beneficiary, for a different policy. The original policy had been in the husband's possession as plaintiff's agent for nearly 10 years, and thereafter, without fraud or deception practiced on plaintiff, she joined her husband in exchanging the second policy for a third; she, however, believing that she was exchanging the policy first issued. *Held*, that plaintiff was precluded from claiming that the first policy had not been lawfully surrendered and was still in force.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

In 1885 Conrad A. Leonhard secured from the Provident Savings Life Assurance Society a policy of insurance upon his life for the benefit of his wife, Josephine Leonhard, in the sum of \$5,000. In 1895, without her knowledge, he surrendered the policy, and secured from the society another one, for the same amount, but upon a different plan. In 1902 the second policy was exchanged for a third, with the full concurrence of the wife, who joined her husband in consummating the transaction. Shortly thereafter the insured died. The third policy was for the sum of \$5,000, less \$1,554.35, the amount of an exchange note given upon an adjustment of the premium rate, and which, according to its terms, was to be deducted from any sum payable upon the policy. The second and third policies were also for the benefit of the wife. Mrs. Leonhard brought suit to recover the full amount of the first policy and certain alleged accretions, tendering the third for cancellation. The proofs showed that when Conrad A. Leonhard obtained the first policy, in 1885, his wife's name was signed to the application by him as her representative. From the time the policy was issued to the time of its surrender to the society, the insured retained possession thereof, and paid all of the premiums. The application for the second policy recited that upon completion of the transaction the first policy should be deemed to be canceled and void, and it was signed in the same way as the application of 1885; the insured representing himself as the agent of his wife. Mrs. Leonhard was ignorant of this change of policies, and did not learn of it until after his death. The second policy remained in her husband's possession and he paid the premiums until it was, in turn, canceled, in 1902, and the third one secured in its place. Mrs. Leonhard took part in the transaction resulting in the issue of the third policy. She signed the application, which recited that it was in exchange for the prior policy, the number of which was given. She also signed a statement which contained a recital that the policy to be canceled and a receipt pertaining thereto were at that time lost or mislaid. She was fully and fairly advised of everything connected with the transaction, and participated in the discussion of the reasons for the exchange of policies, and the benefits to inure therefrom to her husband, as the insured, and to herself, as the beneficiary. In fact, she was advised of everything pertaining to the situation, excepting that it does not appear that she knew that the second policy was a substitute for the first. She did know, however, that at no time did her husband have more than one policy of the Provident Society upon his life for her benefit. By its terms the first policy was subject to lapse and forfeiture upon default in the payment of any quarterly premium. The quarterly premiums were variable in amount, and the insured, who paid them, did not know of the exact amount thereof until he had received notice from the society, which it was its duty to give. By express provision the insured was designated as the proper person to receive notices of maturing premiums. The premiums were paid to the time of surrender in 1895, but none thereafter. The agents of the society acted in good faith, and were not aware of any lack of authority on the part of Leonhard to represent his wife in securing the first exchange and surrendering the original policy. The society denied liability upon the first policy, admitted liability upon the third, and paid into court the amount thereof, less

the amount of the note. The Circuit Court upon final hearing dismissed the bill. Complainant appealed.

F. H. Sullivan, for appellant.

Eleneious Smith (William T. Gilbert and Dickson, Smith & Dickson, on the brief), for appellee.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is contended by the appellant that she had a vested interest in the original policy; that her husband, whose life was insured thereby, had no power, without her consent, to surrender it or to agree to its cancellation (*Bank v. Hume*, 128 U. S. 195, 206, 9 Sup. Ct. 41, 32 L. Ed. 370; *Casualty Co. v. Kacer*, 169 Mo. 301, 69 S. W. 370, 58 L. R. A. 436, 92 Am. St. Rep. 641); that authority to make a contract for another is not, alone, sufficient to authorize its cancellation; that power in her husband to surrender the policy for cancellation cannot be inferred from the fact that he procured it in the first instance, retained it in his possession, and paid the premiums thereon (*Stillwell v. Insurance Co.*, 72 N. Y. 385; *Whitehead v. Insurance Co.*, 102 N. Y. 143, 6 N. E. 267, 55 Am. Rep. 787).

These propositions may be admitted as being amply supported by authority, and, were there nothing else to be said, their controlling influence upon the case in hand would be plain. But the terms of the policy which appellant is seeking to restore made it subject to lapse or forfeiture upon default in the payment of any quarterly premium. No premiums were paid after 1895, and therefore, in the absence of some sufficient reason to the contrary, the vitality of the policy ceased, and it was no longer an existing obligation of the defendant. It is claimed by the appellant in this connection that as the failure to continue the payment of premiums was the natural result of the surrender and cancellation of the policy, and as the defendant participated in and was a party thereto, it is estopped from claiming a forfeiture. *Whitehead v. Insurance Co.*, supra; *Garner v. Insurance Co.*, 110 N. Y. 266, 18 N. E. 130, 1 L. R. A. 256. In the *Whitehead Case* a husband procured certain policies of insurance upon his life for the benefit of his wife, or, in case of her prior death, of their children. The policies were surrendered by him while they were still in force without the knowledge or consent of the assured, and the company paid to him the surrender value thereof. After they were surrendered, no notices of approaching maturity of premiums were given either to the insured or to the assured, and no premiums were paid. It was held that the surrender and the consequent default in premiums were ineffectual to deprive the assured of their rights. The decision, however, was expressly based upon the participation of the insurance company in conduct which was characterized as fraudulent. It knew that the insured was acting beyond his authority. The money consideration for the surrender was paid by the company to the insured, and not to those entitled thereto, and in that way, it was said, the silence of the insured was purchased, and the fact of the sur-

render effectually concealed from those whose interests were vitally affected. Referring to the acts of the insured, the court said:

"His conduct operated as a fraud upon the assured, and in that fraud the insurer participated, with full knowledge of the probable consequences. The company cannot depend upon a default to which its own wrongful act contributed, and but for which a lapse might not have occurred."

This particular feature of the Whitehead Case was adverted to and emphasized in *Frank v. Insurance Co.*, 102 N. Y. 278, 6 N. E. 667, 55 Am. Rep. 807, where it was said that the company participated in keeping the beneficiaries in ignorance of their rights.

In the *Garner Case*, *supra*, the conduct of the insurance company was open to the same criticism. There the insurance contract was made with the insured as trustee for his children, who were named; the application was signed by him as trustee. The company recognized and dealt with him in his trust character and capacity. For 15 years the premiums were paid upon the policy, and the assured had acquired a valuable right thereunder. Without their knowledge or consent, the insured, by an agreement with the company, which knew he was violating his trust, surrendered the policy, and secured for the benefit of another party a substituted policy bearing the same number, for the same amount, calling for the same annual premium, and stating the same age of the insured, with a reference to the date of the first policy. The surrender value of the old policy was absorbed in the new one. A consideration to be paid by the assured in obtaining the new policy—a substantial sum of money—equaled the surrender value of the old one, and was paid by the cancellation of the old policy, in which the new beneficiary had no interest. Concerning the contention of the company that it acted in good faith, the court said that good faith could be asserted of no one who aids in the diversion of a trust fund from its lawful owners to the possession and benefit of another. The principle of these decisions is manifest. To allow an insurer to avail itself of a failure to pay the premiums upon a policy, which directly results from conditions brought about by its own fraud, would be repugnant to the plainest rules of law and justice. But this doctrine is not applicable to the case at bar. Here the course of the defendant is marked with good faith, and all of the acts of the insured were influenced by an obvious desire to aid and protect his wife, having due and necessary regard to his own financial ability. At each surrender and cancellation a new policy for her benefit was issued. The premiums upon the first policy were increasing with the growing age of the insured, and were doubtless becoming burdensome. In signing her name to the original application, he expressed himself as her agent; he retained the possession of the policy as her agent; he received the notices and paid the premiums; and when the policy was surrendered, and the second one was procured in its place, he again expressed his agency. While it is true that, in the face of her sworn denial, these facts may not afford sufficient proof of his authority to act for her in the surrender of the original policy, nevertheless they make for the good faith and innocence of the insurer. This feature of the case brings it within the doctrine of *Miles v. Insurance Company*, 147 U. S. 177, 13 Sup. Ct. 275, 37 L. Ed. 128, and *Schneider v. Insurance Company*, 123 N. Y. 109, 25 N. E. 321, 20 Am.

St. Rep. 727. In the former case a policy of insurance was issued upon the life of a husband for the benefit of his wife, with provision for forfeiture upon default in the payment of any annual premium. It was procured by the husband, who paid nine premiums from his own funds, and was always retained in his possession. Before the maturity of the tenth premium he advised the company that he would be unable to pay it, and expressed his desire for paid-up insurance according to the terms of the policy. He was persuaded by the company to accept instead a policy for a reduced amount, and at a less premium. A year later he announced his inability to pay the premium on the second policy which was about to mature, and at his request there was finally issued to him a paid-up policy. In making each exchange of policies he signed his wife's name to the necessary papers without her knowledge or authority. He ceased paying the premiums on each policy after its surrender was agreed to. The company acted in good faith. Action was brought by the wife to recover upon the first policy. The court held that the failure to pay the premiums resulted in its forfeiture.

In *Schneider v. Insurance Company* a policy was issued upon the application of a husband, insuring his life for the benefit of his wife. Many years afterwards, and shortly prior to the due day of a premium, of which notice was given to the insured as the agent of his wife, the policy was surrendered to the company and canceled; the signature of the wife to the necessary papers being forged. Notices of subsequent premiums were not given. The company was ignorant of the forgery, and acted innocently in the matter. The court, in denying the claim of the wife for a restoration of the policy, said:

"The husband had the possession of the policy, and, in dealing with the defendant in regard to it, was treated as plaintiff's agent; and the rule that, when one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one whose act enabled the fraud to be committed, applies to this case."

The appellant seeks to escape the forfeiture resulting from the non-payment of premiums because of the omission of the company to give notice of the amount and maturity thereof as required by the policy. Her contention is that as the premiums were variable, and their precise amount was determined by conditions wholly within the knowledge of the insurer, the giving of notice was an essential prerequisite to a default. It is doubtless true that this is the general rule. *Insurance Company v. Doster*, 106 U. S. 30, 1 Sup. Ct. 18, 27 L. Ed. 65; *Life Association v. Hamlin*, 139 U. S. 297, 11 Sup. Ct. 614, 35 L. Ed. 167; *Hannum v. Waddill*, 135 Mo. 161, 36 S. W. 616; *Insurance Co. v. Smith*, 44 Ohio St. 156, 5 N. E. 417, 58 Am. Rep. 806. But it is applied to cases where there is evidence of a continuing purpose to keep the insurance alive, and where a notice might accomplish a useful result, and possibly to cases where notice is required by statute as a matter of public policy. Generally speaking, the rule is not applied where the failure to give notice is preceded by acts which amount to an abandonment and rescission of the contract by both parties. The giving of notice of the maturity of premiums would be useless where there has been a surrender of the policy, and a declaration, express or necessarily implied, by the person whose duty it was to receive the notice and pay the premiums,

that no further payments would be made. *Insurance Co. v. Phinney*, 178 U. S. 327, 20 Sup. Ct. 906, 44 L. Ed. 1088; *Insurance Co. v. Myers*, 109 Ky. 372, 59 S. W. 30. *Insurance Company v. Smith*, supra, which is relied on by the appellant, is not in point. There a husband, whose life was insured for the benefit of his wife, and who was her agent for the reception of notices and the payment of premiums, had advised the insurer that she had left him and had instituted suit for alimony, and that it was his desire to so change the insurance as to destroy her interest therein. It is clear that in view of his hostile attitude towards his wife, of which the insurer was fully cognizant, it was not justified in continuing to recognize his agency, and it was therefore its duty to send the premium notices to the wife, as the party beneficially interested.

The appellant also contends that the premiums paid upon the second and third policies should be applied upon the first for the purpose of keeping it alive. A sufficient answer to this contention is her repudiation of the second and third policies. The premiums so paid did not come from her funds, and were not paid through mutual mistake. They were paid by her husband, not upon the original policy, but upon the succeeding ones. The clear intent of her husband and the defendant was not to keep alive the first insurance, but to secure and maintain the second and third policies in their order. No principle of law or equity will justify her, while repudiating these transactions as they were intended by the parties thereto, in claiming the benefits of payments from her husband's funds through a diversion from their intended object. She cannot both repudiate and affirm his acts. While disclaiming his agency, she cannot affirm it as to the payment of his moneys thereunder contrary to his intent. *Weatherbee v. Insurance Co.*, 178 Mass. 575, 60 N. E. 381; *Id.*, 182 Mass. 342, 65 N. E. 383; *Insurance Co. v. Stevens* (D. C.) 19 Fed. 671. Moreover, the amount of payments on the second and third policies was not sufficient to meet the increasing rates of the original insurance; nor would the addition of the surplus or dividend arising upon the surrender of the first policy, and which was duly credited when the second was issued, be adequate to supply the deficiency.

There is another feature of this case which deserves consideration. When the final exchange of policies was made, in 1902, the appellant knew that her husband did not have at any time more than one policy of the defendant upon his life for her benefit. Her belief was that the policy which was then surrendered was the original policy issued in 1885, of the existence of which she learned about the time of its issue. That original policy had been in the possession of her husband as her agent for 10 years. His possession was her possession. As the beneficiary of that policy, she was affected with notice of its character and of all of its provisions. *McMaster v. Insurance Co.*, 99 Fed. 856, 40 C. C. A. 119. When the exchange of 1902 was made, and the second policy surrendered for the third, the character of the former, its incidents, the burdens imposed in respect to premiums, and the desirability of exchanging it for another, were freely discussed with her, and with her husband in her presence. She was an intelligent woman—able to read, speak, and write the English language. There was no fraud or deception practiced upon her. The defendant acted in entire good faith, and

without suspicion of any infirmity in the authority of her husband to represent her in effecting the first exchange. She consented to the surrender of her existing insurance, and the substitution of another more easily carried. She joined with her husband in executing the necessary papers, and she accepted the new policy. Her position now is that she thought she was giving up the original insurance. It was certainly her intent that all prior insurance with the defendant be canceled, and, had she been advised of the transaction of 1895, it is extremely doubtful that her attitude or her acts would have been different. But however that may be, the clear facts of the case; her imputed knowledge of the terms of the first policy; the information she derived from the discussion of the provisions of the second; the good faith of the defendant; that it was her agent, and not defendant's, who erred and exceeded his authority, with actual knowledge of its limitations—preclude her from now assailing the policy which was in part the consideration which she voluntarily offered for the one finally issued to her.

The decree of the Circuit Court will be affirmed.

SOCRATES QUICKSILVER MINES v. CARR REALTY CO.

(Circuit Court of Appeals, Ninth Circuit. February 23, 1904.)

No. 990.

1. EQUITY—RELIEF AGAINST FRAUD—LACHES.

A bill by one claiming under part of the locators of a mining claim, seeking relief against fraud by which the other locators obtained a patent to the entire claim, is demurrable on the ground of laches, having been filed 34 years after the beginning of the fraud, and 28 years after its consummation, where there was nothing to show that complainant's grantors had actual possession of the ground after the making of the application for the patent, and it affirmatively appeared that from a short time thereafter the whole of the property was held adversely to them by defendants and those under whom they claim; that immediately after issuance of the patent the patentees and their successors in interest expressly repudiated and ignored any interest of complainant's grantors, and claimed the whole property; that many of the parties whose acts are complained of have died; that for 30 years after application for the patent no work was done on the property, and that thereafter work was done for 3 years at a loss, but that at the commencement of the suit the property was worth \$500,000.

Appeal from the Circuit Court of the United States for the Northern District of California.

A. H. Ricketts, for appellant.

William E. Colby, for appellee W. H. Jordan.

Robert B. Gaylord, for appellee Carr Realty Co.

Crittenden Thornton, J. F. Riley, and John H. Miller, of counsel for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The demurrers of the various defendants raise several objections to the bill, but one of which it is necessary to

consider. We are of the opinion that the bill shows on its face such laches that the court below rightly sustained the demurrers on that ground, and dismissed it. "A court of equity," said Lord Camden, "has always refused its aid to stale demands, where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there has always been a limitation to suits in this court." *Smith v. Clay*, 3 Brown's Chy. 639, note. This doctrine has been repeatedly recognized and acted upon by the Supreme Court. *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718; *Norris v. Haggin*, 136 U. S. 386, 10 Sup. Ct. 942, 34 L. Ed. 424, and cases there cited.

The doctrine that neither laches nor limitation runs against him who is in actual possession is wholly inapplicable to the facts alleged in the present bill, the substance of which is, so far as applicable to the ground upon which we rest our judgment, that on the 21st day of September, 1867, William S. Bell, Charles Bell, F. X. Banks, John W. Rock, John D. Elwanger, J. M. Epperson, Bedford Manning, W. W. Davis (sometimes called Henry H. Davis), P. K. Epperson, William T. Lane, James H. Lane, Katherine Lane, Alice Lane, and J. B. Epperson, each of whom was then a citizen of the United States, finding a certain portion of the public domain unoccupied and vacant, and not owned or held or claimed by any one, entered thereon, and discovered therein a lode or vein of mineral-bearing ore in place, carrying cinnabar, whereupon they located the same as the Socrates Quicksilver Mines, by the erection of monuments at each of the corners of the claim and at or near the center of each end line thereof, and by placing in one of the monuments a written notice of the location of the claim, designating the same as a location monument, all of which monuments were erected in conspicuous places, and were so placed as that the boundaries of the claim could be readily traced on the ground; that the ground so located was situated in Cinnabar mining district, Sonoma county, Cal., in which district the locators caused a record of the notice of their location to be made with the recorder of the mining district on the 13th day of October, 1867, and on the 24th day of the same month caused the same notice to be recorded in the office of the recorder of the county. It will be noticed that, according to the averments of the bill, there were but 14 of these locators; but it would seem from subsequent averments that there were really 15, and that one—George M. Parker—was inadvertently omitted from the list. We shall so treat the bill.

It is averred that at the time of making the location of September 21, 1867, the locators took possession of the claim, and continuously held, occupied, and improved the same, in accordance with the rules, regulations, and customs of the miners of the district in which it was situate, and with the laws of the United States and of the state of California, and expended in labor and improvements thereon more than \$1,000, and held exclusive and unopposed possession of the whole thereof until February 2, 1869; J. M. Epperson, however, having in the meantime and on the 15th day of January, 1869, conveyed his interest in

the claim to one William Troop. Thus, according to the averments of the bill, the original locators (including, as the assignee of one of them, Troop) held the exclusive possession of the claim for a little over 16½ months, during which time they expended in labor and improvements thereon over \$1,000, and at the expiration of which time it is averred they were entitled to apply to and receive from the government a patent for the mine. But what then happened, according to the bill? Instead of an application for such patent on the part of the assignors of the complainant jointly with their co-locators or otherwise, William S. Bell, Charles Bell, John W. Rock, John D. Elwanger, and James M. Epperson entered into a conspiracy with certain strangers to the claim, namely, R. M. Garratt, Joseph C. Coleman, J. N. Barney, Philip Douglass, William D. Grove, G. W. Greeley, Samuel S. Boone, B. W. Lyons, Charles Myrtetus, Christopher Myrtetus, Thomas H. Washington, Otto Walther, and John A. Robinson, for the purpose of procuring a patent from the United States to the mine in question, "Whereby said William S. Bell, Charles Bell, Charles Myrtetus, Thomas H. Washington, J. M. Epperson, John D. Rock, R. M. Garratt, Joseph C. Coleman, Philip Douglass, William D. Grove, G. W. Greeley, Samuel S. Boone, Christopher Myrtetus, and B. W. Lyons should be named and appear as the grantees in such patent, and therein and thereby appear to be the legal owners of said premises, and the whole thereof, notwithstanding the fact that said Charles Myrtetus, Thomas H. Washington, R. M. Garratt, Joseph C. Coleman, Philip Douglass, William D. Grove, G. W. Greeley, Samuel S. Boone, Christopher Myrtetus, B. W. Lyons, and J. M. Epperson had no valid right, title, claim, or interest in said premises, or any part thereof"; that in pursuance of the alleged fraudulent conspiracy the two Bells, J. M. Epperson, John W. Rock, John D. Elwanger, Otto Walther, and John A. Robinson, contriving and intending to cheat and defraud the original locators, Banks, Parker, Manning, Davis, P. K. Epperson, J. B. Epperson, and the Lanes, of their interest in the mine, and to prevent the issuance of a patent therefor to them, did, on the 8th day of February, 1879, apply to the proper officers of the United States Land Office for a patent to the mine, "then and there falsely and fraudulently claiming and pretending to said officers that said William S. Bell, Charles Bell, J. M. Epperson, John W. Rock, John D. Elwanger, Charles Myrtetus, Thomas H. Washington, R. M. Garratt, Joseph C. Coleman, Philip Douglass, William D. Crowe, G. W. Greeley, Samuel S. Boone, Christopher Myrtetus, and B. W. Lyons were then and there the owners of the possessory title to the said mine, and the whole thereof, and as such co-owners entitled to make application for and obtain a patent from the United States for said Socrates Quicksilver Mine, and the whole thereof; that said William S. Bell, Charles Bell, J. M. Epperson, John W. Rock, John D. Elwanger, Otto Walther, and John A. Robinson, did, in pursuance of their said wrongful and fraudulent purpose, file, in the said United States local land office at the said city and county of San Francisco, certain sham and pretended proofs in said application for patent, wherein and whereby they caused it to appear to the register and receiver of the said local land office, and the officers of the Land Department of the United States, that said William S. Bell, Charles Bell, J. M. Epperson, John D.

Elwanger, John W. Rock, Charles Myrtetus, Thomas H. Washington, R. M. Garratt, Joseph C. Coleman, Philip Douglass, William D. Crowe, G. W. Greeley, Samuel S. Boone, Christopher Myrtetus, and B. W. Lyons, were then and there the true and legal owners of the possessory title to said mining claim, and the whole thereof; that said proofs so filed were false and untrue, and concealed the true state of the title of said premises, and the true state of the title of said premises was not presented to the authorities in charge of the issuance of the said patent, and said pretended proofs were so made and filed for the purpose of imposing upon and deceiving the said register and receiver and the officers of the Land Department of the United States, and the said officers of the local land office at said city and county of San Francisco, and the officers of the United States Land Department were therefore and thereby imposed upon and deceived, and a fraud was thereby committed on the government of the United States, and upon said F. X. Banks, G. M. Parker, Bedford Manning, W. W. Davis, P. K. Epperson, William T. Lane, James H. Lane, Katherine Lane, Alice Lane, and J. B. Epperson, co-locators as aforesaid; for, if the true state of the title to said Socrates Quicksilver Mine had been shown in said patent proceedings, said ten persons lastly hereinbefore named would, with William S. Bell, Charles Bell, John W. Rock, John D. Elwanger, and William Troop, have been the grantees in and by the patent, instead and in the place of said Thomas H. Washington, Charles Myrtetus, R. M. Garratt, Joseph C. Coleman, Philip Douglass, William D. Crowe, G. W. Greeley, Samuel S. Boone, Christopher Myrtetus, and B. W. Lyons." It is alleged that thereafter, and because of the alleged wrongful and fraudulent acts of William S. Bell and his alleged confederates, a patent was issued by the government for the mine on the 13th day of August, 1874, to William S. Bell, Charles Myrtetus, Charles Bell, Thomas H. Washington, J. M. Epperson, John W. Rock, John D. Elwanger, R. M. Garratt, Joseph C. Coleman, Philip Douglass, William D. Crowe, G. W. Greeley, Samuel S. Boone, Christopher Myrtetus, and B. W. Lyons, which patent was, on the 14th day of October, 1874, recorded in the office of the recorder of Sonoma county. It is alleged that in pursuance of the alleged fraudulent scheme, and to secure to themselves the benefit of the alleged fraud and deceit, the two Bells, J. M. Epperson, Thomas H. Washington, and Charles Myrtetus procured Rock and Elwanger to join with Garratt, Coleman, Barney, Douglass, Crowe, Greeley, Boone, and Lyon to, in form, convey to them, the said William S. Bell, Charles Bell, J. M. Epperson, Thomas H. Washington, and Charles Myrtetus, an undivided 2,000 feet of the mine, although each of the parties to the pretended deed well knew that none of the pretended grantors therein except Rock and Elwanger had any right, title, or interest in or to the property; that the deed so made was recorded in the office of the recorder of the county on July 1, 1871. It is alleged that by reason of the said alleged fraudulent acts the two Bells, J. M. Epperson, Charles Myrtetus, Thomas H. Washington, and Christopher Myrtetus became the involuntary trustees of Banks, Parker, Manning, Davis, P. K. Epperson, J. B. Epperson, and the Lanes, and of their and each of their grantees and successors in interest, under whom the complainant

claims. It is alleged that, subsequent to the consummation of the alleged fraud, and after the issuance of the patent and the making of the aforesaid deed to William S. Bell and his alleged confederates therein named, the said William S. Bell, Charles Bell, James Epperson, Charles Myrtetus, Thomas H. Washington, and Christopher Myrtetus claimed and pretended to be the owners of said Socrates Quicksilver Mine, and the whole thereof, and they, and each of them, did thereafter barter, bargain, sell, and in form convey said property, or parts thereof, to sundry and divers persons.

Thus the alleged fraud complained of was initiated in February, 1869, by the application to the United States for its patent to the mine: was followed up by the alleged fraudulent deed of March 10, 1869, duly recorded July 1, 1871, and by the issuance and recordation of the patent in the year 1874, based upon the alleged false and fraudulent proofs and representations. The bill herein was filed February 7, 1903—nearly 34 years after the beginning of the alleged frauds, and more than 28 years after their consummation. There is nothing in the bill to excuse the gross laches of those under whom the complainant corporation claims. It is not alleged when they first became aware of the alleged fraudulent scheme in pursuance of which the patent was applied for, or of the "sham and pretended proofs" (whatever that may mean) upon which the application was based. But they must be held to have had knowledge of all the proceedings for the patent, for they were matters of public record, of which it has been many times held the whole world must take notice. There is nothing in the bill tending to show that those under whom the complainant claims ever held actual possession of the ground in question after the making of the application for the patent, and it affirmatively appears from the bill that the whole of the property was held adversely to the complainant's grantors by the defendants, and those under whom they claim, from March 10, 1869. And again, it appears by express averment of the bill that as early as August 27, 1874, and within a few days after the issuance of the patent, the patentees and their successors in interest expressly repudiated and ignored any interest in the grantors of the complainant, and claimed the whole property as their own. Yet the complainant and its grantors continued to sleep upon whatever rights they may have had for a period of more than five times as long as that prescribed by the statute of limitations of the state in which the property is situate for the recovery of land in an action at law. It is not often that a stronger case is presented to a court of equity for the application of the doctrine of laches. Moreover, it affirmatively appears from the bill that during the many years that intervened between the commission of the alleged frauds and the bringing of the suit the condition of the property, as well as of the parties whose acts are complained of, have greatly changed, many of the latter having long since died, and are therefore not able to testify as to the truth or falsity of the alleged frauds.

In respect to the changed condition of the property, it appears from the bill that from the time of the application for the patent in the year 1869 to the month of January, 1900, no work of any character was done upon the property, during which long period of about 30 years

the complainant's grantors, as has been shown, commenced no suit in relation thereto, although well knowing that the whole thereof was held adversely to them. It is wholly unreasonable to attribute much, if any, value to the property during that period, under these circumstances. But the bill alleges that in January, 1900, the defendant F. A. Huntington took possession of the mine under claim of ownership of the whole of it, and commenced to work it, which he continued to do "at more or less infrequent intervals," without pecuniary profit, and at a loss; but it is averred that at the time of the commencement of the suit—February 7, 1903—the complainant's alleged undivided interest of 1,650 feet out of a total of 3,000 feet was of the value of more than \$250,000, making the whole mine, with the defendant Huntington's work upon it, then worth nearly \$500,000. This brings the case within the rule declared in *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Kinney v. Con. Va. M. Co.*, 4 Sawy. 382, Fed. Cas. No. 7,827.

The judgment is affirmed.

SAN FERNANDO COPPER MINING & REDUCTION CO. v. HUMPHREY.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1904.)

No. 955.

1. APPEAL—FINDING OF FACT—ASSIGNMENT OF ERROR.

An assignment that the court erred in making a particular finding of fact is not reviewable on appeal if there is any evidence on which to base the finding.

2. SAME—EVIDENCE.

In an action to recover money alleged to have been paid as attorney's fees and court expenses in the prosecution of suits alleged to have been rendered necessary by defendant's fraudulent acts, a statement of a witness that a certain sum of money, at the time of taking the testimony, had been paid out by plaintiff for attorney's fees and costs of court in the effort to regain possession of certain properties which defendant, in violation of an alleged trust, had conveyed away, was insufficient to justify a recovery of the amount so paid as damages.

In Error to the Circuit Court of the United States for the Southern District of California.

See 111 Fed. 772.

The plaintiff in error, a corporation organized under the laws of Wyoming, brought an action for damages against the defendant in error, and in its complaint alleged that prior to November 8, 1894, the defendant in error was an incorporator of a corporation known as the San Fernando Mining Company; that on that date said corporation sold to the San Fernando Copper Mining & Smelting Company, a corporation of the state of Colorado, hereinafter designated as the "Smelting Company," all of its interests in the San Fernando copper mines, situate in Lower California, republic of Mexico, and that on said date the defendant in error became also an incorporator of said last-named company; that the objects and purposes of said smelting company were to acquire by purchase all the property of the San Fernando mine, as well as to carry on a general mining business in Lower California, and to acquire mining properties therein, and that in pursuance thereof the defendant in error was employed to act as its manager in Lower California; that on June 18, 1895, the smelting company appointed the defendant in error its

attorney in fact to procure patents for mines and mining claims in Lower California, either in his own name or the name of the company; that thereupon said defendant in error did, on May 27, 1895, acquire an undivided one-half interest in the "San Fernando," consisting of five claims theretofore owned by David Goldbaum, the other half thereof being owned by one Dr. O'Cleary; that such title was acquired by a deed to the defendant in error, and that the consideration therefor was \$3,000, paid by the said corporation to the said Goldbaum through the defendant in error; that at the same time and subsequently the defendant in error acquired for the use and benefit of the said corporation divers other mining claims in Lower California, known as the "San Fernando No. 1," the "San Fernando No. 2," the "Calumet Rosario," the "Hecla Rosario," and the "Iron Mine"; that on April 26, 1897, the defendant in error acquired by patent from the Mexican government the title to the Calumet Rosario and the Hecla Rosario in his own name, and that in the year 1897 he acquired title to San Fernando No. 2—all of which titles were acquired in the name of the defendant in error for the use and benefit, and as the general agent, manager, and trustee, of the corporation; that all the money required for the patenting, surveying, locating, and acquiring of said properties was advanced by the corporation, and that the corporation expended therein more than \$15,000; that the defendant in error, in fraud of the rights of the corporation, on September 5, 1898, sold and transferred the Calumet Rosario and the Hecla Rosario to Eulogio Romero, and caused the title of the iron mine of San Fernando to be conveyed to said Romero; that on January 24, 1899, the defendant in error conveyed the San Fernando No. 1, and thereafter conveyed the San Fernando No. 2, to E. Romero; that the said defendant in error, in furtherance of the said fraud, and in order to cheat and defraud the said corporation of the title to the said mining properties, induced the said E. Romero to convey the same to Thomas E. Brophy on or about April 28, 1899, and the said defendant, in consideration of \$1, conveyed to Thomas E. Brophy the one-half of the San Fernando mine so obtained from David Goldbaum; that demand has been made upon the defendant in error to execute his said trust by the execution and delivery of a deed for said mines to the said corporation, but the said defendant in error has neglected and refused to execute the same; that all of said acts of the defendant in error were done without the knowledge or consent of the said corporation, and in fraud of its rights; that on March 15, 1901 (which was 10 days before the commencement of the action), for value received, the said smelting company sold and conveyed unto the plaintiff in error all its real and personal estate, with all its right and property of whatsoever nature or description, together with all of its right to recover money or personal property, and all of its right of action arising out of the violation of any right of property or of any obligation. The complaint proceeds to aver that the plaintiff in error is obliged to institute proceedings in Lower California, Mexico, for the clearing of the title to its property, and has been compelled to institute proceedings to recover the possession thereof, and has been compelled to expend a large sum of money for attorney's fees and court expenses, to wit, the sum of \$10,000, in pursuit and to recover possession and control of the said properties, and that by reason of the fraudulent acts and conduct of the said defendant in error as aforesaid the plaintiff in error has been damaged in the sum of \$20,000. The defendant in error, answering, denied the allegations of the complaint, and set up a counterclaim thereto, and further pleaded in defense thereof that at all of the times mentioned in the complaint the laws of the republic of Mexico required that a corporation organized without that republic, as said smelting company was organized, before it could take or hold any interest in real or personal property, beneficial or otherwise, or any interest or any trust in real or personal property, or transact any other business in said republic of Mexico, must procure copies of its articles of incorporation, certificate of incorporation, and by-laws of said corporation, viséd by the authorities of the said government where it was incorporated, and viséd by the Mexican consul or other accredited agent of said republic resident in the United States, and by the secretary of foreign relations of the republic of Mexico, and file and record the same in the territory of the republic of Mexico, and pay a tax to the republic for viséing

said papers and recording the same and for permission to do business in said republic, and that until such requirements of the law shall have been complied with such corporations cannot take or hold any interest in any real or personal property, beneficial or otherwise, or any interest in any property, or prosecute any business in the republic of Mexico; that said smelting company never did comply with any of the said laws, never acquired any right to hold property in said territory, but intended at all times to evade said laws of said republic. The case was by written stipulation tried before the court without a jury. The court heard testimony concerning all the matters in issue, and made special findings of fact thereon. Among other findings, it was found specially that the plaintiff in error was never compelled to institute proceedings in Lower California for the clearing of the titles to said property, and has not, by reason of the fraud or fraudulent acts or conduct of the defendant in error, been compelled to institute proceedings for the recovery of the possession thereof; that the plaintiff in error has not been compelled to expend a large sum of money for attorney's fees or court expenses, or any sum, in pursuit or to recover possession or control of the said property, and that the plaintiff in error has not, by reason of the fraudulent acts or conduct of the defendant in error, as alleged in the complaint, been damaged in the sum of \$20,000, or any other sum. Judgment upon the findings of fact and conclusions of law was rendered for the defendant in error.

Withington & Carter, George Fuller, Henry J. O'Brien, and George A. Corbin, for plaintiff in error.

Oscar A. Trippet, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The action was brought to recover money which the plaintiff in error alleged that it was compelled to disburse in prosecuting proceedings to recover the possession of mining properties situate in the republic of Mexico, to which the defendant in error had held the legal title in trust for the plaintiff in error, and which, in violation of said trust, he had conveyed to another. The complaint alleges that in the prosecution of such proceedings the plaintiff in error has been compelled to expend in attorney's fees and costs of court, the sum of \$10,000. It alleges further, it is true, that the plaintiff in error has, by the fraudulent acts and conduct of the defendant in error, "been damaged in the sum of \$20,000," but there is no averment of facts in the complaint showing that damages have been sustained further or otherwise than in the prosecution of the said proceedings to recover possession. There is no allegation that the plaintiff in error has lost any property through the acts of the defendant in error, and no information is afforded by the complaint either of the value of its properties, or of the result of the actions alleged to have been prosecuted for the recovery of the same. The Circuit Court has distinctly found that no moneys were paid out by the plaintiff in error for the prosecution of the alleged actions in the republic of Mexico. This finding under sections 649 and 700 of the Revised Statutes stands as the special verdict of a jury. No error is assigned to the admission or exclusion of evidence bearing upon that issue in the case. It is assigned that the court erred in making the finding, but such a finding is not subject to revision by this court if there were any evidence upon which it could be made. *Dooley v. Pease*, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457; *St. Louis v.*

Rutz, 138 U. S. 241, 11 Sup. Ct. 337, 34 L. Ed. 941; Runkle v. Burnham, 153 U. S. 225, 14 Sup. Ct. 837, 38 L. Ed. 694; McIntosh v. Price, 121 Fed. 716, 58 C. C. A. 136; Empire State M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 114 Fed. 417, 52 C. C. A. 219. The question so submitted to the court was one of fact to be decided on the evidence. It is not our province to review the evidence further than may be necessary to discover that the case is not one wherein there was no evidence to justify the finding. We find from the bill of exceptions that Henry E. Wood, the secretary of the smelting company, and one of the trustees of the plaintiff in error, testified that the latter corporation had paid over \$6,000 to various attorneys "in order to recover possession of one-half of the San Fernando mine, San Fernando No. 1, San Fernando No. 2, San Fernando iron mine, and Hecla Rosario and Calumet Rosario." This is all the evidence in regard to the payment of such expenses. There is nothing in the evidence contained in the bill of exceptions to show the date at which the money was expended—whether during the 10 days that intervened between the conveyance from the smelting company to the plaintiff in error and the commencement of the present action or afterward, but it would seem to be indicated from some of the evidence offered that, if expended, it was expended afterward. Neither is there anything in the evidence to show the nature of those proceedings, in which of them or in what manner the money was expended, or whether the proceedings were properly instituted or were successfully conducted. The trial court found specially, and correctly, we think, upon the evidence in the case, that the defendant in error had never held the Hecla Rosario and the Calumet Rosario in trust for the plaintiff in error or its grantor. Money paid out in the effort to recover the possession of those claims could not, in any event, become the basis of a charge against the defendant in error. The evidence does not inform us how much of the \$6,000 so said to have been expended in attorney's fees and costs of court was expended to recover the possession of those two mines. The evidence of damages must in every case be clear and explicit, and must be such as to demonstrate with reasonable certainty that injury has been sustained by the plaintiff in the action by reason of the acts complained of. We cannot see that the court erred, in view of the evidence presented in the bill of exceptions, in finding that no money had, in consequence of the fraudulent acts or conduct of the defendant in error or otherwise, been expended by the plaintiff in error for attorney's fees or court expenses in proceedings to recover the possession of the properties which it owned. From the bare statement of a witness that a certain sum of money had, at the time of taking the testimony, been paid out by the plaintiff in error for attorney's fees and costs of court, in the effort to regain the possession of properties which the defendant in error, in violation of his trust, had conveyed away, it does not necessarily follow that the sum so paid is recoverable as damages. The finding that the plaintiff in error sustained no damages is conclusive of the whole right of action, and relieves us from the necessity of considering the numerous assignments of error as to other issues in the case.

The judgment will be affirmed.

AMERICAN BRIDGE CO. v. HUNT.

(Circuit Court of Appeals, Sixth Circuit. May 21, 1904.)

No. 1,274.

1. REMOVAL OF CAUSES—FEDERAL COURTS—JURISDICTION—DETERMINATION.

In a suit removed from the state to the federal courts it is the duty of the latter at any stage of the litigation to dismiss or remand the suit on a defect of federal jurisdiction being made to appear, whether the question is raised by the parties or not.

2. SAME—DIVERSITY OF CITIZENSHIP—JOINT DEFENDANTS—SEPARABLE CONTROVERSY.

Where an action for wrongful death is brought in a state court against a foreign corporation and certain of its officers and servants whose citizenship was the same as the plaintiff's, the right of the corporation to remove the suit to the federal courts depended on whether the record at the time of the removal disclosed a separable controversy.

3. JOINT DEFENDANTS—CONCURRING ACTS OF NEGLIGENCE—DEFENSES.

Where plaintiff, in an action for death, pleaded a cause of action against several defendants, some of whom were of the same citizenship as plaintiff, the test of plaintiff's right to join such defendants, and thereby preclude a removal of the cause to the federal courts by defendants whose citizenship was diverse, depended on whether there was a legal concert or identity of the defendants in the same tortious act, or in the concurring acts of negligence contributing to the same injury, and not whether such defendants might present separate and different defenses to the action.

4. SAME—JOINT ACTS OF NEGLIGENCE—PLEADING.

Where, in an action for wrongful death of plaintiff's intestate, the complaint joined the co-employè by whose alleged negligence plaintiff's intestate was killed, whose citizenship was the same as that of plaintiff, with decedent's employer, which was a foreign corporation, and alleged that such corporation was negligent in supplying an electric crane which was not equipped with good and sufficient brakes or other appliances by which it might be controlled, in consequence of which an iron beam being carried by the crane came in contact with other beams on the shop floor, causing them to fall on deceased, and that the corporation was also negligent in causing the crane to be operated by a young, inexperienced, and unskillful boy, who was alleged to have operated the crane so negligently as to permit the beam being carried to swing against the other beams and cause them to fall, etc., the complaint alleged a joint, and not a separable, controversy against such defendants.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

The intestate of the plaintiff below was accidentally killed while engaged in the discharge of his duties as a servant of the American Bridge Company, and this suit is brought under the statute of Ohio to recover damages for a wrongful killing. The suit was instituted in a common pleas court of the state of Ohio. The defendants named in the writ were the American Bridge Company, a corporation of the state of New Jersey, carrying on a manufacturing business within the state of Ohio, Robert H. Finch, Phillip Haas, and Calvin Guthrie, citizens of the state of Ohio. The petition, in substance, charged that the defendant corporation had large shops at Toledo, Ohio, for the construction of iron bridges and other like structures. Among the appli-

¶ 2. Diverse citizenship ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.

¶ 3. See *Removal of Causes*, vol. 42, Cent. Dig. § 107.

ances used in said shop was an electric crane, used in lifting, moving, and handling heavy iron beams and other castings. It is averred that the crane was so worn and out of repair as to be hard to control, and that it was also negligently handled, and so managed as to cause certain iron beams standing upon the floor of the shop to be thrown down, and that they so fell as to crush, maim, and kill the deceased, whose duty required him to be upon the said floor and among the said beams and castings so caused to fall by the negligent operation of said crane. The plaintiff in error, the corporation, filed in due time a petition for the removal of the suit to the Circuit Court of the United States, alleging, among other things, that the suit was of a civil nature, and that the matter in dispute exceeded the sum of \$2,000, exclusive of interest and costs. The ground upon which the removal was sought, as stated, was in these words: "Your petitioner further shows that there is in said action a controversy wholly between citizens of different states, and which controversy is a separable controversy, and can be fully determined between them; that Joseph A. Hunt, administrator of the estate of Henry E. Baker, deceased, was at the time of the commencement of this action, and still is, a citizen of the state of Ohio, residing in said state, and that the said Henry E. Baker, deceased, was during his lifetime and at the time of his death a citizen and resident of the state of Ohio, residing at Toledo, in said state; that your petitioner, American Bridge Company, was at the time the alleged cause of action arose in said action, and at the time of the commencement of this action, and still is, a corporation duly organized and existing under and by virtue of the laws of the state of New Jersey, and a resident and citizen of that state. Your petitioner further shows that the defendants Robt. H. Finch, Phillip Haas, and Calvin Guthrie were at the time of the commencement of the said action, and still are, citizens of the state of Ohio, residing at Toledo, in said state; that the cause of action as shown by the petition is not a joint cause of action against said defendants and your petitioner." Bond and security having been duly given as required by the statute, a certified copy of the record was filed in the court below. A motion to remand to the state court was made and denied. The pleadings were thereupon completed, and upon a trial there was a jury and verdict for the plaintiff against the defendant corporation only, and judgment thereon. The corporation has sued out this writ of error.

Doyle & Lewis and J. W. Schaufelberger, for plaintiff in error.
Charles A. Thatcher, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

There is a preliminary question which must be decided before considering the errors assigned, and that is whether the Circuit Court rightfully obtained jurisdiction by the proceedings under which the cause was removed from the state court. The decision of this question cannot be escaped, for it is the duty of the court at any stage of the litigation to dismiss or remand any suit in which a defect of federal jurisdiction shall appear, without regard to whether the question is made by the parties or not. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 453, 20 Sup. Ct. 690, 44 L. Ed. 842; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140. The right of the corporation to remove the suit depends upon whether the record, at the time of the removal, disclosed a separate controversy. The plaintiff had elected to join the corporation with three individual defendants, and to sue the defendants thus joined as joint tortfeasors, and, if he has stated on the face of his pleading a cause of action which is joint, he had a right to maintain his suit against

all who are liable to him, even though he might have brought separate suits for the same tort against each of those he has chosen to join. Nor does the fact that each defendant so sued might present separate and different defenses defeat the right to sue them in one action. The test of the entirety of the action, and the consequent right to join several defendants in one suit, is found in the legal concert or identity of the defendants in the same tortious act or in concurring acts of negligence contributing to same injury. These principles, so far as they are applicable to the ascertainment of a separable controversy for purposes of removal under the statute, seem to be too well settled to admit of further debate. *Pirie v. Tvedt*, 115 U. S. 41, 43, 5 Sup. Ct. 1161, 29 L. Ed. 331; *L. & N. R. Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473; *C. & O. Ry. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; *Arrowsmith v. Nashville & D. R. Co. (C. C.)* 57 Fed. 165, 169. Whether there is such legal identity of master and servant, or concert between them, as to justify a joint action when the act of negligence charged is that of the servant alone, and the liability of the master is bottomed not upon any immediate fault of the master, but upon the liability of the latter for the negligent acts of the servant, may admit of much discussion. *Warax v. C. N. O. & T. P. Ry. Co. (C. C.)* 72 Fed. 637; *Bryce v. Southern Ry. Co. (C. C.)* 122 Fed. 709; *Davenport v. Southern Ry. Co. (C. C.)* 124 Fed. 983; *Helms v. N. P. Ry. Co. (C. C.)* 120 Fed. 389; *Mulchey v. Society*, 125 Mass. 487; *Campbell v. Sugar Co.*, 62 Me. 553, 16 Am. Rep. 503; *Lamm et al. v. Parrott Silver & Copper Co. (C. C.)* 111 Fed. 241. It must be confessed, however, that the doctrine of the common law in reference to the joinder of master and servant in one suit based alone upon the tort of the servant, as in the *Warax* Case and other cases cited above, is shaken by contrary intimations found in *Powers v. Chesapeake, etc., Ry. Co.*, 169 U. S. 92, 97, 18 Sup. Ct. 264, 42 L. Ed. 673, and *Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131, 137, 21 Sup. Ct. 67, 45 L. Ed. 121. This question, though a nice one, and not foreclosed by authoritative decision, does not necessarily arise upon this transcript as we construe the averments of the plaintiff's petition. Thus three of the officers or servants of the corporation are joined with the corporation as defendants. The citizenship of each of these three individual defendants is identical with the citizenship of the plaintiff. If, therefore, a joint cause of action is stated against the corporation and any one of the individual defendants, a separable and removable controversy is not shown.

As to the defendants *Finch* and *Haas*, it is averred that they "were officers and agents of the defendant company in charge of and were assisting in and conducting the business of the defendant company, and had charge over the decedent, *Henry E. Baker*, and all other employes in and about the work of the defendant company." No other reference is made to these two defendants except as they are included along with the corporation in averments charging the "defendants"—meaning to include the corporation and *Finch* and *Haas*, but not *Guthrie*—with negligence in furnishing a defective crane and an incompetent man for the operation of the crane. The liability of

Finch and Haas depends, therefore, upon whether the officers and agents of a corporation, through whom it conducts its business operations, are liable for the negligence of the corporation in respect of those personal duties which the master owes to his servants. No personal act of either nonfeasance or misfeasance is averred. If liable at all, their liability must arise from their official relation to the company, and grow out of the failure of the company to discharge some duty which it owed to the plaintiff. Whether such an officer would be liable for a mere act of nonfeasance to one occupying the relation of the plaintiff to the company is at least a question of great doubt. Story on Agency (9th Ed.) §§ 308, 309; *Hukill v. Maysville*, etc., R. Co. (C. C.) 72 Fed. 745, 753; *Ewell's Agency*, 438; *Davenport v. Southern Ry. Co.* (C. C.) 124 Fed. 984; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437. But it is unnecessary to determine whether any cause of action is stated against Finch and Haas, or either of them, or, if so, whether the action against them may be joined with one against the corporation, because we have reached the conclusion that concurrent acts of negligence are averred against the bridge company and the other individual defendant, Calvin Guthrie. Thus the corporation is averred to have been negligent in supplying an electric crane "which was not equipped with good and sufficient brakes or other appliances" by which it might be controlled, and that, as a consequence, an iron beam being carried by the said crane came into contact with other beams standing upon the shop floor, causing one of them to fall upon the decedent. It is also averred that the corporation was negligent in that they had "caused said crane to be operated by a young, inexperienced, and unskillful boy, who was not of such skill and experience as to be able to handle such crane," etc. There are certain other vague averments in respect to the insecure manner in which certain beams were suffered to stand upright upon the floor, and liable to be toppled over if touched by objects being carried or swung by the crane, and also in respect to an absence of a rule requiring notice of the swinging of the crane. It is enough that the corporation is charged with negligence in retaining a defective crane and with intrusting its management to an unskilled and inexperienced servant. In respect of the defendant Calvin Guthrie, who was the "unskilled and inexperienced boy" in charge of the operation of said defective crane, it is averred that he (Guthrie) "was negligent in operating the same in that he permitted said floor beam [referring to an iron casting being carried or moved by the crane] to swing against said other beams, and allowed it to be set upon said floor with such force and violence as to fall against other beams." Thus we have the negligence of the company in respect to its duty in furnishing a reasonably safe appliance and competent fellow servants concurring with the negligence of the defendant Calvin Guthrie in the management of a defective crane to bring about the injury to the decedent.

But it is insisted that it is a misconstruction of the petition to read it as charging any negligence whatever against the defendant Guthrie. It must be conceded that if, upon a fair and reasonable construction of the averments of the petition, no facts are averred which, as

matter of law, if proven, would constitute actionable negligence against Guthrie, his joinder as a defendant with the corporation will not prevent a removal. Concurring negligence of master and servant is essential to the right of joint action, and it is clear that, if no negligence of any character is averred against the servant, concurrent negligence is not charged. This contention is based upon a clause in the paragraph of the petition charging negligence against the corporation and the other individual defendants, Finch and Haas, in respect of the defective character of the crane. It is said, in characterizing this crane, that the brakes were so insufficient "that the person who was operating the same was unable to control or stop" its movement, etc., and that the defendants had caused said crane "to be operated with its electrical attachments in such condition that the same could not be controlled." In a subsequent paragraph, dealing with the suit as one against the defendant Guthrie, it is charged that he was negligent in operating this very crane, and permitted it to swing a beam being carried against beams standing upon the floor, knocking them over, so that they fell upon the decedent. The most that can be said is that, if it is true, as charged, that the defendant Guthrie negligently mismanaged the movements of the crane so as to permit it to swing against other objects, and so topple them over, that the crane, even though defective in its brakes or electrical attachments, was not so defective and insufficient as to have been incapable of all control by the operator, as charged by the prior paragraph. Guthrie's negligence must have co-operated with the negligence of the corporation. Evidence that the crane was insufficient and defective, and that the defects had contributed proximately to the injury complained of, would clearly have established a case against the corporation, although it did not appear that the defects were so grave as to render the movements of the machine absolutely uncontrollable by a skillful and competent operator. Evidence of affirmative mismanagement of a defective machine by an incompetent operator would make out a prima facie case against the operator if his mismanagement proximately contributed to the injury of the decedent. But it is not averred that the defects were such as that the machine was uncontrollable by a competent and skillful servant; but only that it was uncontrollable by the operator. The operator was Guthrie, and it is averred that he was "not of such skill and experience as to be able to handle such crane," etc. The conclusion we reach is that a separable controversy did not appear upon the pleadings as they stood at the time of removal.

The judgment will be reversed, and the court below directed to remand the suit to the state court. The plaintiff in error will pay all the costs incurred since the wrongful removal.

In re SIMPSON MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. April 12, 1904.)

No. 1,033.

1. SALE—RECOVERY OF PROPERTY FROM RECEIVER—CONDITIONAL DELIVERY.

Evidence considered, and *held* not to entitle the seller of a machine to a corporation, which later became bankrupt without having settled therefor, to recover the machine from the receiver in bankruptcy on the ground that the sale was conditional, and the machine was not accepted by the bankrupt, but to show that it was delivered under a verbal contract for its unconditional sale, and that objections thereto by the president of the bankrupt were made for the sole purpose of obtaining delay in settlement, the company being at the time in financial difficulty.

Appeal from the District Court of the United States for the Northern District of Illinois.

Hill, Clarke & Co., the appellants, filed in the bankruptcy proceedings in the court below an intervening petition asking for the return to them by the receiver in bankruptcy of a certain radial drill, with a belt drive, speed shaft, and other attachments, which machinery, as is alleged, they had shipped to the bankrupt at Winthrop Harbor, Ill., on January 14, 1902, and for which, if the machinery should be accepted by the bankrupt, they were to receive \$950 in six notes, each for the sum of \$158.33, payable at short dates thereafter. They allege that the machinery was never accepted by the bankrupt; the notes were not signed, but were returned to the petitioners unexecuted; and that they were notified by the bankrupt, prior to the appointment of the receiver, that the machinery was not acceptable to it. Under a creditors' bill in the state circuit court for Cook county, Ill., a receiver was appointed of the bankrupt on April 5, 1902, and upon subsequent proceedings in bankruptcy the same person was appointed receiver by the bankruptcy court on June 16, 1902, and took possession of the property in question, with the manufacturing plant of the bankrupt at Winthrop Harbor. The receiver answered the petition, claiming lawful possession of the property, and putting at issue the allegations of the intervening petition. The matter was referred to a referee in bankruptcy, who, on July 7, 1902, filed his report, with the evidence taken before him, recommending that the petition be dismissed without prejudice to the right of the interveners to file their claim as a general claim against the bankrupt's estate. Exceptions were filed to this report, which, on the 22d day of July, 1903, were overruled, the report confirmed, and the intervening petition dismissed. From this decree the appellants, on the 29th of July, 1903, prayed and were allowed an appeal to this court. The evidence touching the facts involved is referred to in the opinion of the court.

Lester H. Whipp, for appellant.

Eugene Stewart, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The question here is whether the machinery in question was unconditionally delivered to and accepted by the bankrupt, or whether the sale was a conditional one, under which the machinery was delivered to the bankrupt for trial and approval, and not accepted. We have recently had occasion to consider the rule with respect to the passing of title in the case of machinery delivered on trial. In *re George M. Hill Company*, 123 Fed. 866, 59 C. C. A. 354. In that case there was a written agreement, by the terms of which the machine was delivered,

which the purchaser agreed to buy and pay for when the machinery was running satisfactorily; the title and right of possession to remain with the seller until the machine was fully paid for in cash. We there held there must be an acceptance by the buyer; that mere receipt did not constitute acceptance, which comprehends both physical receipt and mental assent; that the purchaser had right of investigation and of reasonable opportunity to determine whether the machine would work satisfactorily. We also endeavored to state the rule with respect to the inquiry whether an expressed dissatisfaction by the vendee was based upon reasonable ground and was rested in good faith, to the effect that, if the purchaser be in fact satisfied, but fraudulently and in bad faith arbitrarily or capriciously declared dissatisfaction, and the contract had in fact been performed by the vendor, the purchaser was bound to accept. But in that case we found as a fact that continuously from the receipt of the machine the bankrupt refused to accept it; that the question was not whether he was justified in the refusal, but whether he did in fact refuse; and, finding such continued refusal, whether it was justifiable or not, the bankrupt could not be heard to say, as against the vendor, that it accepted what it constantly declared it would not accept, and could not take advantage of its own bad faith and fraud; and in that respect the receiver of the bankrupt stood in the shoes of the bankrupt, and had no higher right to the property than the bankrupt could assert.

The questions here to be resolved are questions of fact—whether the sale was a conditional sale, whether there was an acceptance of the thing sold. In December, 1901, a verbal contract was made in respect of the machinery. The first negotiations were between Simpson, the president, and Bolen, the treasurer, of the bankrupt, on the one hand, and Sammons, the manager, and Wigglesworth, a salesman, of Hill, Clarke & Co., upon the other hand. There is some conflict or confusion in the testimony with respect to the details of the conversation. The machine was examined, and its working was exhibited to the proposing purchasers. It was equipped with an electric motor so as to show the exact working of it. Mr. Sammons testified that, having settled upon the terms of payment, provided the credit of the proposing purchasers was satisfactory, with respect to which he would inquire, he was asked what guaranty could be given, and he answered that the appellants would guaranty the machine to be as represented and to do the work they wanted it for, otherwise they were at liberty to return it. He also testified, "I stated to him [Simpson] that we would ship the machine, and guaranty it to be as represented, and when he was satisfied that it was so he could settle for it upon the terms that we had agreed upon." Mr. Simpson, the president of the bankrupt, who testified for the intervening petitioners, states the first conversation to be that he looked into this particular machine, and thought it would be about what he wanted; that he made an arrangement with Hill, Clarke & Co. by which the bankrupt would purchase that machine, and the terms upon which the purchase might be made. He states another conversation before the delivery of the machine; that because the machine had not been presently delivered he called to ascertain the reason; that the appellants

stated to him that they were not satisfied with the machine; that they had to experiment with it; that it was taken back to the end of the store, and experimented with, and they could not possibly ship it in the condition it was in; that they told him that the five-foot arm was so heavy at the bottom of the machine that it caused friction so that it would not turn easily, and they arranged for a friction roller on the bottom end of the stub to relieve the friction; that he expressed doubt as to the feasibility of the friction roller; that he said he would take the machine provided that "the swing of that arm would not bother us, and, if it didn't work any better, we would not have it at any price." Bolen, the treasurer, testifying on the other side, says that he was present at the appellants' place of business but once, and that was when the four persons named were there; that the working of the machine was exhibited to them, and it was decided to purchase it if satisfactory terms could be made, upon which they settled; and that not a word was said with respect to shipping the machine on trial. Wigglesworth, the salesman of the appellants, who was present at the first conversation, was not called as a witness.

It is clear that at this first conversation there was no conditional sale, for neither witness testifies thereto. A conditional sale, if one there was, must rest upon the testimony of Simpson with respect to the second conversation, and to which he alone testifies. According to his story, the appellants objected to sending the machinery at that time because they found that the five-foot arm was so heavy on the stub on the bottom of the machine that it caused friction and would not turn easily, and a friction roller was arranged for this bottom end of the stub, and that Simpson said he would take the machine provided "the swing of the arm would not bother us, and if it didn't work any better we would not have it at any price." The next that is heard of the matter, the machine is shipped to the bankrupt on the 14th of January, 1902, and placed in its plant, and put to use therein. The communications thereafter were had by correspondence alone. Twenty-eight days after the shipment, and on the 11th of February, 1902, the appellants wrote the bankrupt, inclosing a statement of account and notes for signature to cover the amount according to the terms of the sale, and suggesting that, as the first one would expire in a day or two, it would be well to send a check for the amount specified in that note. On February 15, 1902, the bankrupt, by Simpson, its president, answered this letter, stating that:

"While the machine in the main is a very good one, yet it has two very serious defects that should be remedied before settlement; one is the old trouble of swinging easier, or at least swinging easy enough to make it a practical machine. We have ideas on this score, which we think would be of value to you, but we think it will take time and money to make the necessary changes on the machine; and the other, which is probably the greater fault, is that it has only about 28" movement on the head. When the spindle head is moved up towards the post as far as it will go, the change cannot be made on the speed. It seems to us that the mechanism that produces the change on the speed, which is the same thing as changing to the back gear, and vice versa, could be operated from the other side of the spindle arm. This is a matter we would like you to take up, and see what could be done to remedy it."

On the 18th of February, 1902, the appellants wrote to the bankrupt as follows:

"Replying to your valued favor of the 15th regarding radial drill would say that if it still continues to bother you in swinging too hard, we can send you another roller and holder for the same, and you can put these at the bottom of the column in front. This will carry all the weight on these two rollers, and we think it will give you no further trouble in regard to swinging.

"Regarding the movement of the head, would say that this is about the same as any other universal radial, and is fully as much, if not more than the Baush or Prentice style, which simply swings the arm and not the column.

"In regard to the handle for changing the speed, would say that we discovered a short time ago that the head interfered with this handle when in its inner position. However, by taking this handle out and putting in a small ball handle you will find that the head will pass right over it. In fact, that is what we are now doing, and we should be glad to send you a small ball handle to put in yours, or you can put in one yourselves and remedy the trouble very quickly. Of course it would not be a very serious to operate this lever from the back, but still it would necessitate running around the machine, which we desire to prevent. By having this short ball handle, it enables the operator to change this from the front, and does not interfere with any other motion.

"Kindly let us hear from you as to whether we shall get out another roller to go down the bottom of the front of the column, and whether we shall send you the ball handle as mentioned above.

"We desire to effect a satisfactory settlement with you on this machine at the earliest possible moment, and should be pleased to hear from you by return mail."

On February 19th the bankrupt wrote to the appellants as follows:

"Your esteemed favor of the 18th instant is at hand, and we have mailed your letter to our foreman at Winthrop Harbor for consideration, and will let you know what he says."

No further letter was addressed by the bankrupt to the appellants, but the latter, on March 7, 1902, wrote as follows:

"We hand you herewith statement of account of the amount of \$950.00 which was agreed to be settled for by you by giving us six notes to run 1, 2, 3, 4, 5 and 6 months respectively, and dated January 14th, the date of shipment. We have written you some time since asking you to send us these notes, but have not heard from you, and would ask that you let us have them at once together with cash in settlement of note due February 14th. Your prompt attention will oblige."

This was the end of the correspondence and of all communication, so far as the evidence discloses, between the parties. Mr. Bolen, however, testifies that Mr. Simpson never complained to him that the machine was unsatisfactory, and that 15 or 16 days after the letter of February 11th Mr. Simpson told him he did not want to execute the notes; that he did not wish them to become due right along, and he expected to make objection to the machine temporarily "until we get around to that matter a little better"; that the company was in financial embarrassment at the time, and Mr. Simpson said he "didn't want to sign those notes, for if they were signed we could not meet them." Mr. Simpson does not deny this conversation, but does not recollect it. Upon the appointment of a receiver, Mr. Simpson, without authority, took possession of all the correspondence between the parties, and delivered it to the appellants. We are not inclined to place undue weight upon the uncorroborated testimony of the presi-

dent of a company who is so manifestly a volunteer against that company. His evidence is more strenuous in the interest of the appellants than that of their own officers, and his claim that this machine was conditionally delivered is contradicted by his own acts, and by the acts of the appellants, and by the correspondence. The machine was in constant use in the plant of the bankrupt. It is somewhat strange that no complaint of the machine was ever preferred except after nearly a month's use of it, and then only in answer to a demand for payment; and after the complaint stated in his letter of the 15th of February, and after his receipt of the letter of the appellants of the 18th of February in reply, proposing to rectify the alleged difficulty, and after his answer of the 19th of February stating that he had referred the matter to the foreman for consideration, no further complaint is preferred, and the machine is continued in use without complaint for 45 days, until the affairs of his company passed into the hands of a receiver on the 5th day of April. No notice was taken of the appellants' letter of March 7th demanding settlement. This conduct fortifies the statement of Bolen that Simpson expected to make objections to the machine temporarily for the purpose of postponing payment, and that he did not wish to sign the notes, for they could not be met at maturity by reason of the financial embarrassment of the company. We are satisfied that the objections to the machine preferred by him were pretentious merely, not real, and were made in bad faith, and that there was acceptance by the bankrupt of the machine in question.

Nor are we able to find in the conduct of the appellants any evidence of a conditional sale. We may assume that they guarantied, as Sammons testified, that the machine was as represented, and would do the work for which it was designed. The appellants undoubtedly stood ready to fulfill that guaranty. They went further, and were willing and desirous to adjust this new machinery, and rectify any minor difficulties in operation that could be suggested. But their constant demands for settlement of the price to be paid clearly indicate that they then considered the sale an unconditional one, completed by delivery of the machine. After their last demand of March 7th, to which no answer was vouchsafed, they allowed the machine to remain in use by the bankrupt without objection, and without suggestion that they had further duty to perform with respect to that machine; and they had right so to conclude, because the suggestion of adjustments contained in their letter of February 18th, which they were ready to make, had been entirely ignored. We find no occasion to disturb the finding of the court below.

The decree is affirmed.

UNITED STATES v. NEW YORK CENT. COAL CO. et al.

(Circuit Court of Appeals, Second Circuit. April 19, 1904.)

1. CONTRACTS—CONSTRUCTION—BREACH.

Defendant agreed to furnish to the United States, during the fiscal year ending June 30, 1902, 600 tons of bituminous coal, with 30 per cent. additional at the buyer's option, which was subsequently exercised. On June 4, 1902, 246 tons remaining undelivered, defendant was notified to deliver the balance "as soon as practicable"; but, no coal having been delivered by 11:30 a. m. on June 27th, the buyer demanded the balance due and stated that defendant might have until 1 o'clock on that day "to decide." The buyer's agent returned at that hour, and was informed that defendant "was not going to deliver the coal." *Held*, that the demand on June 27th should not be construed as requiring a delivery by 1 o'clock on that day, but as a demand for performance within the contract period, and hence defendant's reply might properly be treated as a repudiation of the contract.

In Error to the Circuit Court of the United States for the Southern District of New York.

Writ of error to review a judgment, dismissing the complaint on the merits, entered pursuant to an order to that effect made at the trial. The United States, the plaintiff in error, was plaintiff below, and the New York Central Coal Company and the surety, the Union Surety & Guaranty Company, were defendants. The action was to recover damages for breach of contract.

Henry L. Burnett, U. S. Atty., and Arthur M. King, Asst. U. S. Atty.

Moses D. Moss, for defendant in error New York Cent. Coal Co.
Before TOWNSEND and COXE, Circuit Judges.

COXE, Circuit Judge. On May 8, 1901, Capt. Folger, acting for and in behalf of the United States, entered into a contract with the New York Central Coal Company (hereafter called the defendant), by which that company agreed, during the fiscal year ending June 30, 1902, to furnish and deliver to the plaintiff, at the general lighthouse depot at Tompkinsville, N. Y., 600 tons of bituminous coal at an agreed price. The plaintiff reserved the right to increase or decrease the stipulated number of tons to the extent of 30 per cent. On June 4, 1902, after the delivery of 503½ tons, the plaintiff served upon the defendant the following notice:

"You will please deliver, under the terms of your contract 277 tons (not more) of Georges Creek bituminous coal at this depot (Tompkinsville) as soon as practicable."

The plaintiff thus exercised its option to call for the maximum amount provided for by the contract. On the 7th day of June the defendant asked a delay until the end of the month in furnishing the coal thus demanded. Whether or not the request was refused does not appear. On the 27th day of June, at about half-past 11 in the morning, the plaintiff demanded that the entire amount then due on the contract, 246 tons, be delivered and that the defendant might have until 1 o'clock on the same day to decide.

The chief clerk of the third lighthouse district, who was acting for Capt. Folger in these negotiations, testified as follows:

"I went out and returned at 1 o'clock, and saw him and asked him if he was going to deliver the coal, and he said 'No,' that he was not going to deliver the coal. Then I said, 'If you do not deliver it, we will purchase in the open market in accordance with the contract, and charge the difference against your bond,' and he said, 'All right,' or words to this effect, 'You can purchase the coal.'"

Coal was purchased on the same day, but it was Allegheny and not Georges Creek coal.

The trial court dismissed the complaint on the ground that the final unqualified demand was not served until half-past 11 on the morning of June 27th "and required immediate delivery of 246 tons, which time was afterwards extended to 1 o'clock on the same day." The court was of the opinion that the demand of June 4th, which contained the qualifying words "as soon as practicable," gave the defendant such time as in its judgment was reasonable in which to make the delivery and, therefore, there could be no default, in any event, during the life of the contract, until an unqualified demand was given. Such a demand was given on the 27th but, in the opinion of the court, it only allowed an hour and a half in which to make the shipment, which was considered unreasonable if not impossible.

The crucial question, and in fact the only question, is whether the court erred in dismissing the complaint. Upon this question we get but little assistance from the briefs. The defendant's brief is largely, and the plaintiff's brief is almost exclusively, devoted to a discussion of exceptions relating to the question of damages. In our view all this is irrelevant to the point in issue. If the plaintiff failed to prove a cause of action it is wholly immaterial what damages it suffered; if, on the other hand, the court erred in dismissing the complaint, a new trial must be ordered and, in either case, a ruling upon the question of damages, as presented by the present record, will be utterly inconsequential. It is quite probable that, in the event of a new trial, the testimony upon this question will be more satisfactory and complete. It seems to have been assumed that the occurrences on June 27th amounted to an unconditional demand to deliver 246 tons of coal at Tompkinsville, Staten Island, within an hour and a half after notice was served at No. 29 Broadway, New York. Such a demand, if made, was not only unreasonable, it was unconscionable, and the action of the trial court in holding that the defendant was not placed in default by failure to comply would not be open to criticism. But we are unable to accept this view of the transaction as correct.

Twenty-three days prior to this interview between the parties, a written demand had been served for the delivery of the coal due upon the contract, and a number of oral notices of similar import had been given the defendant by telephone. No coal had been furnished and but three days more remained of the life of the contract. It was necessary to get a definite answer from the defendant whether it intended to furnish the coal or not. When the plaintiff's agent, Mr. Conover, called upon the defendant's secretary, Mr. Goodstein, and

asked him what he intended to do, he was informed by the latter that he could not answer at the moment as some one higher in authority would have to be consulted and he asked Conover if he would call again. Conover testifies: "I said yes, I would give him until 1 o'clock." Not until 1 o'clock to deliver the coal, but to decide whether he intended to perform or repudiate the contract. When Conover returned the conversation previously quoted took place and it is incompatible with the theory that the defendant was in default by reason of the nondelivery of the coal before 1 o'clock. "I asked him," said Conover, "if he was going to deliver the coal," not if he had delivered the coal. Goodstein replied, "No, he was not going to deliver the coal." The entire conversation shows conclusively, to our minds, that the contract was still in force and was so treated by both parties until the defendant flatly repudiated it by refusing to perform its stipulations. If Conover had intended his interview at half-past 11 as a peremptory notice to deliver the coal by 1 o'clock of the same day he would not have returned at the latter hour; he would have known that delivery was out of the question. The mere fact that he returned is conclusive proof that he did not consider it final. In addition to this Conover testifies expressly that his object in seeking the interview was "to give him a chance to deliver the coal under the terms of the contract."

There is evidence that a letter was presented to Goodstein at the interview on the 27th, which was a demand to deliver 277 tons of coal, but the letter was not introduced in evidence and the witness was not permitted to state its contents in detail. This letter, so far as its purport is disclosed, throws no additional light on the controversy. The contract provided that the coal was "to be furnished in such quantities and at such times during the fiscal year as the inspector may require," and the defendant agreed "to be governed in all matters regarding the fuel to be delivered under this contract" by the inspector or his authorized agent. On June 4, 1902, 246 tons of coal were due under the contract. On that day the defendant was notified to deliver the coal. The words "as soon as practicable" did not change the legal obligation of the defendant; the law implied a reasonable time in which to make the delivery. If nothing more had been done it seems obvious that the defendant would have been in default and liable for damages if he had allowed the contract to expire without making the delivery. Did anything transpire thereafter to change the legal status of the defendant? We think not. The notice of June 4th remained in full force; it was never withdrawn, changed or modified. In the absence of all proof to the contrary it cannot be said that 26 days was not sufficient time within which to deliver 246 tons of coal. Yet during 23 days of this period the defendant did nothing and the record contains no shadow of an excuse for this inaction. The interview of June 27th was the final effort of the plaintiff to induce the defendant to perform its contract and had the defendant desired to make the delivery during the three remaining days he would undoubtedly have been permitted to do so. If consent were necessary it would have been granted, although we see no reason why the defendant had not, in any event, the strict le-

gal right to make the delivery pursuant to the provisions of the contract.

It will be noted that no complaint was made by the defendant that insufficient time had been allowed. No additional time was requested and no excuse of any kind was presented. The final demand for performance was met by a point blank refusal. The contract was then at an end and the plaintiff was not called on to wait longer to secure the coal which defendant had agreed to furnish. The repudiation of the contract, so far as the facts are disclosed by the present record, appears, in our judgment, to have been without palliation or excuse. We think, therefore, that it was error to dismiss the complaint.

The judgment is reversed.

In re GEORGE M. HILL CO.

(Circuit Court of Appeals, Seventh Circuit. April 12, 1904.)

No. 1,024.

1. BANKRUPTCY—PREFERENTIAL TRANSFER OF PROPERTY—DEPOSIT IN BANK.

The deposit of money in bank by an insolvent within four months prior to his bankruptcy, on open account, subject to check, does not constitute a transfer of property amounting to a preference, under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], although the bank may be at the time a creditor, and under section 68a the bank has the right to set off so much of its claims as equals the balance in such account.

2. SAME—PAYMENT OF NOTES TO INDORSEE.

The payment to a bank by an insolvent, within four months prior to bankruptcy, of notes given to third persons, but which have been indorsed to and are owned by the bank, constitutes a preference given to the bank, under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], which it must surrender under section 57g before proving a claim against the estate.

3. SAME—PAYMENTS AND NEW CREDITS—NET RESULT OF TRANSACTIONS.

A corporation previous to its bankruptcy had borrowed large sums from a bank, giving its notes therefor, and had also obtained a discount of customers' notes, which it indorsed. The bank had also discounted notes given by the corporation to third persons. Such transactions continued during the four months prior to bankruptcy, the corporation being in fact insolvent, but the bank having no knowledge or notice of such fact. The net result of the transactions during such time was to decrease the corporation's direct indebtedness on its own notes, both those given direct to the bank and those given to third persons, by the excess of payments over new notes given, but to increase its contingent indebtedness on indorsements of customers' notes. *Held*, that the latter should not be considered in determining the amount of preferences received by the bank which must be surrendered under Bankr. Act July 1, 1898, c. 541, § 57g, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], as a condition to its proving a claim against the estate, since the discounting of the customers' notes which were the bankrupt's property did not increase its estate, but that the excess of payments over new credits on both the other items of direct indebtedness, taken together, constituted a preference, which must be surrendered.

Appeal from the District Court of the United States for the Northern District of Illinois.

See 123 Fed. 866, 59 C. C. A. 354.

Orville Peckham, for appellant.

Horace Kent Tenney, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge. The First National Bank of Chicago, the appellant here, filed in the bankruptcy court its amended claim against the estate of the bankrupt.

The indebtedness to the appellant is not in dispute. The contest below, as here, had reference to certain payments made by the bankrupt within four months prior to the filing of the petition in bankruptcy. On June 4, 1903, the referee made an order which upon petition for review he certified to the court below, wherein he found, first, that there was due to the bank from the bankrupt upon notes executed by it payable to the bank, and upon its indorsements of notes of third persons, held by the bankrupt, the sum of \$55,644.45; second, that the bankrupt for four months prior to the filing of the petition in bankruptcy was wholly insolvent and not possessed of property sufficient to pay its debts; third, that within the period of four months the bank received from the bankrupt the sum of \$3,700.93, which was paid and received with knowledge by the bank of the fact of insolvency, and that such payment was a preference which the trustee was entitled to recover from the bank; fourth, that within the stated period the bankrupt paid to the bank the further sum of \$77,005.53, which was received without knowledge of the bankrupt's insolvency, which payment constituted a preference which the bank was bound to pay to the trustee as a condition of proving its claim against the estate. It was thereupon ordered that the claim of the bank be disallowed, unless the bank should within 10 days pay to the trustee the amount of \$80,706.46, and if such sum should be paid the claim of the bank should be allowed at the sum of \$136,350.91. On the 22d of July, 1903, upon the hearing, the court below approved and confirmed the findings and judgment of the referee, which decree the bank brings here for review.

The bankrupt, a corporation engaged in the book business in the city of Chicago, and against whom a petition in bankruptcy was filed on March 6, 1902, had been for a long time a customer of the First National Bank, maintaining a deposit account with it, and was a constant and large borrower of money from it. The bank was ignorant of the insolvency of the bankrupt until March 4, 1902, two days before the filing of the petition in bankruptcy. In its dealings with the bankrupt the bank kept a "loan account" and a "deposit account." The loan account included direct loans, being discount to the bankrupt of its notes (herein designated as direct indebtedness), and notes of customers of the bankrupt received from, indorsed by, and discounted for it (herein called contingent indebtedness). During the same period the bank discounted for others of its customers

notes of the George M. Hill Company to a large amount, indorsed by such other customers. Such discounts, however, did not appear in the loan account of the bankrupt kept by the bank, but in the loan account of the customers for whom the discounts were made. On November 6th, the commencement of the period of four months immediately preceding the filing of the petition in bankruptcy, the loan account stood as follows:

| | |
|-------------------------------|-------------|
| Direct indebtedness | \$30,000 00 |
| Contingent indebtedness | 39,700 00 |
| | <hr/> |
| | \$69,700 00 |

On March 6, 1902, the date of the filing of the petition in bankruptcy, the loan account exhibited as follows:

| | |
|-------------------------------|-------------|
| Direct indebtedness | \$23,500 00 |
| Contingent indebtedness | 51,829 86 |
| | <hr/> |
| | \$75,329 86 |

There was in fact \$20,000 in addition paid during the stated period, but with the money of the bank loaned for that purpose. The loans were for like amounts, and were contemporaneous with the payments, and are treated by the referee as renewals and not considered as payments. The amount actually paid by the bankrupt upon its direct indebtedness during the stated period of four months was \$17,500. The last payment, \$2,500, was made January 7, 1902, and reduced the direct indebtedness at that date to \$15,000, at which sum it remained until February 11th, when \$5,000 was added, and on March 1st \$3,500 more was loaned, making the total direct indebtedness, at the date of filing the petition in bankruptcy, \$23,500.

On the second day before the filing of the petition in bankruptcy, and after knowledge of the insolvency of the George M. Hill Company, the bank appropriated the balance in the deposit account standing to the credit of the company, to wit, \$3,700.93, and applied it upon the direct indebtedness in the loan account.

During the stated period of four months the bankrupt paid to the bank on its promissory notes discounted by the bank for third parties, and owned by the bank, the sum of \$59,505.53. These payments do not appear upon the loan account of the bank with the George M. Hill Company, but in the loan account kept by the bank with the customers for whom the discount of the notes was made. The sums thus received by the bank within the stated period of four months were these:

| | |
|---|-------------|
| On loan account | \$17,500 00 |
| In payment of bankrupt's notes discounted by the bank for third parties | 59,505 53 |
| Appropriated balance | 3,700 93 |
| | <hr/> |
| | \$80,706 46 |

These accounts the referee held to be preferences, the appropriated balance to be repaid to the trustee, because received with knowledge of insolvency, and the others to be repaid as a condition of the allowance of the bank's claim.

The contention here is with respect to the ruling upon each of these sums.

First. With respect to the appropriated balance of \$3,700.93, it was ruled below that because the appropriation of that amount was with knowledge of the insolvency of the George M. Hill Company it was a transfer of property amounting to a preference, under section 60a of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. It is sufficient to say that the precise question has recently been ruled to the contrary by the Supreme Court, in *New York County National Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380. In this respect, therefore, the referee and the court were in error.

Second. It is insisted by the appellant that payment by the bankrupt of notes given by it to third parties and discounted by the bank were, under the law, preferential payments to those for whom the bank discounted the notes, and were not preferential payments to the bank. We are not able to concur in this contention. The fact that the bank did not enter these notes in its loan account with the bankrupt, but in the account with the parties for whom they were discounted, is of no moment. The real question is, what was the true nature of the transaction? Was payment under the law preferential to the bank receiving payment? The title of the bank to these notes was absolute. The debt thereby evidenced was a debt owing by the bankrupt to the bank. True, the original payees of the notes were liable to the bank upon their indorsements of the notes, contingent upon their dishonor by the maker and upon due notice of such dishonor. True that, in the absence of a bankruptcy law, payment of the notes by the maker would inure to the benefit of the indorsers, relieving them from such contingent liability. True, also, that the debt of the bankrupt expressed by the notes would become a debt to the indorsers if and when, in discharge of their liability as indorsers, they should repossess themselves of the notes. But it was the bank, not the indorsers, who received the preferential payment. The release of the indorsers from contingent liability, if such release was effected by such payment, was an incident not affecting the penalty imposed by the bankruptcy act for the receipt, however innocent, of a preferential payment. Within the definitions of the bankruptcy act the indorser has been held to be a creditor of the bankrupt, while his liability as an indorser is contingent, so as to charge him with preferential payment made to the holder of the note. *Swarts v. Siegel*, 117 Fed. 13, 54 C. C. A. 399. But none the less is the owner of the note likewise subjected to the penalties of the act for receipt of such preferential payment. *Swarts v. Fourth National Bank of St. Louis*, 117 Fed. 1, 54 C. C. A. 387. In these cases both the bank and the indorsers were held chargeable for receipt of preferential payment by reason of the amount paid to the bank, which payment must be refunded before either party could prove an independent claim against the bankrupt with which the other party was in no wise connected. This would not result, as counsel supposed, that in such case the insolvent estate would recover twice what it

lost. Only the amount by which the assets of the estate had been depleted must be returned.

It is further said that the bank, refusing to receive payment of the notes, would thereby discharge the indorser. The contention is not free from difficulty, and if that result would follow the enforcement of the act would be productive of injustice. But we think the matter has been ruled by the Supreme Court in *Bartholow v. Bean*, 18 Wall. 635, 21 L. Ed. 866, a case arising under the former bankruptcy act (Act March 2, 1867, c. 176, 14 Stat. 534, 536). The question was presented in that case, and Mr. Justice Miller, delivering the opinion of the court, said:

"It is very obvious that the statute intended, in pursuit of its policy of equal distribution, to exclude both the holder of the note and the surety or indorser from the right to receive payment from the insolvent bankrupt. It is forbidden. It is called a fraud upon the statute in one place and an evasion of it in another. It was made by the statute equally the duty of the holder of the note and of the indorser to refuse to receive such a payment. Under these circumstances, whatever might have been the right of the indorser, in the absence of the bankrupt law, to set up a tender by the debtor and a refusal of the note holder to receive payment, as a defense to a suit against him as indorser, no court of law or equity could sustain such a defense, while that law furnishes the paramount rule of conduct for all parties to the transaction; and when in obeying the mandates of that law the indorser is placed in no worse position than he was before, while by receiving the money the holder of the note makes himself liable to a judgment for the amount in favor of the bankrupt's assignee, and loses his right to recover, either of the indorser or of the bankrupt's estate."

Within the rule in *Pirie v. Chicago Title & Trust Company*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, and *In re Fort Wayne Electric Corp.*, 99 Fed. 400, 39 C. C. A. 582, we have no doubt that the amount of these notes thus paid should be refunded as a condition that the bank prove its other claim. The payment of the several notes was the payment of a debt within the stated period, which inured to the detriment of the bankrupt's estate, disturbing the equality of the statute and forbidden by the statute.

Third. In *Jaquith v. Alden*, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717, it was ruled that payments on a running account, in the usual course of business, by a person whose property has actually become insufficient to pay debts, where new sales succeeded payments, and the net result was to increase his estate, and the seller had no knowledge or notice of the insolvency, and no reason to believe an intention to prefer, are not preferences which must be surrendered as a condition to the allowance of a proof of claim under the bankruptcy act. It is insisted by the appellant that under this rule it was improper to require the repayment of the sum of \$17,500 paid during the stated period upon the direct indebtedness. It is to be observed that this account with the bankrupt kept by the bank does not include the notes of the bankrupt discounted by the bank for the respective payees of those notes, and which, as we have said in the preceding paragraph, was the debt of the bankrupt to the bank, and upon which was paid the sum of \$59,505.53 during the stated period. We think that in stating the accounts between the parties, within the rule declared in *Jaquith v. Alden*, all the transactions be-

tween the parties must be included, and that we are not limited to an account as it is stated or was kept by the bank, because we are to inquire whether the net result of the transaction was to increase or decrease the estate of the bankrupt. If the account was stated including that amount, there remains no question that the net result of the dealings was to decrease the bankrupt's estate, and that the bank is therefore chargeable with the amount of that net decrease as a condition of proving its claim. Treating the account, however, as it is stated by the bank, there appears, during the stated period, to have been a decrease of direct indebtedness of \$6,500, and an increase of contingent indebtedness of \$12,129.18, showing an apparent net increase of indebtedness of \$5,629.18. The inquiry presents itself whether the contingent indebtedness is properly included in that account. That contingent indebtedness was the contingent liability of the bankrupt upon notes of its customers discounted by the bank upon its indorsement of those notes and the proceeds paid to the bankrupt. This created no increase of the bankrupt's estate, for these notes were assets of the bankrupt, which by the transaction it had simply converted into money. Its liability upon these notes to the bank was contingent upon dishonor of the notes and due notice of such dishonor, and the bank's claim thereon might be proven as a contingent claim. The amount of liability could only be determined at the maturity of the notes. At the time of the bankruptcy the amount of these notes was \$51,829.86, upon which there was paid by makers of them, at or before the hearing by the referee, the sum of \$4,433.19. Whether and to what extent the bankrupt's estate should be charged could only be determined when the contingent liability had become an absolute liability. But, since the test is not whether the bank was damaged by it, or the indebtedness to it increased, but whether the bankrupt's estate was increased, and as the discount of these notes did not increase the bankrupt's estate, but operated merely to convert existing assets into cash, we do not think that this contingent liability should be permitted, in stating the account, to work an increase of benefit to the estate.

The referee and the court below allowed, as a preferential payment, the sum of \$17,500 upon the direct indebtedness during the stated period, upon the postulate that there was a decrease of that direct indebtedness during the stated period of \$6,500. These payments were made on or prior to January 7, 1902, reducing the direct indebtedness at that date to \$15,000; but by discounts obtained February 11th of \$5,000, and March 1st of \$3,500, the direct indebtedness was increased from \$15,000 on January 7th to \$23,500 at the date of filing the petition in bankruptcy. The actual decrease of indebtedness between the 6th day of November, 1901, and the 6th day of March, 1902, was \$6,500, and yet the court below has charged as a preferential payment the total payments made upon this direct indebtedness of \$17,500, ignoring the subsequent discount by the bank during the stated period, and by which the estate was increased. The court below, nevertheless, ignored the payment of \$20,000 because the payments were made by renewal notes, and the estate, with respect to increase or decrease of assets, was unaffected thereby. By

the bankruptcy statute, section 57g (30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]), the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences; and under the rule in *Jaquith v. Alden* we must ascertain the net result of gain or loss to the estate during the stated period, and, treating this account of direct indebtedness by itself, there was a direct loss to the estate of only \$6,500, and the amount of preference could only be that sum. Restoration, not punishment, is the object of this law. It was therefore not correct to hold the entire payment of \$17,500 to be a preference. It results, therefore, that, in ascertaining the amount which should be required to be paid to the trustee as a condition of proving the claim of the bank, the amount of payments upon the notes of the bankrupt discounted to third parties, to wit, \$59,505.53, should be included, to which should be added the amount of preference on direct indebtedness of \$6,500, making a total of \$66,005.53.

The decree is reversed, and the cause is remanded, with directions to the court below to enter a decree in conformity with the views herein expressed.

THE NEWBURGH.

(Circuit Court of Appeals, Second Circuit. April 19, 1904.)

No. 191.

1. COLLISION—MOVING AND ANCHORED VESSEL—BURDEN OF PROVING CONTRIBUTORY FAULT.

Where a steamer proceeding up the Hudson river was clearly in fault for a collision with an anchored lighter because of her excessive speed in a dense fog and her fault was sufficient to account for the collision because those in charge were ignorant whether she was or was not on the anchorage grounds, the burden rested upon her to prove clearly that the lighter was chargeable with contributory fault for being anchored outside the anchorage grounds.

2. SAME—EVIDENCE CONSIDERED.

A lighter with a tow started up North river when a dense fog came on. Having proceeded to the vicinity of 100th street above the crossing ferries, she made for the anchorage grounds on the west side of the river, and, after taking soundings and proceeding as far as she thought was safe, anchored, where she was later struck by a passing steamer, which was going at a speed of eight miles an hour, and sunk. Her exact location when anchored was not known, but the weight of evidence indicated that she was on the anchorage grounds. *Held*, that such evidence was not sufficient to charge her with contributory fault, the fault of the steamer being clear.

3. SAME—ANCHORING IN HUDSON RIVER—STATUTORY REQUIREMENTS.

Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3543], providing that it shall be unlawful to tie up or anchor vessels or other craft in navigable channels in such manner as to prevent or obstruct the passage of other vessels, does not condemn a lighter which, compelled to anchor in the Hudson river because of a dense fog, made her way to the side on which were the anchorage grounds, as far as was considered safe, and anchored after taking soundings which indicated that she was within the grounds; the exercise of precautions commensurate with the danger being all that is required.

Appeal from the District Court of the United States for the Southern District of New York.

The libel was filed by Eugene S. Belden, in behalf of the owners, insurers, master and crew of the steam lighter Clifford. The libelants appeal from a final decree of the District Court for the Southern District of New York, holding the propeller Newburgh liable for half the damages received by the Clifford by reason of a collision with the Newburgh in the Hudson River, off 104th street, at about half past 9 on the morning of December 29, 1901, during a dense fog. The Newburgh was held in fault for excessive speed. Her claimant, the Central Hudson Steamboat Company, has not appealed. The Clifford was held in fault for anchoring off the designated anchorage ground.

The opinion below is reported in 124 Fed. 954.

Samuel Park, for appellants.

Charles C. Burlingham and Charles L. Kingsley, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. No appeal having been taken by the claimant the negligence of the Newburgh must be considered as established beyond controversy.

The single question to be determined is whether the Clifford was at fault in anchoring at the place where the collision occurred. Was she on the anchorage ground, namely, west of a line drawn through the center of the river? The testimony was taken by deposition and was submitted on briefs in the District Court, no oral argument being made. The District Judge assumed that it was conceded that the Clifford was somewhat to the eastward of the anchorage ground. No such concession is made in this court. Entertaining the idea that there was no dispute regarding the position of the Clifford the judge, very naturally, deemed it unnecessary to enter into an independent examination of the evidence bearing upon the question of location. That question is the principal one debated in this court and, after giving it careful consideration, we are led to the conclusion that the preponderance of proof is to the effect that the Clifford was on the anchorage ground at the time of the collision and that the most favorable finding to which the Newburgh is entitled is that the question is involved in doubt. Our reasons for reaching this conclusion are as follows:

First. No one knows, or pretends to state as a fact, the precise location of the Clifford. It is known that she was near the center of the river and either on or near the anchorage grounds. Beyond this all is inference and guesswork. The testimony of the master of the Clifford that "I didn't think it safe to get on any anchorage ground there—it was a good place to get in collision," has no reference whatever to the place where he actually dropped anchor. He was referring to the situation at 56th street, more than two miles below, where the anchorage ground was directly in the path of the ferries.

Second. The master of the Clifford says that he was either on the anchorage ground or "right close to it," and gives his reasons for his opinion. Before anchoring soundings were taken. The depth of the water on the anchorage ground does not exceed ten fathoms and the line showed six fathoms, indicating that he was well within the zone

of safety. It is true that when asked for his opinion as to his whereabouts the master was not altogether clear. It is manifest that he did not know exactly where he was. At one time he testified that he thought he was on the anchorage grounds. At another time he said, "I don't think I was on them. Of course, I couldn't tell or not; I was trying to avoid collision." And, again, he said he anchored on the edge. Nevertheless, the deduction from the undisputed fact that the depth of the water was but six or seven fathoms corroborates the libelants' theory that the Clifford was on the anchorage ground.

Third. The Clifford was examined by the superintendent of the wrecking company the day after the collision and he found her in the same position as when she sank, nearer the New Jersey than the New York shore, close to the channel bank on the west side of the river and well onto the anchorage ground. This would be conclusive as to her location were it not for the fact that immediately after the blow the Newburgh, with her stem still in the wound made by the collision, endeavored to push the Clifford into shoal water. There is a difference of opinion as to what the effect of this maneuver was. The libelants' witnesses think that it did not move her an inch. The claimant's witnesses, on the other hand, are of the opinion that the Clifford must have been moved, though no one seems to be able to give the distance or the direction with accuracy. The testimony of the pilot of the Newburgh that the Clifford was moved half of a mile westward from the place of collision is evidently untrustworthy, for, if the chart correctly shows the width of the river at 104th street, she would have brought up on the New Jersey shore. When it is remembered that the Clifford had out her large port anchor, with 30 fathoms of chain, that she was rapidly filling and that the Newburgh had her stem in a wound which extended to the mast, so that she was endeavoring to push the Clifford broadsides through the water, the contention that she was moved for any considerable distance does not commend itself to the court.

Fourth. We do not lose sight of the fact that "a line of three white buoys marks the east limit of the anchorage ground" and that they are located from 125th street down to Hoboken. The claimant's testimony indicates that one of these was located between 46th and 50th streets and another a little below 96th street. The master and pilots of the Newburgh testify that she passed the buoy at 50th street about 200 feet on her port side. This was two miles and more below the place of the collision and, in the absence of other proof, would seem to offer an exceedingly slight foundation for the argument that she did not cross the eastern edge of the anchorage ground at 104th street. We are unable to find a particle of testimony that any one on the Newburgh saw the buoy at 96th street before the collision. This seems to us most significant and accords with the libelants' theory. One of the Newburgh's witnesses, Monahan, testifies as follows:

"I saw two buoys. The other one was off a trifle below 96th street, that was after the collision; I was bringing the lighter back to the 86th street dock—96th street."

This would indicate that he was west of this buoy when he passed up the river, for if he had passed 200 feet to the eastward it is not clear how he could have seen it in a dense fog going from the place of collision to the dock on the New York side. However this may be, it seems evident that if this buoy had been 200 feet on her port side some one on the Newburgh would have seen it.

Fifth. The testimony of the witnesses for the claimant as to the location of the collision is confused and uncertain. One of them says it might have been off 78th, 79th or 80th street, and the others place it at about 79th street. This obvious error does not prove that the witnesses were intentionally misrepresenting the facts, but it does demonstrate the absolute impossibility of making accurate observations in the circumstances existing on the morning in question. As before stated the weight of evidence favors the libelants' contention that the Clifford was on the anchorage ground. But let it be conceded that the testimony is so contradictory and uncertain that it is impossible to locate the Clifford with accuracy. How then stands the case? The Newburgh's admitted violation of the law, her reckless conduct and excessive speed are sufficient to account for the disaster that followed. Her negligence was gross and we think the burden was upon her to prove the negligence of the Clifford.

As was said by the Supreme Court in *The City of New York*, 147 U. S. 72, 85, 13 Sup. Ct. 211, 216, 37 L. Ed. 84.

"Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel."

In *The Oregon*, 158 U. S. 186, 197, 15 Sup. Ct. 804, 809, 39 L. Ed. 943, the same principle is re-affirmed, the court observing:

"Where one vessel clearly shown to have been guilty of fault, adequate in itself to account for the collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributing fault. This principle is peculiarly applicable to the case of a vessel at anchor, since there is not only a presumption in her favor, by the fact of her being at anchor, but a presumption of fault on the part of the other vessel, which shifts the burden of proof upon the latter."

See, also, *Clarita and The Clara*, 23 Wall. 1, 13, 23 L. Ed. 146; *The Hustler* (D. C.) 100 Fed. 134; *The Mexico* (D. C.) 78 Fed. 653; *The Ludvig Holberg*, 157 U. S. 60, 71, 15 Sup. Ct. 477, 39 L. Ed. 620.

Has the Newburgh sustained the burden? Has she presented "clear proof" that the Clifford was off the anchorage ground? We think not. The master of the Clifford was confronted by a grave responsibility. The situation was one of great peril. His exact whereabouts was unknown; he had reached a point on the river where he felt confident that he was beyond the danger of crossing ferry-boats; he thought he was on, or very near the anchorage ground, and that if he kept on moving he was liable to collide with an anchored vessel at any moment. There was danger no matter what course was adopted and we are not prepared to assert that, after taking soundings, it was faulty seamanship to anchor where he says he did—"between the ferries and clear of them where I supposed every-

thing was safe." His judgment was vindicated to some extent by the discovery, after the fog cleared, that vessels were anchored both to the east and west of where the Clifford was struck. Being enveloped in a fog so dense that from the time it shut down he had not seen either shore, we are inclined to think that he exercised due caution, having in view the extraordinary perils which confronted him. *The City of Lawrence*, 115 Fed. 791, 53 C. C. A. 287.

But a single word need be said regarding the other accusations against the Clifford. It is argued that she did not keep a sufficient lookout and did not give proper signals. A sufficient answer is that negligence in these particulars, assuming it to exist, contributed in no degree to produce the accident. Each vessel heard the other's signals before it was possible for them to see each other. A score of lookouts on the Clifford would not have prevented the collision.

We had occasion to examine the Act of March 3, 1899, c. 425, 30 Stat. 1152, § 15 (U. S. Comp. St. 1901, p. 3543), in the case of the *John H. Starin*, 122 Fed. 236, 58 C. C. A. 600, and shall not attempt to define its meaning further than to say that we are convinced that it has no application to the present controversy.

The decree is reversed with costs to the libelants, and the cause is remanded to the court below with instructions to enter a decree for the libelants for the full amount of their damages with interest and costs.

EUREKA COUNTY BANK v. CLARKE.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1904.)

No. 1,002.

1. APPEAL—FINDINGS—OPINION OF TRIAL COURT—ASSIGNMENTS OF ERROR.

The opinion of the trial court, as distinguished from its findings and decision, is not a proper subject for an assignment of errors.

2. SAME—FINDINGS OF FACT—REVIEW.

Where an action at law is tried by the court without a jury, the appellate court is precluded from weighing the evidence for the purpose of determining whether or not the court's findings were justified thereby, unless there was no evidence whatever to support the findings.

3. SAME—CONVERSION.

Where, in an action for conversion of certain stock, defendant's answer expressly denied plaintiff's title, and alleged defendant's possession of the stock and dividends, and its refusal to surrender them to plaintiff, and the court found that the defendant had "converted" such stock and dividends to its own use, the finding was a sufficient finding that defendant was in possession of the stock and dividends, and that it denied and acted in defiance of plaintiff's title.

In Error to the Circuit Court of the United States for the District of Nevada.

For opinion below, see 123 Fed. 922.

Cheney, Massey & Smith and William H. Metson, for plaintiff in error.

N. Soderberg, Alfred Chartz, and J. Emmett Walsh, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was an action for the conversion of certain shares of stock, together with the accrued dividends thereon, and was, by the stipulation of the respective parties, tried before the court without a jury, resulting in findings and judgment in favor of the plaintiff below (the defendant in error here). In the brief of counsel for the plaintiff in error (defendant below) it is said that the findings of fact were not made by the trial court until after it had given its judgment, for which reason it is contended that the judgment must be reversed. The record does not sustain this statement of counsel. It is true that the dates appended to the findings and judgment, respectively, would indicate that such was the fact, but the judgment itself declares that the findings of fact and conclusions of law were already of record, and that in pursuance thereof the judgment was rendered.

The 6th, 7th, 8th, 9th, 10th, 11th, 12th, and 13th assignments of error are leveled at the opinion of the court below, which is a very different thing from its findings and decision. *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565; *Thomas v. Tanner*, 14 How. Prac. 426. The reasons for the decision of a court do not constitute a proper subject for an assignment of errors.

The 1st, 2d, 3d, and 4th assignments are simply to the effect that the court below erred in making its respective findings of fact, and the 5th assignment is simply that the court erred in ordering judgment in favor of the plaintiff upon those findings. There is no assignment calling in question any ruling of the trial court in respect to the admission or rejection of evidence, nor any of its decisions during the trial. In effect, the assignments only are that the court below erred in finding, in accordance with the allegations of the complaint, that on the 15th day of April, 1902, the plaintiff was the owner and entitled to the possession of the shares of stock in question, and the dividends theretofore accrued thereon, and that on the same day the plaintiff demanded of the defendant the delivery of the stock and the payment of the accrued dividends, and that the defendant wrongfully converted the stock and dividends to its own use, by reason of which conversion there was due from the defendant to the plaintiff the sum of \$11,251.75, and in ordering judgment to be entered in favor of the plaintiff and against the defendant for that amount, with legal interest and costs of suit. In what respect the court so erred, if at all, is not undertaken to be specified in the assignment of errors.

It is well settled that in an action at law the findings of fact made by the court, where the action is tried without a jury, stand upon the same basis as a verdict, and that the appellate court is precluded from weighing the evidence for the purpose of determining whether or not the findings of fact were justified by it. *Hepburn v. Dubois*, 12 Pet. 344, 9 L. Ed. 1111; *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; *Lancaster v. Collins*, 115 U. S. 222, 6 Sup. Ct. 33, 29 L. Ed. 373; *Dooley v. Pease*, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457; *Ward v. Joslin*, 186 U. S. 142, 22 Sup. Ct. 807, 46 L. Ed. 1093; *Case Mfg. Co. v. Soxman*, 138 U. S. 431, 11 Sup. Ct. 360, 34

L. Ed. 1019; *Hathaway v. First National Bank*, 134 U. S. 494, 10 Sup. Ct. 608, 33 L. Ed. 1004.

If there be no evidence at all to support the findings of fact made by the trial court, such findings would, as matter of law, be erroneous.

In the case of *The Francis Wright*, 105 U. S. 381, 387, 26 L. Ed. 1100, the court said:

"It is undoubtedly true that if the Circuit Court neglects or refuses, on request, to make a finding one way or the other on a question of fact material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal, taken in time and properly presented by a bill of exceptions, may be considered here on appeal. So, too, if the court, against remonstrance, finds a material fact which is not supported by any evidence whatever, and an exception is taken, a bill of exceptions may be used to bring up for review the ruling in that particular. In the one case the refusal to find would be equivalent to a ruling that the fact was immaterial; and in the other, that there was some evidence to prove what is found, when in truth there was none. Both these are questions of law, and proper subjects for review in an appellate court. But this rule does not apply to mere incidental facts, which only amount to evidence bearing upon the ultimate facts of the case. Questions depending on the weight of evidence are, under the law as it now stands, to be conclusively settled below, and the fact in respect to which such an exception may be taken must be one of the material and ultimate facts on which the correct determination of the cause depends."

It is true that that was a cause in admiralty, but no reason is perceived why what was there said in respect to findings of fact is not equally applicable to an action at law tried by the court without the intervention of a jury. And in the case of *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862, which was an action at law tried before the judge without a jury, it was held that when there is no demurrer to the declaration, or other exception to the sufficiency of the pleadings, no exception to the ruling of the court in the progress of the trial in the admission or exclusion of evidence, or otherwise, no request for a ruling upon the legal sufficiency or effect of the whole evidence, and no motion in arrest of judgment, and the only matter presented by the bill of exceptions which the appellate court was asked to review arose upon the exception to the general finding by the court for the plaintiff upon the evidence adduced at the trial, no question of law was presented which the Supreme Court could review.

Nor is the contention that there was no evidence at all to support the findings presented to this court by the assignment of errors, and, if it were, it would not, we think, be difficult to show that such contention is not well founded.

It is also insisted on the part of the plaintiff in error that the findings of fact do not support the judgment given; that there is no finding that the defendant was ever in possession of the stock and dividends, nor that it denied or acted in defiance of plaintiff's title, nor that there was any assertion of title in itself; that the finding to the effect that the defendant refused to deliver to the plaintiff the stock and dividends after demand made was but evidence of the ultimate fact which the law denominates a conversion; and at the same time it is contended on behalf of the plaintiff in error that the finding to the effect that the defendant did convert the stock and dividends in question to its own use was not a finding of fact, but a pure conclusion of law. The answer to these

contentions of the plaintiff in error is that in its answer filed in the cause it expressly denied the plaintiff's alleged title, and expressly alleged its own possession of the stock and dividends, and its refusal to turn them over to the plaintiff. Moreover, the word "conversion," by a long course of practice, has, as was held by the court in *Burroughs v. Bayne*, 5 Hurl. & N. 296, "acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them." The finding, therefore, of the court below, to the effect that the defendant converted the stock and dividends in question to its own use, means that it deprived the plaintiff, whom the court found to be the owner and entitled to the possession of the property, of her dominion over it.

The judgment is affirmed.

SCHWEER v. BROWN.

(Circuit Court of Appeals, Eighth Circuit. March 26, 1904.)

No. 1,921.

1. BANKRUPTCY—COMMITMENT OF BANKRUPT FOR REFUSAL TO SURRENDER PROPERTY—IMPRISONMENT FOR DEBT.

The obligation of a bankrupt to surrender to his trustee property in his possession belonging to his estate is not an obligation to pay a debt, the title to such property being in the trustee; nor can he, by refusing to comply with an order of court requiring him to make such surrender, convert himself into a debtor, so as to render his commitment therefor an imprisonment for debt.

2. SAME.

The mere denial by a bankrupt, under oath, of the possession of assets belonging to his estate, is not conclusive, and does not preclude the court from enforcing its order requiring him to surrender such property to his trustee by imprisonment for contempt, where it finds, on sufficient evidence, that it is in his possession or under his control.

3. SAME—SUFFICIENCY OF EVIDENCE.

Evidence considered, and *held* to support a finding that a bankrupt had in his possession or under his control assets belonging to his estate, and an order requiring him to surrender the same to his trustee under penalty of punishment for contempt.

Appeal from the District Court of the United States for the Eastern District of Arkansas.

A petition of creditors, an order to show cause, a response by the bankrupt, and a hearing before the referee in bankruptcy upon the issue joined, resulted in a finding by the referee that Schweer, the bankrupt, had in his possession or under his control assets belonging to his estate in bankruptcy of the amount or value of \$17,895.61, and an order that he surrender the same to the trustee. Upon the application of the bankrupt the matter was certified to the District Court of the United States for the Eastern District of Arkansas, and that court, upon a review of the proceedings and the evidence before the referee, found that the bankrupt had in his possession or under his control assets of his estate in bankruptcy amounting to \$15,607.61, and thereupon ordered him to surrender the same to the trustee within a specified time, and that, upon his failure so to do, he be committed to the county jail of Pulaski county, Ark., as for contempt, and be there detained until the further order of the court, or discharged by due process of law. The bankrupt appealed.

Harry H. Myers and U. S. Bratton, for appellant.
George B. Pugh and Robert E. Wiley, for appellee.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first contention of the bankrupt is that the enforcement of the order of the District Court would constitute imprisonment for debt, and would therefore be in contravention of the provision of the Constitution of Arkansas (Const. art. 3, § 16) that no person shall be imprisoned for debt in any civil action on mesne or final process unless in case of fraud. This is no longer a debatable question. Assuming the correctness of the finding of the referee and of the District Court that the bankrupt had in his possession property belonging to his estate in bankruptcy, his obligation to comply with the order of the court by surrendering it to the trustee is not the obligation to pay a debt. The adjudication in bankruptcy operated to transfer to the trustee the title to all of the property of the bankrupt which was subject to distribution among his creditors. His obligation and his duty to surrender to the trustee property in his possession which belongs to the trustee, and not to him, cannot be converted into a debt, at his option, by his mere refusal to comply with the order of the court. *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; *In re Purvine*, 96 Fed. 192, 37 C. C. A. 446; *In re Rosser*, 101 Fed. 562, 41 C. C. A. 497; *Ripon Knitting Works v. Schreiber* (D. C.) 101 Fed. 810; *Id.*, 104 Fed. 1006, 43 C. C. A. 682; *In re Schlesinger*, 102 Fed. 117, 42 C. C. A. 207. These cases also furnish a conclusive answer to the claim of the bankrupt that his mere denial under oath of the possession of assets is conclusive, and that in such case the only remedy of the trustee and the creditors is by proceedings under the penal sections of the bankruptcy act.

The final question is whether the evidence presented by the record is sufficient to support the finding upon which the order of the District Court was based. Without stopping to consider the measure of proof which is applicable to a case of this character—whether it need only be clear and convincing, as in cases of fraud, or whether it must be sufficient to convince beyond a reasonable doubt, as in criminal actions or proceedings—it will do to say that a careful examination of the record has satisfied us beyond a reasonable doubt that when the order was made the bankrupt had in his possession or under his control assets in the amount or value of \$15,607.61, and that such assets were then a part of his estate in bankruptcy. We are also satisfied that in the application of the evidence to the issue the District Court was duly considerate of the nature of the proceeding and of the rights of the bankrupt, and that, if there was error in the ascertainment and fixing of the amount specified in the order, it was an error of which the bankrupt has no just cause for complaint.

On July 1, 1902, the bankrupt, who owned and conducted a store in a little town in Arkansas containing about 100 inhabitants, had a stock of general merchandise of the value of \$5,000, and had on hand about \$1,000 in money and some outstanding accounts. Between that time and the latter part of the following November, when the pro-

ceedings in bankruptcy were instituted, he purchased from various wholesale houses goods of the value of over \$27,000. The record presents a clear case of a deliberate purpose on the part of the bankrupt to defraud the merchants from whom his purchases were made, and to despoil them of their property. This purpose was thinly veiled; was scarcely denied at the hearing. A large portion of the goods was quickly sold by him to other persons without breaking the packages in which they came, and in some instances shipments were diverted without even unloading the goods from the cars. The bankrupt claims that some of these sales were at cost, and the remainder at a substantial profit, and that in every case he actually received payment for goods so disposed of. In the ascertainment of the amount which he should be ordered to turn over to the trustee, he was therefore properly charged with the proceeds. In the endeavor to ascertain what became of the money and property which it was conceded the bankrupt had, the controversy at the hearing before the referee centered principally about two claims made in his behalf. A few days before the institution of proceedings in bankruptcy, and in contemplation of such proceedings, the bankrupt made a statement under oath that the value of his stock of merchandise then on hand was \$2,300. The approximate accuracy of this statement was demonstrated by the inventory of the receiver, who took temporary charge of the store, which showed the value of the property to be \$2,400. The bankrupt claimed at the trial that his sworn statement was inaccurate, that at the time it was made he actually had on hand between eight and nine thousand dollars worth of merchandise, and that, during the three or four days which elapsed before possession was taken for the receiver, about two-thirds thereof was stolen in some mysterious way by persons unknown. The evidence offered in support of this contention was not worthy of serious consideration. The claim was also made that between the 1st day of July, 1902, and the time when the receiver took possession in the following November, the bankrupt lost and squandered \$13,700 in gambling, in betting upon the races, and in riotous living. But his testimony upon that subject was so vague, indefinite, and unsatisfactory as to be entitled to very little credit in a court of justice. Almost every attempt on the part of counsel for the trustee to secure from the bankrupt a statement of the details of his alleged losses was frustrated by the answer that he did not remember. Such corroboration as his testimony received—and it was only in part—was from testimony similar in character of professional gamblers, who in many instances contradicted each other and the bankrupt himself. The proper limits of an opinion forbid more than a general characterization of the mass of inconsistencies and improbable statements appearing in the record. The referee, out of an abundance of caution, allowed for these causes a loss of \$6,000. Aside from the amounts covered by these claims, there still remained a balance of several thousand dollars, to account for which no substantial effort whatever was made. The District Court, in making the order complained of, reduced by over \$2,000 the amount found by the referee to be in the possession or under the control of the bankrupt. The considerations which led the court to this action do not appear, but it was doubtless due to a desire to avoid any error prejudicial to the rights of the bank-

rupt. In a proceeding of this character, no punishment can be inflicted for reprehensible and dishonest conduct, but, in a careful effort to avoid such result, a court, when called upon to pass upon the weight of testimony and the credibility of witnesses, is not to be deprived of those faculties of judgment and discrimination as to what is true or probable, on the one hand, and untrue, improbable, or absurd, upon the other, which are permitted to be exercised by juries in similar cases.

The order of the District Court will be affirmed.

UNITED STATES v. JULIUS WILE BRO. & CO.

(Circuit Court of Appeals, Second Circuit. April 14, 1904.)

No. 145.

CUSTOMS DUTIES—RECIPROCAL COMMERCIAL AGREEMENTS—SCOPE.

Reciprocal commercial agreements made with foreign countries under the authority of section 3, Tariff Act July 24, 1897, c. 11, 30 Stat. 203 [U. S. Comp. St. 1901, p. 1690], cannot legally extend the scope of said section.

AME—RECIPROCAL AGREEMENT WITH FRANCE—CORDIALS—SPIRITS.

Cordials are within the provision for "spirits manufactured or distilled from grain or other materials," in section 3, Tariff Act July 24, 1897, c. 11, 30 Stat. 203 [U. S. Comp. St. 1901, p. 1690], and, when imported from France, are subject to the reduced rate of duty provided for such spirits in the reciprocal commercial agreement with that country, 30 Stat. 1774, negotiated under the authority of said section.

Appeal from the Circuit Court of the United States for the Southern District of New York.

The decision in question ([C. C.] 124 Fed. 1023) affirmed an unpublished decision of the Board of General Appraisers, which followed *Nicholas v. U. S.* (C. C.) 122 Fed. 892, and reversed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Julius Wile Bro. & Co.

A. H. Washburn and D. Frank Lloyd, for appellant.

Albert Comstock, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The tariff act of July 24, 1897, c. 11, § 1, Schedule H, 30 Stat. 173 [U. S. Comp. St. 1901, p. 1653], provides as follows:

"Par. 289. Brandy and other spirits manufactured or distilled from grain or other materials, and not specially provided for in this act, two dollars and twenty-five cents per proof gallon."

"Par. 292 [30 Stat. 173 (U. S. Comp. St. 1901, p. 1654)]. Cordials, liqueurs, arrack, absinthe, kirschwasser, ratafia, and other spirituous beverages or biters of all kinds, containing spirits, and not specially provided for in this act, two dollars and twenty-five cents per proof gallon."

Both sides agree that the cordials in controversy are of such a character that they would be covered by the phrase "spirits manufactured or distilled from grain or other materials" in paragraph 289, had they not been excepted from the provisions of such paragraph by the use

of the words "not specially provided for in this act," and by being specially enumerated in paragraph 292. The importers protested to the collector that duty should be assessed only at the rate of \$1.75 per proof gallon. They rely upon the provisions of section 3 of the same tariff act (30 Stat. 203 [U. S. Comp. St. 1901, p. 1690]). The relevant portions of that section are as follows:

"Sec. 3. That for the purposes of equalizing the trade of the United States with foreign countries and their colonies, producing and exporting to this country the following articles: Argols, or crude tartar, or wine lees, crude; brandies or other spirits manufactured or distilled from grain or other materials; * * * the President be, and he is hereby authorized, as soon as may be after the passage of this act * * * to enter into negotiations with the governments of those countries exporting to the United States the above mentioned articles * * * with a view to the arrangement of commercial agreements in which reciprocal and equivalent concessions may be secured * * * and whenever the government of any country or colony producing and exporting to the United States the above mentioned articles * * * shall enter into a commercial agreement with the United States * * * which, in the judgment of the President, shall be reciprocal and equivalent, he shall be and he is hereby authorized * * * to suspend * * * by proclamation * * * the imposition and collection of the duties mentioned in this act on such article or articles so imported * * * and thereafter the duties * * * upon such article * * * shall be as follows, namely

"Brandies, or other spirits manufactured or distilled from grain or other materials, one dollar and seventy-five cents per proof gallon," etc., etc.

Thereafter a reciprocal commercial agreement was concluded between the governments of the United States and the French Republic. 30 Stat. 1774. It provided, inter alia, that during its continuance the following articles of commerce, the product of the soil or industry of France, shall be admitted at rates of duty not exceeding the following, to wit:

"On brandies, or other spirits manufactured or distilled from grain or other materials, one dollar and seventy five cents per proof gallon." 30 Stat. 1775.

The French text of this provision reads:

"Cognacs, ou autres spiritueux, ou liqueurs fabriquees, provenant de la distillation de grains ou d'autres matieres, un dollar et soixante quinze cents par gallon."

Proclamation was duly made in conformity with section 3, and subsequently the cordials in controversy were imported.

The government contends that the commercial agreement cannot legally extend the scope of section 3 of the tariff act, a proposition which is undoubtedly sound. The only question in the case is as to the meaning of the words "brandy and other spirits manufactured or distilled from grain or other materials" as used in section 3. Reference is made to various authorities which hold that "it is not to be assumed that the same word is used in the statute with two different meanings, unless that is made clearly apparent by the connection in which the word is used." *Junge v. Hedden* (C. C.) 37 Fed. 197, affirmed 146 U. S. 233, 13 Sup. Ct. 88, 36 L. Ed. 953. And it is argued that because the phrase under discussion is found in paragraph 289, and that paragraph does not include cordials and liqueurs, the same phrase should not be construed to cover them when used in section 3. The

difficulty with this argument is that it starts with a false assumption. The phrase "brandy and other spirits," etc., in paragraph 289, is not of itself so narrow in scope as to exclude cordials. If it stood alone in that paragraph it would include them, and they are excepted from paragraph 289 only because the words "not specially provided for in this act" are inserted therein, and because the cordials and liqueurs are specially provided for in paragraph 292. Congress certainly understood that, except for these additional provisions, the phrase was broad enough to include cordials and liqueurs, and they added the provisions so as to make the exceptions which they wished to make in the ordinary duty schedule. But in section 3 the phrase "brandies, or other spirits manufactured or distilled from grain or other materials" is wholly unqualified by any exception or proviso, and it must be assumed that, for the purposes of that section, Congress intended to make no exception or proviso, thus leaving the phrase to comprehend such articles as it would naturally comprehend when unqualified by exception or proviso.

The decision of the Circuit Court is affirmed.

UNITED STATES v. LUYTIES et al.

(Circuit Court of Appeals, Second Circuit. April 14, 1904.)

No. 166.

1. CUSTOMS DUTIES—RECIPROCAL AGREEMENT WITH FRANCE—PLACE OF EXPORTATION.

A bill of lading for certain merchandise was made out in Switzerland, but the invoice was certified by a United States consul in France, and the evidence showed France to have been the country of production, and from which the merchandise was exported. *Held*, that the importation was within the reciprocal commercial agreement with France and the United States, May 30, 1898, 30 Stat. 1774, negotiated under the authority of section 3, Tariff Act July 24, 1897, c. 11, 30 Stat. 203 [U. S. Comp. St. 1901, p. 1690].

Appeal from the Circuit Court of the United States for the Southern District of New York.

The decision of the Circuit Court (124 Fed. 977) affirmed an unpublished decision of the Board of General Appraisers, which followed *Nicholas v. U. S.* (C. C.) 122 Fed. 892, and reversed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Luyties Bros.

A. H. Washburn and D. Frank Lloyd, for the United States.

Wm. A. Kenner, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The principal contention advanced in argument is disposed of in our opinion in *U. S. v. Julius Wile Bros. & Co.*, 130 Fed. 331, handed down to-day. An additional point is made that the article in question was not produced in and exported from France.

The absinthe was shipped from Basle, in Switzerland, by a through bill of lading via Antwerp to New York. The bill of lading is dated several days after the invoice, and the importer explained that Pontarlier, France, where the invoice is dated, was not a shipping point where the agents of the Red Star Line accept freight, and therefore the goods had to be sent first to Basle, where through bill of lading could be obtained. The invoice was consulated at Dijon, and there is no evidence in the case to controvert the statement of the special deputy collector that "the goods were imported * * * from France."

The decision of the Circuit Court is affirmed.

MOSLE et al. v. BIDWELL.

(Circuit Court of Appeals, Second Circuit. April 25, 1904.)

No. 92.

1. CONSTRUCTION—LEGISLATIVE INTENT—METHOD OF ASCERTAINMENT.

Though, in construing a law, a court may not, in order to reach a conclusion as to legislative intent, inquire what individual members of Congress supposed a bill to mean, or what they intended to accomplish by their votes, it may consult the history of the act and the reports of committees having it in charge.

2. SAME—STATUTES IN PARI MATERIA—SUBSEQUENT LEGISLATION.

On appeal from a decision construing section 20, Customs Administrative Act June 10, 1890 (chapter 407, 26 Stat. 140 [U. S. Comp. St. 1901, p. 1950]), it appeared that Congress, in consequence of the apprehended results of said decision, had, in the act of December 15, 1902, c. 1, 32 Stat. 753 [U. S. Comp. St. Supp. 1903, p. 255], enacted an amendment, which, as reported to the House of Representatives by the committee having the bill in charge, was intended to "confine the language of the section [20] to the primary meaning and intent of the law." *Held*, that the latter statute should in this case be taken as declaratory of the meaning of the earlier one, and that said section should be construed to have had the effect given by the amendment.

3. CUSTOMS DUTIES—MERCHANDISE WITHDRAWN FROM WAREHOUSE—RATE OF DUTY APPLICABLE.

The provision in section 20, Customs Administrative Act June 10, 1890, (chapter 407, 26 Stat. 140 [U. S. Comp. St. 1901, p. 1950]), that merchandise in bonded warehouses may be withdrawn for consumption "on payment of the duties and charges to which it may be subject by law at the time of said withdrawal," means such payment as the merchandise would be subject to if imported at the time of withdrawal.

In Error to the Circuit Court of the United States for the Southern District of New York.

Note U. S. v. Benzon, 24 Fed. Cas. 1112; Merritt v. Cameron, 137 U. S. 542, 11 Sup. Ct. 174, 34 L. Ed. 772. For decision below, see 119 Fed. 480.

This cause comes here upon writ of error to review a judgment of the Circuit Court in favor of defendant in error, who was defendant below, sustaining a demurrer to the complaint. The action was to recover from the collector of the port of New York certain duties collected upon sugars imported from the island of Porto Rico.

¶ 1. See Statutes, vol. 44, Cent. Dig. §§ 292, 293, 299.

John G. Carlisle, for plaintiffs in error.

Chas. Duane Baker, for defendant in error.

Argued before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The sugars were imported and stored in bonded warehouse on April 4, 1899. The tariff act of July 24, 1897, c. 11, schedule E, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647], imposed duties on sugars, and there has been no change in that schedule down to the time when the collector exacted duties on this importation. On April 11, 1899, by exchange of ratifications, the treaty of peace between the United States and Spain (30 Stat. 1754), ceding the island of Porto Rico to the United States, became effective. The Supreme Court has held in *De Lima v. Bidwell*, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041, that merchandise brought from Porto Rico to the United States after the ratification of that treaty, and until the enactment of the Foraker act, was not subject, by the law in force during that period, to any import duty whatsoever. On May 6, 1899, the sugar in question was withdrawn from bond for consumption, and duties were liquidated and paid May 17, 1899, at the rate prescribed in the tariff act of 1897. The importers protested, claiming that it might be withdrawn from bond free of duty. They relied on section 20 of the customs administrative act of June 10, 1890 (chapter 407, 26 Stat. 140 [U. S. Comp. St. 1901, p. 1950]), which reads:

"Sec. 20. That any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: provided, that nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles."

The plaintiffs contended that the phrase "duties to which it may be subject by law at the time of withdrawal" should be construed to mean "duties no greater nor different than other like goods imported at the time of withdrawal would be subject to." The court held that the goods were subject to duty in the amount exacted of the plaintiffs when they were deposited in bond; that they remained so in the absence of any treaty or statute relieving them from duty; and that neither the treaty nor any statute passed subsequently to the one imposing the duty has impaired or affected the right to collect it.

We need not discuss the several arguments which have been advanced in criticism and in support of this decision. No principle of statutory construction is better settled than the one which holds that the intention of the Legislature, when discovered, must prevail, any rule of construction declared by previous acts to the contrary notwithstanding. The following excerpts from *U. S. v. Freeman*, 3 How. 556, 11 L. Ed. 724, are apposite to the case at bar:

"A legislative act is to be interpreted according to the intention of the Legislature, apparent upon its face. * * * In doubtful cases a court should compare all parts of a statute and different statutes in *pari materia* to ascertain the intent of the Legislature. * * * If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute; and, if it can be gathered from a subsequent statute

in *pari materia* what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute."

On December 15, 1902, Congress passed an act (chapter 1, 32 Stat. 753 [U. S. Comp. St. Supp. 1903, p. 255]) amending section 20 of the customs administrative act, quoted above, by inserting before the existing proviso an additional proviso, as follows:

"Provided, that the same rate of duty shall be collected thereon as may be imposed by law upon like articles of merchandise imported at the time of withdrawal."

Ordinarily, such an amendment might be taken as indicating an intention to make some change in the existing law, but, although we may not inquire as to what individual members supposed a bill to mean, or what they intended to accomplish by their votes, we may consult the history of the act itself, and the reports of committees having it in charge, in order to reach a conclusion as to legislative intent. It appears that the bill was introduced in consequence of the apprehended results of the decision of the Circuit Court in the case at bar, and the committee of ways and means reported to the House on December 11, 1902, that "the bill simply endeavors to conform the language of the section to the primary meaning and intent of the law and to accord with the custom and ruling of the Treasury Department." Under the rule laid down in *U. S. v. Freeman*, supra, the later statute may be taken as declaratory of the meaning of the earlier one.

The judgment is reversed, and cause remanded for a new trial.

COXE, Circuit Judge, concurs in result.

THE THOMAS QUIGLEY.

(Circuit Court of Appeals, Second Circuit. April 19, 1904.)

No. 150.

1. TOWAGE—TUG MOVING LIGHTER IN ABSENCE OF MASTER—LIABILITY FOR INJURY.

A tug which, contrary to custom, took a loaded lighter from a safe anchorage in the absence of the master, and towed it to the wharf of the cargo owner, assumed the duty of seeing that it was left in the care of some competent person, and did not relieve herself from liability for its injury by delegating such duty to the wharf owner.

2. WHARVES—UNSAFE CONDITION OF BOTTOM—LIABILITY OF OWNER.

The owner of a wharf used for its own purposes, which negligently allowed the bottom around it to become filled with obstructions, so that a vessel could not safely lie there unless special care was taken to prevent it from grounding at low tide, and which had a loaded lighter brought there and moored on Sunday, during the temporary absence of the master, assumed the duty of seeing that it was so placed as to be safe, and is liable for its injury resulting from the failure to breast it out into sufficiently deep water.

3. TOWAGE—INJURY TO TOW—CONTRIBUTORY FAULT.

The owner of a lighter which was moved by a tug on Sunday, contrary to the usual custom, at the instance of the owner of the cargo, was not

chargeable with fault because the master, who did not know it was to be taken that day, was temporarily absent, so as to preclude him from collecting damages for its injury through the fault of the tug and the cargo owner.

Appeal from the District Court of the United States for the Southern District of New York.

Appeal from a decree of the District Court for the Southern District of New York, in favor of the libellant for \$1,773.03 and against the asphalt company and the tug Quigley, one-half of said sum to be paid by each. The libellant was the owner of the lighter Stamford and filed the libel to recover the damages sustained through the sinking of the Stamford at the asphalt company's wharf at Newark, N. J., after having been towed there, without a master, by the Quigley. The District Court found that both the company and the tug were at fault and both have appealed. The opinion below is reported in 123 Fed. 161.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

James J. Macklin and Le Roy S. Gove, for claimants.

R. D. Benedict, for appellant Barber Asphalt Co.

Herbert Green, for appellee.

COXE, Circuit Judge. The District Court found the tug liable for towing the lighter on Sunday, from Hunter's Point, East River, to Newark, N. J., and delivering her, with no care taker on board, to incompetent and ignorant laborers at work on the premises of the asphalt company.

That this was the initial fault to which all the others were attributable can hardly be doubted. If there had been a prudent and skillful master on board the Stamford to see that she was properly breasted out from the bulkhead and that her lines were sufficiently slack to permit her to slide into deep water as the tide receded, if there had been a competent person present to offer her assistance in case of emergency the accident would not have happened. For this neglect the tug was primarily responsible. She should not have undertaken the voyage at all in the absence of the master but, having done so, it was her duty to deliver the Stamford into the custody of some responsible person, having sufficient expert knowledge to see that she was not permitted to sink at her dock.

The asphalt company was inculpated for maintaining a dangerous mooring place for vessels doing business at its wharf, the bottom being uneven and the water, at low tide, insufficient for loaded boats to lie there with safety. The Stamford came there to deliver a cargo of stone dust to the asphalt company. The company was bound to know the condition of the bottom and the depth of water on its own premises. Its employes knew that the Stamford was without a master and they undertook to make her fast. They were required to exercise ordinary skill and care, but instead of this the work was done in a manner so negligent that at low tide, owing to the parting of the bow line furnished by the asphalt company, one end of the lighter slid into deep water, the other end catching on the bottom. The result was that when the tide returned she took in water enough to sink her.

It is argued that the Stamford may have sprung a leak, which would account for her sinking. The answer is that there is no testimony to sustain the contention. On the contrary it appears that the lighter was in good condition before the disaster and, even after she was raised, she did not leak while being towed to a dry dock for repairs. We cannot substitute conjecture for facts.

Further discussion is unnecessary for the reason that the questions in controversy are all fully treated in the opinion of the District Judge. We concur in his reasoning and conclusions with a single exception. We do not assent to the proposition that "it does not appear that the result would have been changed" if the master of the Stamford had proceeded to Newark and taken charge of her. We agree, however, with the District Judge in thinking that, in the peculiar circumstances here developed, the act or omission of the master does not relieve the appellants from the consequences of their negligence.

The decree is affirmed with interest and costs.

THE WALLACE B. FLINT.

(Circuit Court of Appeals, Second Circuit. April 19, 1904.)

No. 199.

1. COLLISION—STEAMER AND TUG WITH TOW CROSSING—FAILURE TO STOP.

A tug proceeding up East river with a car float on each side held in fault for a collision with a crossing steamer approaching from her star-board side, for failing to see or signal the steamer until they were within 1,000 feet of each other, and for then continuing on her course until after her second signal of two whistles was not answered, although there was an ebb tide, and she could have stopped without danger to herself or tows.

Appeal from the District Court of the United States for the Southern District of New York.

Appeal from a final decree of the United States District Court for the Southern District of New York, awarding to the libellant, the Joy Steamship Company, as owners of the propeller Seaboard, the sum of \$12,029.43, one-half of her damages caused by a collision with a car float in tow of the steam tug Wallace B. Flint. The collision occurred at half past 9 on the night of January 2, 1902, about midway between Astoria Ferry Slip and Horn's Hook. The Seaboard was engaged in transporting passengers and freight between New York and Boston, and on the night in question she was upon a trip from Boston to New York. The Flint left Pier 50, East river, with two loaded car floats, bound up the river to the Harlem river. The tide was ebb, the night clear, the wind moderate. The Flint proceeded through the channel east of Blackwell's Island and for some time prior to the collision the tug Transfer No. 9 assisted in towing the floats. She let go, however, previous to the collision. She was absolved from fault by the District Court and her conduct is no longer an issue in the case. When the Flint was some distance below, and the Seaboard some distance above, the Astoria Ferry the ferryboat Steinway came out of her slip and proceeded to her slip at Ninety-Second street, New York City, thus passing between the Seaboard and the Flint. After an exchange of signals between the Seaboard and the ferryboat and after two signals from the Flint, to which the Seaboard did not reply, the collision occurred. The float on the port side of the Flint struck the Seaboard 40 feet

from her stern on the port side, causing the injuries complained of. The court found both vessels at fault and both parties appealed.

The opinion of the District Court is reported in 125 Fed. 426.

Charles C. Burlingham, for libellant.

Samuel Park, for claimant.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). It is unnecessary to consider the alleged negligence of the Seaboard for the reason that the value of the Flint is conceded to be less than the judgment against her for \$12,029.43. The question of the Seaboard's negligence, therefore, becomes academic. This was frankly admitted upon the argument by the counsel for the libellant.

The faults for which the Flint was held liable by the court below were that she did not see the Seaboard soon enough and that she continued her course and speed after receiving no response to her signal of two whistles. It was thought that this was a grave fault with the vessels only about 1,000 feet apart and with the Seaboard continuing her attempt to pass ahead. The District Judge found that the vessels were within half a minute of each other when the Flint saw the Seaboard and that there was then no time for experiments. After the Flint had steadied on her course for the Harlem river, headed for Ninety-Seventh or Ninety-Eighth street, so as to pass below Mill Rock, she continued in that direction without change. The first signal to the Seaboard was when the vessels were 900 or 1,000 feet apart. The Seaboard did not reply; the Flint slowed down, but held her course. She then signaled a second time and, receiving no reply, she reversed, but she was still going ahead when the float struck the Seaboard. The Flint at this time certainly had the Seaboard on her own starboard hand and the vessels were on crossing courses. The rule applicable to such a situation would apply unless the previous action of the Seaboard in changing her course to avoid the Steinway renders it inapplicable. We incline to the opinion that the rule did apply, but it is unnecessary to decide the point as the negligence of the Flint is clearly established without reference thereto. The tide was against the Flint; she could easily have stopped without danger to herself or the floats. Instead of doing this she kept on although she had received no signal from the Seaboard and it was quite evident, as soon as the latter had cleared the ferryboat, that she intended to cross the bow of the Flint. The situation required immediate action and the obvious thing to do was to stop the headway of the Flint without a moment's delay. Even on the testimony of the master of the Flint ordinary prudence should have dictated the propriety of this maneuver. He says that he did not know which way the Seaboard was going, whether she was intending to take the east or the west channel, and yet he kept on across her bow and did not stop and back until he had failed to receive a response to his second signal. It is true that when this occurred the vessels were in close proximity, but no sufficient reason is given for the failure of the Flint to signal the Seaboard until she

was only "900 feet or 1,000 feet away." Of the 12 witnesses sworn all but 4 were examined in the presence of the District Judge, and even though we entertained doubt as to the negligence of the Flint we would not be disposed to disagree with the finding of the judge upon the facts.

The decree is affirmed with interest but, as both parties have appealed, without costs in this court.

NEW YORK TELEPHONE CO. v. TREAT.

(Circuit Court of Appeals, Second Circuit. April 19, 1904.)

No. 163.

1. INTERNAL REVENUE—WAR REVENUE ACT—TAX ON TELEPHONE MESSAGES.

Under the war revenue act of June 13, 1898, c. 448, § 25 (30 Stat. 460), which imposes a tax of 1 cent on telephone companies for each message transmitted over their lines for which a charge of 15 cents or more is imposed, a company is subject to the tax on messages transmitted under contracts with subscribers by which each pays \$90 per year for the right to send not to exceed 600 local messages during the year.

In Error to the Circuit Court of the United States for the Southern District of New York.

On writ of error to the United States Circuit Court for the Southern District of New York, to review a judgment in favor of the defendant in error, who was defendant below, entered upon the finding of the Circuit Judge, a jury trial having been waived.

The action was brought to recover \$21,492.75 and interest, collected by the defendant, as collector of internal revenue for the Second District of New York, as a tax upon telephone messages under the war revenue act of June 13, 1898, c. 448 (30 Stat. 448, 460). Section 25 of said act contains the following:

"Telephone Messages: It shall be the duty of every person, firm or corporation owning or operating any telephone line or lines to make within the first fifteen days of each month a sworn statement to the collector of internal revenue in each of their respective districts, stating the number of messages or conversations transmitted over their respective lines during the preceding month for which a charge of 15 cents or more was imposed and for each of such messages or conversations the said person, firm or corporation shall pay a tax of one cent; provided, that only one payment of said tax shall be required, notwithstanding the line of one or more persons, firms or corporations shall be used for the transmission of each of such messages or conversations."

The plaintiff is a corporation, engaged in the telephone business in the city of New York and the amount stated above was collected by the defendant, under the said section, as a tax upon messages transmitted by the plaintiff between July 13, 1898, and May 1, 1899. During this period there were in existence in the city of New York contracts for limited telephone service made by the plaintiff with its subscribers by which it agreed to transmit a given number of messages for a stated sum which averaged 15 cents per message. For instance, when the number of messages was limited to 600 the price paid per annum was \$90, and 10 cents for each message in excess of 600.

These contracts were headed

"Contract for Telephone Service.

"(Direct Line—Message Rate)."

The first paragraph is as follows, the words "six hundred," "ninety" and "ten" having been inserted in order that its purport may be better understood:

"The subscriber requests the New York Telephone Company (herein styled

the 'Company') to establish at ——— Borough of Manhattan, in the City of New York, a telephone station and furnish service for one year from the first day of the month following the connection of the station, and thereafter until this contract is terminated as herein provided; and agrees to pay for the right to send in said year *six hundred* local messages, *ninety* dollars, payable quarterly in advance; for additional local messages *ten* cents each, payable as herein provided; for the fraction (if any) of the month in which the station is connected proportionately at said annual rate; and for foreign messages such tolls as are now or may be established, payable monthly."

Under these contracts if 600 messages were sent it would be at the rate of 15 cents per message; if less than 600 were sent it would necessarily be at the rate of more than 15 cents per message. In no instance was the tax collected where the rate charged was less than 15 cents.

Melville Eggleston and C. Walter Artz, for plaintiff in error.

Henry A. Wise, Asst. U. S. Atty., for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). The war revenue act provides that every telephone company shall pay a tax of 1 cent on every message transmitted over its line for which a charge of 15 cents or more was imposed. The defendant has collected this tax and nothing more.

If the contracts under discussion, between the plaintiff and its subscribers, had been drawn for the express purpose of bringing them within the terms of section 25 of the act of June 13, 1898, c. 448 (30 Stat. 460), language more apt could scarcely have been selected. Of course the transmission of the message necessitated the use of the company's books, apparatus lines, etc., but this is equally true where the sender enters a public pay station and pays a stated sum for the message he is about to transmit.

It is undoubtedly true that the plaintiff could have so drawn the contract as to avoid the payment of the tax. The private installation, the directory listings and the other advantages enumerated in the plaintiff's brief, might have been included as part of the consideration, but the short answer is that they were not so included.

The contract is perfectly plain; there is no ambiguity, no necessity for interpretation, no room for construction. The subscriber "agrees to pay for the right to send in said year 600 local messages \$90, payable quarterly in advance." If to these quoted words the clause "or at the rate of 15 cents for each message" had been added, or if the subscriber had agreed to pay "15 cents each for 600 messages," the contract would not have expressed more clearly the understanding of the parties that they had made "a message rate" contract and that the \$90 was paid for the right to send 600 local messages.

The contract defines a local message as follows:

"A local message is a personal communication five minutes or less in duration, from said station to another station connected with an exchange of the company in said borough."

Again, it provides that:

"The rate for local messages for each year succeeding the first, payable quarterly in advance, shall be in accordance with the schedule in force at the beginning of such year, and shall be computed from the number of such messages sent from such station during the preceding year, but the rate shall not

exceed that prescribed by the schedule in force at the beginning of the preceding year unless," etc.

Without quoting further from the contract we are of the opinion that the parties were dealing with local messages as the subject-matter of their agreement and that the privileges accorded the subscriber, enumerated in the plaintiff's brief, were only the necessary ingredients of and incidents to the agreement to transmit the 600 messages.

The right to use all the apparatus required to transmit the message is implied, just as the use of the messengers, wagons and cars of an express company is implied when a given sum is paid for the transmission of a package; just as the right to use the conveniences of the company's railway carriages is implied when a passenger procures a commutation ticket entitling him to so many stated trips between two stations on the company's line.

There is nothing ambiguous about the law and it is not permissible for us to take into consideration the legislative intent in order properly to interpret the enactment. It needs no interpretation. What the lawmakers intended to do is immaterial when what they actually did do is free from doubt.

The judgment is affirmed with costs.

ELDRED v. KIRKLAND.

(Circuit Court of Appeals, Second Circuit. April 19, 1904.)

No. 192.

1. PATENTS—VALIDITY AND INFRINGEMENT—CIGAR LIGHTERS.

The Chambers patent, No. 492,913, for an electric lamp lighter, covers the first successful device by which a fluid-burning cigar lighter is ignited automatically by electricity and automatically extinguished, and was not anticipated; and while not a broad invention, the device is novel and useful, and the claims are entitled to a construction sufficiently liberal to give the inventor the benefit of well-known equivalents. Claim 1 is invalid, as too broad, in terms covering prior devices; but claims 5 and 10 are valid, and are infringed by a lighter made in accordance with the Gruhlke & Kessler patent, No. 562,395, the Kessler patent, No. 598,489, and the Gruhlke patent, No. 628,982.

Appeal from the Circuit Court of the United States for the Northern District of New York.

This is an appeal from a decree of the Circuit Court for the Northern District of New York holding letters patent No. 492,913, for an electric lamp lighter, invalid, and dismissing the bill, with costs. The opinion below is reported in 124 Fed. 553. The patent was considered by the Circuit Court of Appeals for the Seventh Circuit in *Eldred v. Kessler*, 106 Fed. 509, 45 C. C. A. 454, where the specification and claims are set out in *hæc verba*. The court held that the patent must be limited to the precise construction shown and described, and, as so limited, the defendant's lighter, which is the same device in controversy in the case at bar, did not infringe.

Louis K. Gillson and Charles C. Linthicum (Clifford E. Dunn, of counsel), for appellant.

Stem, Heidman & Mehlhope, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. The complainant is the owner of letters patent No. 492,913, granted to Josephus C. Chambers, March 7, 1893, for an improvement in electric lamp lighters. The bill, in the usual form, prays for an injunction and an accounting. The answer interposes the familiar defenses of lack of novelty and invention and non-infringement.

The patent is for an electrically ignited fluid-burning wick lamp, intended for use as a cigar lighter and so arranged as to be lighted and extinguished automatically. The poles of an electric circuit are arranged adjacent to the end of the lamp to be lighted, the circuit being normally open. The breaking of the circuit produces an electric spark to ignite the lamp. When the lamp is not in use the wick is inclosed and covered by an open-sided hood, arranged at the upper extremity of a pivotally mounted arm having an operating handle at its lower end. By moving this arm upon its fulcrum, the wire point of the electrode mounted on the arm is brought first into contact with the metal of the lamp adjacent to the wick thereby completing the electric circuit. As the arm continues to be moved farther the wire point is disconnected from the lamp and produces an electric spark adjacent to the wick which lights it. When the user has lighted his cigar he releases his hold upon the handle and the arm returns to its normal position, out of electrical connection with the lamp, bringing the insulating cap and the extinguisher into position to extinguish the lamp. The device is provided with a battery of its own and can be used in small hamlets where there is neither gas nor electricity.

The claims involved are the first, fifth and tenth. They are as follows:

"(1) In an electrical lamp-lighter, the combination, with a lamp, the burner of which is formed into or provided with an electrode, an extinguisher formed into or provided with the opposite electrode, and means for establishing and breaking the electrical connection between said electrodes, substantially as set forth."

"(5) In an electrical lamp-lighter, the combination, with a lamp, the burner of which is formed into or provided with an electrode, an arm pivotally secured adjacent to the lamp, one end of which is provided with an extinguisher, and an electrode, and means for automatically returning the arm to extinguish the light, substantially as set forth."

"(10) In an electric lamp-lighter, a lamp, a support therefor, an arm led into proximity to the lamp, provided with an extinguisher, an electric circuit having its electrodes at the adjacent portions of the arm and lamp, said arm and lamp the one movable in relation to the other to close said circuit to ignite the lamp, and self retracting to extinguish the lamp, said circuit being normally open, substantially as described."

In discussing the prior art we deem it unnecessary to consider all the patents pleaded in the answer or even all of those referred to by the experts, for the reason that it is agreed by counsel and experts alike that the three which approximate most closely to the invention of Chambers are the patents to Eastman, granted August 30, 1892; Hen & Weinmann, granted May 1, 1888, and Kronenberg, granted March 12, 1889. If these patents do not anticipate or fatally limit the claims it is manifest that the other patents segregated or combined will not operate to do so.

The Eastman patent shows a self-lighting lamp, which consists of a tube corresponding in cross-section with the interior of a sheath, which holds the lamp, and is provided at its lower end with an extinguisher, which fits over the end of the burner when the lamp is at rest. The sheath is mounted upon a base at an angle of, approximately, 20 degrees, there being insufficient slope to enable the lamp to slide into place. Each time it is removed it must be shoved home by the hand of the user. The flame is electrically produced by the act of taking the lamp from its sheath and is extinguished by returning it thereto. The wick is ignited automatically by making and breaking contact with an electrode mounted on an arm which extends up and over the sheath in the line of travel of the wick tube; in all other respects the device is operated manually. The user withdraws the lamp completely from the sheath and carries it to the end of the cigar. If he be a prudent and careful person he will insert it again in the sheath and push it into place. If, on the other hand, he be thoughtless or stupid he is quite likely to place the lamp, still burning, in some other position with the probability that disastrous results will follow. If he simply releases his grasp, as in the Chambers device, the lamp will drop to the floor. It cannot be successfully contended that the Eastman torch is self-extinguishing. The apparatus in this respect is no more automatic than if a cup of water were provided and the user were instructed to put out the flame by thrusting the end of the torch into the water. Indeed, the manual action resembles that required in using the tapers so long in vogue where the alcohol flame was smothered by returning the taper to its holding tube and dropping it into place. The extinguisher consists of a flat plate, instead of an open-sided cap, which would, in all probability, bat down the wick and render the lamp useless after a few trials. Eastman shows the nearest approach to the device of the patent in suit. He and Chambers both had the same idea in mind, namely, the production of a self-igniting and self-extinguishing cigar lighter. Chambers succeeded. Eastman failed. The one produced a lamp having both these characteristics. The other a lamp having but one. Instead of anticipating, or seriously limiting the scope of the patent, Eastman offers mute but persuasive tribute to Chambers' skill and ingenuity. Had he hit upon some plan by which his torch could be returned automatically to an open-sided cap extinguisher he would have secured the prize. "In the law of patents it is the last step that wins." Eastman failed to take it.

The Hen & Weinmann patent discloses an electric igniting apparatus in which a small wick saturated with alcohol is ignited automatically by the rubbing of the wick holder against an electric brush when the lamp is removed from its socket. There can be no doubt that in this, as in the Eastman and Chambers patents, the lamp is lighted automatically by an electric spark produced by, substantially, similar apparatus. In other respects, though operating upon the principle of the Eastman device, it is apparently less serviceable and convenient. It has all of the defects of the Eastman lamp in addition to others peculiar to itself. It has none of the typical advantages of the Chambers device. It is sustained in a vertical position by a

bracket, the lamp being placed in its holder manually and held there by a spring. Should the spring cease to press against it the lamp would drop out. When removed from its holder the lamp, like Eastman's, can be carried wherever desired and laid down anywhere. The intention of the patentees, however, is that when no longer required for use it shall be returned to the holder by pushing it in from the bottom until the extremity of the wick tube passes into the extinguisher at the top of the holder which thus extinguishes the flame. There is nothing about the lamp to convey this intention to the user, who would be quite likely to throw it aside where it might communicate fire to contiguous objects. If he understood that he was expected to return the lamp to the holder he had no means of knowing that he was to push it in until the burner entered the extinguishing cap. Failure in this regard would result in the temporary or permanent impairment of the apparatus. The Hen & Weinmann structure has no pivotal connection between the burner and the extinguisher and no means of any kind for automatically extinguishing the lamp.

Kronenberg invented an "electric gas lighter" and, of course, the problems with which he had to deal differ essentially from those which we are considering. The object of the inventor was to provide means for completely turning off the gas at the ignitor jet, and to adapt such means so as to turn on the gas in the act of lifting the device to or near the mouth of the user. When thus ready for use the gas is lighted by electric sparks and is turned off when the device assumes its normal position. The only feature which resembles any part of the Chambers structure is the vibrating lever which suggests the "Arm F" of the patent in suit, but in function, operation and result the two are essentially different. No amount of mechanical skill could make the lever of the Kronenberg patent do the work of the pivoted arm of the Chambers patent.

The record discloses no material feature of the prior art which is not found in the three patents considered. These patents are typical of the pre-existing situation and we fail to find there the combination of the Chambers patent; we fail to find a fluid burning cigar lighter, ignited automatically by electricity and automatically extinguished. The Chambers lighter occupies a field narrow and circumscribed it is true, but still one that has never been occupied before. Chambers has provided a self-igniting and self-extinguishing lighter which produces the desired flame, extinguishes it the moment the cigar is lighted and remains in economical and harmless inactivity until again needed; these results being accomplished by a single movement of the user's hand. He has not made a great invention or a "pioneer invention," if that much abused expression be confined to its legitimate meaning, but he has produced a novel and useful device which is far removed from mere mechanical skill. His invention belongs to that vast field of minor achievement which has given this country its acknowledged pre-eminence and which it is the policy of the patent law to protect.

The question of infringement remains.

The first claim is too broad; it can be read on the Eastman and Hen & Weinmann devices. This was admitted by the complainant's expert. He says:

"I am free to admit, however, that the naked terms of claim 1 of the Chambers patent do not clearly distinguish its construction from that of the Hen & Weinmann patent, or, in other words, that it is necessary to read the claim in the light of the specification and consider that the elements enumerated must be of substantially the character described in the specification and shown in the drawing of the Chambers patent in order to distinguish the combination of this claim from the device shown by Hen & Weinmann."

The admission is creditable to the witness for it is in exact accordance with the facts and saves unnecessary discussion.

The fifth claim is for the combination, in an electrical lamp lighter, of the following elements:

First.—A lamp the burner of which is formed into or provided with an electrode.

Second.—An arm pivotally secured adjacent to the lamp.

Third.—An extinguisher and an electrode at one end of the arm.

Fourth.—Means for automatically returning the arm for extinguishing the light.

The tenth claim is for the combination, in an electric lamp lighter, of the following elements:

First.—A lamp.

Second.—A support for the lamp.

Third.—An arm led into proximity to the lamp provided with an extinguisher.

Fourth.—An electric circuit having its electrodes at the adjacent portions of the arm and lamp.

Fifth.—Said arm and lamp, the one movable in relation to the other, to close said circuit to ignite the lamp and self retracing to extinguish the lamp, the circuit being normally open.

The defendant is using a device made under patents No. 562,395, granted to Gruhlke and Kessler June 23, 1896, No. 598,489, granted to W. F. Kessler February 1, 1898, and No. 628,982, granted to A. C. Gruhlke July 18, 1899. The infringing lighter, made in substantial compliance with the directions of these patents and particularly the latter, contains all the elements of the fifth and tenth claims as above specified. This proposition is too obvious to require discussion and is not seriously disputed. The defense of noninfringement is established only by limiting the claims to the mechanism described and shown, thus denying to the complainant the right to hold even the plainest equivalents. In the defendant's structure the lamp moves pivotally and the extinguisher is stationary. In the Chambers structure the lamp is stationary and the extinguisher moves. The one is the exact equivalent of the other even if the alternative construction were not pointed out in the specification, as it is. The lower portion of the tubular arm in the defendant's structure is cut away to receive the nozzle of the lamp and smother the flame without batting down the wick; its operation, in effect, is the same as that of the open-sided hood of the patent. It is argued that there is nothing in the description or claims calling for such an extinguisher and that the

"open-sided housing or hood" is the invention not of Chambers but of the complainant's expert. It is true that the words quoted are employed by the expert as aptly describing the part which is described as "a cap and its extension acting as an extinguisher." The open-sided feature is plainly shown in the drawings and the operation of the parts is such that the caps of the prior art could not be utilized. It is this structure, by whatever name it is designated, which is the "extinguisher" of claims 5 and 10, and this is the "extinguisher" which the defendant has appropriated.

As in most combination claims the separate elements can be found in the prior art, but this is of no moment if the combination be new, as it is in the present instance. We do not think the complainant is entitled to a broad construction of the claims in issue, but we do think the claims should receive an interpretation sufficiently liberal to give him the benefit of well-known equivalents, such, for instance, as the substitution of a weight for a spring and one form of support for another.

The judge of the Circuit Court naturally and properly followed the decision of the Circuit Court of Appeals for the Seventh Circuit. That decision is entitled to the greatest respect, but we are reluctantly constrained to a different conclusion. The court says:

"The Eastman patent was granted for an 'electric cigar-lighting lamp,' and shows a fluid-burning device which differs in form from that of Chambers, but is equally automatic in lighting and extinguishing by electricity,—closely resembling the Hen & Weinmann device, except for this dual feature."

If we were able to concur in this interpretation of the Eastman patent we would have no difficulty in reaching a similar conclusion, but for the reasons heretofore stated we are compelled to take a very different view of its scope and meaning. In none of the devices shown, including Chambers', is a fluid burner extinguished by electricity and in Eastman's the extinguishing is not automatic but manual. This proposition was not disputed at the argument and it is not disputed in the defendant's brief. Had it appeared to the satisfaction of the court in the Kessler case that Chambers was the first to produce a fluid burner not only ignited automatically but automatically extinguished as well, it is not improbable that a different conclusion would have been reached.

The decree is reversed, with costs, and the cause is remanded to the Circuit Court with instructions to enter the usual decree, upon the fifth and tenth claims, in favor of the complainant.

SILVER & CO. v. J. P. EUSTIS MFG. CO. et al.

(Circuit Court, D. Massachusetts. May 17, 1904.)

No. 1,839.

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

In suits for infringement the rule is that the patent must be supported by public acquiescence or prior adjudication to entitle complainant to a preliminary injunction, unless there are some peculiar conditions which call for the exercise of the court's discretion in granting the injunction. It is also incumbent on complainant to show that the threatened injury will be irreparable.

2. SAME.

Where it is not shown that a complainant has suffered or is threatened with any serious injury from the alleged infringement of his patent by defendant, and defendant denies infringement since the commencement of the suit, and states that he abandoned the manufacture and sale of the alleged infringing article, and does not intend to and will not further infringe, such irreparable injury does not appear as to require the granting of a preliminary injunction. The effect of such injunction in deterring others from infringement cannot be considered on such an application.

3. SAME—PLEADING—PLEA.

In a suit for infringement, a plea setting out that defendant abandoned the manufacture and sale of the infringing article before the commencement of the suit will be stricken out where such statement is contradicted by evidence already in the record.

In Equity. Suit for infringement of patent. On motion for preliminary injunction and to strike out plea.

Stephen J. Cox and William R. Bigelow, for complainant.
Edward S. Beach, for defendants.

HALE, District Judge. This is a suit in equity to enjoin and restrain the defendants from manufacturing or selling bath seats which are alleged to infringe United States letters patent No. 736,032, dated August 11, 1903, issued to William H. Silver, and assigned to complainant.

The case now comes before the court upon a motion for a preliminary injunction and upon a motion of the complainant to strike out a plea filed by the defendants, which plea alleges that prior to the filing of the bill of complaint the defendants and their agents had wholly ceased to make, use, or sell bath-tub seats which are alleged to infringe the patent in suit; that after the date of the patent, and before the filing of the bill, the defendant company made and sold $2\frac{1}{3}$ gross of seats for the purpose of using up old parts on hand; that in so manufacturing said seats the defendant company made such substantial alterations in the parts that the seats did not infringe the patent in suit; that since the sale of said $2\frac{1}{3}$ gross of seats the defendants and their agents have wholly ceased to manufacture, use, and sell bath-tub seats, and were not at the time of the filing of said bill of complaint engaged in their manufacture, use, and sale, and

¶ 1. See Patents, vol. 38, Cent. Dig. §§ 476, 477, 480, 481.

¶ 3. Pleading in infringement suits, see note to *Caldwell v. Powell*, 19 C. C. A. 595.

have not at any time since the filing of the bill of complaint threatened to manufacture, use, or sell bath-tub seats, but have in good faith finally abandoned such manufacture, use, and sale, and are not now threatening, and do not intend, now or at any time in the future, to manufacture, use, and sell such bath-tub seats. The motion to strike out this plea alleges that the plea presents no valid defense to the suit, is irrelevant and immaterial, and improperly filed herein, and, if the facts presented in said plea were true, they would not defeat complainant's suit.

The court will first consider whether or not a temporary injunction will be ordered. The case shows that the defendant John P. Eustis, who is the treasurer of the defendant corporation, claimed to be the inventor of the identical subject-matter of the patent in suit; that he made application for a patent therefor, and contested an interference proceeding between his application and the application for the patent in suit; that he prosecuted this interference before all the tribunals of the Patent Office in which it was possible for him to prosecute it; and that, after the Patent Office had decided against him, and granted a patent to Silver, the complainant's assignor, the defendants then promised and agreed not to infringe the patent, but to respect complainant's rights thereunder. Complainant's affidavits tend to show also that the defendants continued their infringement until a short time before suit was brought. There is also some evidence that the defendants have offered infringing seats for sale since the filing of the bill of complaint. Indeed, the denial of Mr. Eustis, the treasurer of the defendant company, is not clear and unequivocal. Under the practice of the court in this circuit, the rule in this class of cases is that the patent must be supported by public acquiescence or prior adjudication in order to entitle a complainant to a temporary injunction, unless there are some peculiar conditions in the case which call for the exercise of the court's discretion in granting an injunction. *Hatch Storage Battery Company v. Electric Storage Battery Company*, 100 Fed. 975, 41 C. C. A. 133. It is also incumbent upon the complainant in this class of cases, before he is entitled to a temporary injunction, to show that the threatened injury by the alleged wrongful act of infringement will be irreparable. In *Parker v. Woolen Company*, 2 Black, 551, 17 L. Ed. 333, Mr. Justice Swayne, speaking for the Supreme Court, says:

"A court of equity will interfere when the injury by the wrongful act of the adverse party will be irreparable, as where the loss of health, the loss of trade, the destruction of the means of subsistence or the ruin of the property must ensue. A diminution of the value of the premises without irreparable injury is no ground for interference. The case must be one of 'strong and imperious necessity,' or the right must have been previously established at law."

In *Ladd v. Oxnard*—a recent case in this circuit—75 Fed. 732, Judge Putnam, referring to the case of *Parker v. Woolen Company*, says:

"The reasons for equitable interference in patent, trade-mark, and copy-right cases are brought within this definition by the words 'the loss of trade.' This, for reasons easily understood, involves injuries which it is impossible to compute by any rule of law, or any practical rule whatever, or even to ascertain. Unless there is this special ground for equitable relief by injunction, a bill for that purpose will not lie even in patent cases."

In the case before us the record does not show any public acquiescence in the patent, nor does it show any prior adjudication of the patent. The decision of the Patent Office cannot be held to take the place of a decree of a court.

Upon the question of irreparable injury the complainant does not entitle himself to the relief sought for. In the testimony presented by the complainant no great force is laid upon any injury which defendants will be likely to inflict, even if they break their promise of noninfringement. If such promise should be broken, this motion could be renewed at any time, as a court of equity is always open for the protection of its suitors; and defendants who have put themselves under promises of noninfringement must expect a prompt interference of the court if they break such promises. The injury which is most forcibly brought before the court by the complainant is that other manufacturers "will continue to infringe our patent with impunity, and to flood the market with seats practically identical in construction, but made in most instances of inferior material." A court of equity cannot be invoked to relieve a suitor from such injury as this. This court, in affording relief under this application, cannot take into consideration any fear which complainant may have of other infringers.

In *Paul Steam System Company v. Paul*, in which this court has just sent down an opinion (129 Fed. 757), the court said:

"The practice in the federal courts, and especially in this circuit, is to refuse an injunction unless the case shows beyond reasonable question the necessity for such intervention of the court. The practice of this circuit has been, except in clear cases of necessity, to leave a cause untrammelled by injunctions or decretal orders until the final hearing."

We see no reason in this case to apply a different rule, and must refuse to order a temporary injunction.

We now come to consider the plea offered by the defendants, the substance of which we have quoted. The rules of equity are not intended to authorize a defendant to make his defense by plea, and, if unsuccessful there, to make it over again in an answer. Walker on Patents, § 588. The testimony in this case sets out, among other things, that the defendants have ceased to sell the infringing bath-tub seats; that they have not sold them since the filing of the bill; that they have abandoned their manufacture, and do not intend to manufacture or sell them. But the evidence in the record before us tends to contradict the plea. That evidence tends to show that there has been some infringement since the filing of the bill. In this view of the case it is unnecessary for the court to pass upon the question whether the allegations of the plea relieve the complainant from the fear of infringement set forth in the bill, and so present a valid defense to the suit. It is the duty of the court in this proceeding to examine not only the plea itself, but the whole case as presented, and to decide whether anything in the record is inconsistent with the plea. The court finds that the evidence is contradictory to and inconsistent with the plea. We are therefore of the opinion that the plea cannot prevail.

A decree may be entered: The motion for temporary injunction is denied. It is ordered that the plea be stricken out, and that the defendants file their answer within 30 days.

JAMISON v. WIMBISH, Superintendent.

(District Court, W. D. Georgia, S. D. June 28, 1904.)

1. CRIMINAL LAW—SENTENCE.

This case involves the legality of a sentence by a police magistrate for a petty municipal offense to a term at hard labor on a local chain gang.

2. SAME—INFAMOUS CRIME.

Whether or not a crime is infamous must depend upon the fact whether, by the statute defining it, an infamous punishment can be awarded. Mr. Justice Gray in *Ex parte Wilson*, 5 Sup. Ct. 935, 114 U. S. 417-447, 29 L. Ed. 89.

3. SAME.

An order of a police magistrate directing that a person shall serve a term in such a chain gang as that portrayed in the evidence is a sentence to infamous punishment.

4. SAME.

A city charter which authorizes its police judge to impose fines for the violation of any law or ordinance passed in accordance with its charter to an amount not to exceed \$500; to imprison offenders in the city barracks for a space not more than 60 days, or at labor on the public works in the county chain gang for not more than 6 months; where it appears also that the persons convicted of minor municipal offenses are made to wear the typical striped clothing of the penitentiary convict; where iron manacles, which can only be removed by the use of the cold chisel, are riveted upon their legs; where the irons on each leg are connected by chains; where they work and sleep in the same clothing; where they wake, toil, rest, eat, and sleep in manacles and chains; where their progress to and from their work is public, and where they work on the public roads and before the public eye; where at all times they are watched with convict guards armed with deadly weapons, who will kill them if they attempt to escape; where they are liable to public and severe whipping by a whipping boss with a heavy leathern strap about two and a half or three feet long, with solid hand-grasp, and with broad, heavy, and flexible lash; and where they are imprisoned, work, and eat with felons from the State Penitentiary, and are only separated from them at night by a wooden lattice work—creates infamous punishment.

5. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.

Due process of law in a criminal case requires a law describing the offense, the offense must be described in the accusation, the accused must be given his day in court, his trial must proceed according to established procedure, consisting of rules of pleading and practice, and it is imperative that the court be of competent jurisdiction.

6. SAME—JURY TRIAL.

While summary proceedings before municipal courts for the punishment of minor offenses against ordinances or by-laws can conclude with sentence of pecuniary fine, and, in default, with moderate imprisonment, or with both fine and imprisonment, under the American system the power to sentence for such offenses to hard labor on the public chain gang does not and cannot exist in the jurisdiction and procedure of police courts, where trial by jury is not a right of the accused.

7. HABEAS CORPUS—FEDERAL JURISDICTION.

While the courts and judges of the United States having discretion to grant the writ of habeas corpus should exercise that discretion in the light of the relations existing under our system of government between the judicial tribunals of the Union and the state, where the necessity of the writ is urgent, and where the proceeding against the prisoner is repugnant to the Constitution, the writ should be granted.

¶ 7. Jurisdiction of federal courts in habeas corpus proceedings, see note to *In re Huse*, 25 C. C. A. 4.

8. SAME—VOID SENTENCE.

Where a sentence is of that character that it is void for want of jurisdiction, habeas corpus will lie, and may be issued by any court or judge invested with jurisdiction to grant it.

9. SAME—EVIDENCE.

Where a citizen of the United States has been sentenced by a single judge of a police court for a minor municipal offense to seven months on the chain gang described by the evidence in this case, and where, by state law, should he sue out a writ of certiorari, he could not be discharged unless he was able to pay costs or give bond, and where he is not able to do either, and his full punishment must have been suffered before, in the ordinary course, his cause could have been heard and determined by the state courts, and where it is alleged and proven that he is deprived of his liberty in violation of the Constitution of the United States, it makes a case for the urgent and immediate relief of habeas corpus at the hands of a United States court.

(Syllabus by the Court.)

Alexander Akerman and Charles Akerman, for petitioner.
Minter Wimberley, City Atty., for respondent.

SPEER, District Judge. This is a petition for the great writ of right—the writ of habeas corpus. It involves the legality of a sentence by a police magistrate, for a petty municipal offense, to a term at hard labor on one of those local chain gangs—perhaps the most melancholy and distressing spectacle which afflicts the patriot and humanitarian in many localities of our country. It involves the inquiry, is such deplorable and degrading punishment, adjudged by such a court for minor municipal offenses, tolerable under the American system? It is believed that in no case previously decided by state or national court has there been so fully and fairly made this inquiry, fraught as it is with the misery of thousands of humble men, women, and children, and fraught, also, with the hope of a possible return by local governments to more humane methods, with the resultant uplifting of millions of the people. Immediately, it involves the question whether the recorder of Macon can, without any sort of criminal pleading, and without the intervention of a jury, convict a citizen twice for one violation of a minor municipal ordinance, and sentence him to seven months at hard labor on the public chain gang; the punishment to be suffered in a branch of the State Penitentiary. Here, also, is the question, can it be maintained, in the light of the Constitution, that one man, under any form of procedure, devised or to be devised by local legislation, may consign men, women, and children to a chain gang for such trivial offenses as are within the jurisdiction of a police magistrate?

The petitioner, Henry Jamison, is a respectable colored man, between fifty-five and sixty years of age. It appeared that he was working for many of the reputable people of Macon in house cleaning, laying carpets, and like work. On the night of the 13th day of March of this year, he was arrested by two policemen of the city, carried immediately to the city prison, and placed in a cell. The next morning he was brought before the recorder. He was immediately put upon his trial for certain offenses. The following entries taken from the docket of the recorder's court constitute the entire record:

"Recorder's Docket, City of Macon.

"Date—March 14, 1904. No. case, 131. Arrested, March 13, 1904, 12:40 p. m.

"Case—Mayor and Council of the City of Macon vs. Henry Jamison, Drk Dis Con. Arresting officers, Mosely and Mitchell.

"Date—March 14, 1904. No. case, 133. Arrested, March 13, 1904.

"Case—Mayor and Council of the City of Macon vs. Henry Jamison. Offense, Dis Con in barrack. Arresting officer, Reddy."

He was immediately convicted, and an aggregate fine imposed of \$60, and an alternative penalty for both cases of seven months at hard labor on the chain gang. For a poor day laborer like this man to pay a fine of \$60 was wholly impossible. At noon the same day, he was sent to the chain gang, was at once clothed in the stripes of a convict, heavy iron manacles connected by a chain were riveted on each leg, and he was immediately put to work on the public road with other convicts from the recorder's and the city court, and from the State Penitentiary, at manual labor as severe, perhaps, as any of which the human frame is capable. He remained with the chain gang for five days, when the writ of habeas corpus was sued out in his behalf, and he was brought before this court.

The material averments of the petition are that the petitioner was arraigned in the recorder's court without any indictment, accusation, or written charge of any kind having been preferred against him, and without any form or semblance of a judicial trial he was sentenced to pay a fine, which he was wholly unable to pay, and then to serve a term of 210 days on the county chain gang of Bibb county. The petition further avers that the trial, sentence, and commitment were illegal and void, and that he was thereby deprived of his liberty and subjected to infamous punishment without due process of law. In further support of this averment, copies of what purport to be the judgment of conviction are annexed to the petition. These are brief printed blanks. The first reads as follows (Exhibit A):

"Recorder's Court—No. 131. Offense, drunk and disorderly, Macon, Ga., March 14, 1904. Mayor and Council of the City of Macon vs. Henry Jamison.

"On hearing the evidence in the above-stated case: It is ordered by the court that the defendant do pay a fine of twenty-five dollars or in default thereof be and is hereby committed to the county chain gang for and during the space of ninety days."

The second is termed "Exhibit B." It is as follows:

"Recorder's Court, Macon, Ga., March 14, 1904. Offense, disorderly conduct in the barrack. Mayor and Council of the City of Macon vs. Henry Jamison.

"On hearing the evidence in the above-stated case: It is ordered by the court that the defendant do pay a fine of thirty-five dollars and in default thereof be and he is hereby committed to the county chain gang for and during the space of 120 days to begin at the expiration of case No. 131.

"[Signed]

Custis Nottingham,

"City Recorder."

It is observable that there is no finding of guilt or innocence by the recorder, and no finding of fact. It is a sentence, and nothing more. It is not, as seems to be supposed, insisted that an arrest by a policeman without warrant was invalid, and no such question is in the case.

Upon this petition the writ was issued, and served upon E. A. Wim-bish, who is superintendent of the Bibb county chain gang. By the pay-

ment of \$8,000 per annum to the city of Macon, the county commissioners purchase for their chain gang the convicts from the recorder's court, and are thus enabled to utilize their energies. The superintendent of the chain gang demurred to the petition on the grounds that the facts set forth were insufficient to give jurisdiction to this court, and, further, "that the petition fails to allege and show that the petitioner had exhausted or attempted to correct any alleged errors on the trial or in the commitment by appeal to the courts provided by law for the correction of the errors of the recorder's court." The answer of the respondent is, further, that he holds the petitioner by virtue of a commitment from the recorder's court; that the Bibb county chain gang is a chain gang duly established by the law of the state of Georgia; that Jamison was duly convicted; that the recorder's court of the city of Macon is a municipal or police court, duly organized by law, and authorized to try cases and inflict punishment for the violation of municipal law in a summary manner. He denies that the commitment is illegal and void, and that the petitioner is deprived of his liberty and subjected to an infamous punishment without due process of law, and in violation of the Constitution of the United States. The demurrer and the facts submitted on the answer and traverse thereto were heard and argued together.

To properly determine this case, it seems essential to inquire, in the first place, whether an order of the recorder directing that a person shall serve a term in the Bibb county chain gang is a sentence to infamous punishment. The law upon this subject is settled. In *Ex parte Wilson*, 114 U. S. 417, 447, 5 Sup. Ct. 935, 29 L. Ed. 89, Mr. Justice Gray, for the unanimous court, announced that whether or not a crime is infamous must depend upon the fact whether, by the statute defining it, an infamous punishment can be awarded. And said the learned justice (page 428, 114 U. S., page 940, 5 Sup. Ct.):

"For more than a century, imprisonment at hard labor in the State Prison or Penitentiary, or other similar institution, has been considered an infamous punishment in England and America."

Justice Gray continues:

"Among the punishments 'that consist principally in the ignominy,' Sir William Blackstone classes 'hard labor in the house of correction or otherwise,' as well as whipping, the pillory, or the stocks. 4 Blackstone's Commentaries, p. 377. And Mr. Dane, while treating it as doubtful whether confinement in the stocks or in the house of correction is infamous, says 'punishments clearly infamous are death, gallows, pillory, branding, whipping, confinement to hard labor, and cropping.' 2 Dane's Abridgment, 569, 570."

This decision was rendered in 1884, and from it there has been no judicial departure. 10 Rose's Notes on U. S. Supreme Court Reports, 1074 et seq. It is perhaps not inappropriate at this point to recall the fact that this salutary doctrine of constitutional law has been of service to the people of this district. It was formerly the practice to prosecute illicit distilling and other violations of the internal revenue laws by information. In view of the ease with which such charges were presented, and the profits flowing therefrom to informers and others, frivolous prosecutions were multiplied, and great inconvenience, and, indeed, oppression, were experienced by the rural population. This was averted by the decision in this court in *United States v. Johanssen* (C. C.) 35 Fed. 407-414. Adopting the definition of an "infamous

punishment" as expressed in *Ex parte Wilson*, *supra*, and calling attention to the liberalizing and humane tendencies of the law as advanced by the progressive steps of our Supreme Court, we announced that "hereafter the courts of the United States of this district will take no action in the large class of cases involved, save after the presentment or indictment by the grand jury." The forecast of the effect of the decision made in the opinion has been justified by the event:

"That crime is rare; that the impartial and law-respecting investigations of the grand juries would bring to the bar of justice the willful lawbreaker, but would in all likelihood discountenance the sinister and malevolent informer, who has used the powers of the government to purvey to his malice, or to his greed for the perquisites of the witness for the prosecution."

All of this has proven true. Thus it will be seen that the enforcement of a constitutional principle which in one case deprives the municipal authorities of the profits which arise from involuntary and unpaid servitude, imposed, not for crime, but for peccadillos, on another occasion, and for 14 years since then, becomes the salutary and effective defense of the rights and the peace of the people.

The most cursory view of the evidence in the record will convince the impartial that practically every ignominious mark of infamous punishment is stamped upon the miserable throng in Bibb county chain gang. This is clear from the testimony of the superintendent, E. A. Wimbish, and from the uncontradicted evidence of witnesses who have there expiated their disregard of sundry provisions of the city code. The sufferers wear the typical striped clothing of the penitentiary convict. Iron manacles are riveted upon their legs. These can be removed only by the use of the cold chisel. The irons on each leg are connected by chains. The coarse stripes, thick with the dust and grime of long, torrid days of a semitropical summer, or incrustured with the icy mud of winter, are their sleeping clothes when they throw themselves on their pallets or straw in the common stockades at night. They wake, toil, rest, eat, and sleep, to the never-ceasing clanking of the manacles and chains of this involuntary slavery. Their progress to and from their work is public, and from dawn to dark, with brief intermission, they toil on the public roads and before the public eye. About them, as they sleep, journey, and labor, watch the convict guards, armed with rifle and shotgun. This is to at once make escape impossible, and to make sure the swift thudding of the picks and the rapid flight of the shovels shall never cease. If the guards would hesitate to promptly kill one sentenced for petty violations of city law should he attempt to escape, the evidence does not disclose the fact.¹ And the fact more baleful and more ignominious than all—with each gang stands the whipping boss, with the badge of his authority. This the evidence discloses to be a heavy leathern strap, about 2½ or 3 feet long, with solid hand grasp, and with broad, heavy, and flexible lash. From the evidence, we may judge that the agony inflicted by this im-

¹ To show the fierce vigilance of the guard, on the day this case was argued a number of felons from the State Penitentiary, who by state law are brigaded with those convicted by the recorder for minor municipal offenses, attempted to escape from the chain gang described. Three were shot down, all desperately wounded. One will probably die, and, if he lives, will be a paralytic for life, as it is stated that the buckshot penetrated the vertebrae.

plement of torture is not surpassed by the Russian knout, the synonym the world around for merciless corporal punishment. If we may also accept the uncontradicted evidence of the witnesses, it is true that on the Bibb county chain gang for no day is the strap wholly idle, and not infrequently it is fiercely active. One witness, who served many months, testified that if the gang does not work like "fighting fire," to use his simile, the whipping boss runs down the line, striking with apparent indiscrimination the convicts as they bend to their tasks. Often the whipping is more prolonged and deliberate. At times, according to another witness, also uncontradicted, the convicts, when at the stockade, are called into the "dog lot." All present, the whipping boss selects the victims in his judgment worthy of punishment. They are called to the stable door, made to lie face downward across the sill, a strong convict holds down the head and shoulders, and the boss lays on the lash on the naked body until he thinks the sufferer has been whipped enough. It is but just to Mr. Wimbish to record his statement that he knew nothing of this ceremony. It may be judged from the evidence that it is a whipping more formal and dramatic than any other inflicted. Since this is done at the stockade, we may presume that the convicts and guards are the only witnesses; but on the public roads, in the presence of wayfarers and bystanders, often the convict, to use an expression of a witness, "is taken down and whipped." The evidence gives us the account of two white persons who were thus whipped—one, a boy with but one arm. For this reason, it was not necessary to hold him. He stood and cried as the boss applied the lash. The other white boy was compelled to place his head between the legs of a burly negro convict, and was thus immovably held. The punishment will mark the lad with infamy in the minds of his fellows as long as he may live. The offense of one of these lads was "loitering in the depot." Nor does the recorder sentence to this punishment men who commit crimes against the laws of the state. By explicit decisions of the state courts, this official has no jurisdiction to sentence, but must commit such offenders to the appropriate state court for jury trial. The punishment here described is inflicted upon those who are convicted of minor municipal offenses, such as disorderly conduct, violations of the bicycle ordinances, walking or standing on the park grass, loitering in the depot or in the railroad yard, careless driving, and the like.

It is obvious that discipline for all prisoners is necessary. While we may deplore the fact that more humane methods are not adopted, that is not the question. The question is this: Can the recorder, under the American Constitution, without jury trial and due process of law, sentence to such punishment? It is, moreover, true that the Bibb county chain gang is a branch of the State Penitentiary. The "State Penitentiary," as the term is generally understood, is no longer utilized. The state has a "prison commission," but no "State Prison." Its penitentiary consists of its felony convicts. None of these are directly worked by the state. The prison commission has supervision alike of these felons and the county chain gangs. The act of the General Assembly approved August 17, 1903, provides that the several counties of the state shall have the right, at their option, to work and use convicts sentenced to the penitentiary for period of five years or

less on the public roads or public works. It requires the prison commission to make a just apportionment of all the felony convicts of this class among the several counties of the state on the basis of their general population as shown by the United States census. The felons from the penitentiary, thus used, work on the county chain gangs. It appears from the evidence of Mr. Wimbish, the superintendent of the Bibb county chain gang, that the Bibb county commissioners promptly availed themselves of the opportunities afforded by the legislation to distribute these felons among the several counties of the state. Forty-six of these men sentenced to the Georgia penitentiary are now in the Bibb county chain gang. At night they are separated from the convicts from the recorder's court by a wooden latticework. In the day these criminals of the most desperate character, from all parts of the state, work indiscriminately with the men, women, and children sentenced from the recorder's court for the petty offenses of which he has jurisdiction. It cannot be said, however, that the convicts of the recorder have the rights under the law afforded the felons. One guilty of burglary, arson, manslaughter, or any crime on the calendar, however heinous, has been accorded a copy of the accusation against him; trial by jury, the opportunity to appeal—in short, due process of law. Not so with the lad who loiters on the streets or is overcome by sleep in the depot. Not so with the licensed barber who turns over his chair to a brother, but unlicensed, artist during his temporary absence from the shop. To the same branch of the penitentiary they may swiftly go.

The docket of the recorder's court was in evidence, and literal extracts therefrom made pending the trial will be added as an exhibit to this opinion. From this, the sole record, it appears that during the month of March, 1904, alone, 149 persons were convicted by the recorder for violations of municipal ordinances. Upon these people there were imposed sentences amounting to 6,751 days, or a possible aggregate to the people of nearly 19 years of the misery and degradation of the Bibb county chain gang. The principal authority for this vigorous scheme of municipal penology is section 59 of the charter of the city of Macon (Laws Ga. 1893, p. 257). This provides that the recorder of said city "shall have the power to impose fines for the violation of any law or ordinance of the city of Macon passed in accordance with its charter, to an amount not to exceed \$500, to imprison offenders in the city barracks for a space of not more than sixty days, or at labor on the public works in the county chain gang for not more than six months." Neither the charter of Macon, nor any other enactment by the state, makes any provision for a trial by jury in this court. It is, of course, clear, and from settled authority, that municipal laws made under a charter from the state must be regarded as the laws of the state, and, further, that an officer like the recorder, appointed under such charter, must be regarded as an officer of the state. His acts are the acts of the state, and the Constitution provides, "Nor shall any state deprive any person of life, liberty or property without due process of law."

It is contended by the learned city attorney that one sentenced by virtue of this provision of the charter ought not to complain that he is deprived of liberty without due process of law, for the reason

that this provision was enacted by the General Assembly, and is therefore the law of the land. This seems rotary or circumferent reasoning, and the gifted logician seems to emerge from the circle at the point where he entered. It is for the reason that the state, by legislation, has made one of its agents—a recorder without a record, a criminal judge of a court without criminal pleading—a tribunal in which one man is intrusted by the state with practically arbitrary power to impose cruel and infamous punishment for offenses the most trivial, that the jurisdiction of the United States court empowered to protect the constitutional rights of the citizen is invoked. Said Mr. Justice Matthews, in rendering the majority opinion in *Hurtado v. California*, 110 U. S. 535, 4 Sup. Ct. 111, 28 L. Ed. 232:

“While conceding that each state prescribes its own modes of judicial proceeding, it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is to become indefinite, and not operate as a practical restraint. It is not every act of legislation in form that is law. Law is something more than mere will exerted as an act of power. In the language of Mr. Webster in his famous definition, ‘It is the general law, the law which hears before it condemns, which proceeds upon inquiry and renders judgment after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.’”

While the definitions of the term “due process of law” are varied, and while, perhaps, none of them are sufficiently elastic and flexible to expressly anticipate and defeat the multiform methods by which those “drest in a little brief authority” assail the liberties and immunities of the individual, yet the requirements of this essential to distributive justice are familiar to every mind. In that valuable publication, the *American & English Encyclopædia of Law* (2d Ed., vol. 10, p. 303), a sufficient statement may be found:

“Due process of law, in a criminal case, requires a law describing the offense. The offense must be described in the accusation. The accused must be given his day in court. His trial must proceed according to established procedure, consisting of rules of pleading and practice.”

It may be added that it is imperative that the court be of competent jurisdiction.

It is obvious that all procedure in courts created or authorized by the state must be authorized by state law. So long as the enactments to this end do not deny or violate the fundamental essentials of the Constitution, ordained for the establishment of justice and the perpetuation of liberty by the people of the United States, no interference therewith is appropriate or to be tolerated. “When, however,” said Prof. Guthrie in his interesting work on the Fourteenth Amendment, pp. 104, 105, “the statute clearly invades some substantive right, or when a statute harmless on its face is systematically enforced in violation of fundamental rights, or when the court, transgressing its functions, attempts to render judgment without jurisdiction of the subject-matter or notice to the parties, the procedure is not due process of law, and may be declared void and set aside by the courts under the jurisdiction conferred by the fourteenth amendment.”

It is not questioned that the summary proceedings before municipal courts for the punishment of minor offenses against ordi-

nances or by-laws can conclude with sentence of pecuniary fine, and, in default of payment, with moderate imprisonment, or with both fine and imprisonment. Sir William Blackstone, in his *Commentaries*, 4th book, par. 228, states:

"Another branch of summary proceedings is that before justices of the peace in order to inflict divers petty pecuniary mullets and corporal penalties denounced by acts of Parliament for many disorderly offenses, such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others."

And the famous commentator cites certain evil consequences of this jurisdiction, which we forbear to mention. But he concludes in this language:

"From these ill consequences we may collect the prudent foresight of our ancient lawgivers, who suffered neither property nor the punishment of the subject to be determined by the opinion of any one or two men, and we may also observe the necessity of not deviating any farther from our ancient constitution by ordaining new penalties to be inflicted upon summary convictions."

The jurisdiction of the justices of the peace in England at the time of these authoritative declarations of that great writer and judge, who "found the English law a skeleton, and who clothed it with life and beauty," is practically equivalent to that of a police magistrate in our own times. Unhappily, we witness in the recorder's court in Macon the punishment of the citizens determined by the opinion of one man, and the punishment for such offenses as novel and unprecedented as it is ignominious and cruel.

The act of the General Assembly of Georgia attempting to bestow the power on the recorder of Macon is the only statute to which attention has been called by which those convicted of minor offenses can be sentenced by a police court to confinement and hard labor on the chain gang. By the charter of Atlanta, the police court may inflict a fine of \$500, or 30 days' imprisonment, or work on the public works. In Augusta the maximum fine is \$300, and the maximum imprisonment or labor on the public works 90 days. In Rome, Athens, and Columbus, "labor on the public works" is the term used in designating the punishment. While it may be true, as insisted in the argument, that the Macon chain gang, in management, discipline, and punishment, is not more than an equivalent for the management of "public works" elsewhere, yet the framers of the charters mentioned, perhaps with laudable respect for the opinions of mankind, seemed to have blinked the use of the word. Indeed, it may be with entire accuracy declared that the voluminous and exhaustive preparation of the city attorney and the subsequent examination by the court have evoked no shred of authority, either American or English, where a sentence for petty offenses by a police magistrate to a public chain gang, with the ignominious accessories of fetters, the stripes, lash, and of the degradation of convict life, has been sustained or even palliated. Under the American system, the chain gang has no place in the jurisdiction and procedure of police courts, where trial by jury is not a right of the accused. How abhorrent would be such a punishment in such cases to those great American jurists whose finding is ultimate determination, we may judge from *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223. In denouncing a convic-

tion in a police court of the District of Columbia, Justice Harlan said:

"The jurisdiction of the police court, as defined by existing statute, does not extend to the trial of infamous crimes, or offenses punishable by imprisonment in the penitentiary."

And this for the reason that there was no provision for jury trial.

Finally it is urged that a court of the United States may not, by judgment upon habeas corpus, afford relief to the citizen who is deprived of his liberty even by a colorable order from a police court of the state, and though the court is without jurisdiction, its order void, and its sentence to infamous punishment so severe that, if the petitioner can survive, it will probably exhaust the last resource of nature. This contention does not seem marked by any considerable merit. So valuable is deemed this great remedy, that the Constitution itself provides that "the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it." Sections 751, 752, and 753 of the Revised Statutes [U. S. Comp. St. 1901, p. 592] provide that the Supreme Court, Circuit and District Courts, and the several justices and judges of said courts within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. It is true that it is provided that the writ shall not extend to a prisoner who is in custody by a state court unless that custody is in violation of the Constitution or of a law or treaty of the United States. This topic is thoroughly discussed in the opinion of Mr. Justice Harlan, for the unanimous court, in *Ex parte Royal*, 117 U. S. 245, 6 Sup. Ct. 734, 29 L. Ed. 868. From this decision, which has never been departed from, the law is clearly deducible that the courts and judicial officers of the United States named in the habeas corpus enactments shall not have power to award the writ to any prisoner in jail, or, we may add, in confinement by constituted authorities, except in the specified cases, and most important of these is where he is alleged to be held in custody in violation of the Constitution of the United States. Cases of this latter class are expressly provided for by the act of Congress of February 5, 1867, c. 28, 14 Stat. 385. This declares that the several courts of the United States, and the several justices and judges thereof, within their respective jurisdictions, in addition to the authority they have conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States. The power, therefore, in the court to grant the writ, by statute and authority, is complete.

It is true that it has been held in *Ex parte Royal* and in many other cases that, the United States court having discretion to grant the writ, that discretion should be exercised in the light of the relations existing under our system of government between the judicial tribunals of the Union and of the states. It has been further held that the discretion should be subordinated to the special circumstances in each case, and that where the state court has jurisdiction the writ should generally not be granted unless the necessity

is urgent. In view of these settled principles, in a multitude of cases the Supreme Court and the other United States courts have refused to award the writ. But as in the Royal Case, it was always held that, if the proceeding against the prisoner was repugnant to the Constitution, the prosecution against him had nothing upon which to rest, and the entire proceeding was a nullity. It was said in *Ex parte Siebold*, 100 U. S. 371-376, 25 L. Ed. 717, that an unconstitutional law is void, and is as no law; a conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal case of imprisonment. Adverting to the argument which was made here, that, where a defendant has been regularly tried and convicted in a state court, his only remedy was to carry the judgment to the state court of last resort, and hence by writ of error to the Supreme Court, Mr. Justice Bradley, in *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872, declared:

"This might be so if the proceeding in the state court was merely erroneous, but, where it is void for want of jurisdiction, habeas corpus will lie, and may be issued by any court or judge invested with supervisory jurisdiction in such case."

The wealth of authority upon this subject is very great. It is believed that every pertinent case has been examined, and while, in rare cases, decisions of the Circuit or District Courts have been reversed by the Supreme Court for error in the determination of the cause itself, no case has been found wherein there is a disapproval of the action of such courts for awarding the writ of habeas corpus where it is fully averred and shown that the petitioner is held in custody in violation of the Constitution and laws of the United States. On the other hand, there are many precedents where the decisions of such courts have been affirmed for granting the writ and discharging the prisoner under averments that he has been deprived of his liberty in violation of those fundamental rights and immunities secured to him by the Constitution and laws of our common country. A case precisely in point is *In re Mills*, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107. In that case the proper punishment might have been imprisonment, but a District Court of the United States sentenced the prisoner to imprisonment in the penitentiary. Holding that such imprisonment was infamous, with or without hard labor, the Supreme Court held that the court below was without jurisdiction to pass any such sentence, and the orders directing sentence of imprisonment to be executed were void. A fortiori would such judgment from a police court be annulled. This, it was declared, is not a case of mere error, but one in which the court below transcended its powers; citing *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *Ex parte Parks*, 93 U. S. 18, 23 L. Ed. 787; *Ex parte Virginia*, 100 U. S. 339-343, 25 L. Ed. 676; *Ex parte Rowland*, 104 U. S. 604, 26 L. Ed. 661; *In re Coy*, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274; *In re Hans Nielsen*, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118.

The aggressions of municipal corporations upon the rights and liberties of the citizens, declared by competent observers to be at once the most vicious feature of our present social condition and the most alarming portent of our future, have thrust a multitude of unconstitutional ordinances before the courts of the United States.

This has occasioned much shrilling and no little objurations from the local interest from time to time affected, but, happily for the people, the courts steadily proceed with the exercise of their constitutional powers. In *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, it was held that, in a suit brought before the Supreme Court from a state court which involved the constitutionality of ordinances made by municipal corporations in the state, the United States court will, when necessary, put its own independent construction upon such ordinances. The same elevated tribunal remarks in the same case:

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so practically as to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, and denial of equal justice, it is still within the prohibition of the Constitution."

See, also, *Ex parte Lee Tong* (D. C.) 18 Fed. 253; *The Laundry License Case* (D. C.) 22 Fed. 701; *In re Tie Loy* (C. C.) 26 Fed. 511; *Ex parte Ah Jow* (C. C.) 29 Fed. 181. In all of these cases persons convicted in the state court without due process of the law were released by habeas corpus for the reason that the conviction was violative of the fourteenth amendment to the Constitution of the United States.

It is, moreover, true that, in the extended examination herein made, no case has been found which approaches that of the petitioner in strong appeal to the court for the urgent, immediate, and effective relief of habeas corpus. A respectable man, past middle life, accustomed to indoor work requiring no physical exertion, is arrested at night, on his way home, and hurried to the cells of the city prison. The next morning, without accusation of any sort, he is sentenced to pay fines impossible of payment, and the alternative punishment—because of its infamy violative of the Constitution—for seven months on the chain gang is at once imposed. By noon, in stripes and shackles, in easy range of the repeating rifles and shot-guns of the guards, this man is toiling on the public roads with the frantic energy of one who works under fear of death, or of punishment to which, in the mind of a vast majority of men, death itself would be preferable. Before him are 210 days of agony, 210 nights in a fetid stockade. That he is unable to give the bond, he testifies. Could he appeal? An appeal to the courts of the state would have brought him no relief. His complaint involved the legality of the great majority of the convictions by the recorder's court, and, in large measures, the authority and jurisdiction of the court itself. Opposed to him was a powerful organization, with all of its active and potent agencies. Well might he and his counsel conclude that, had appeal been made to the state courts by certiorari or otherwise, it would have been resisted, as it is resisted here, to the court of final appeal. In the meantime, from March until October, through the deadliest months of a semitropical climate, with unceasing toiling in the summer sun, his suffering and wretchedness, his danger and infamy, would never cease. It seems that he might apply for writ of certiorari to the judge of the superior court. *Acts Gen. Assem. 1902*, p. 105, c. 70. Could he have given bond and paid the costs, that judicial officer might, in his discre-

tion, have superseded the judgment of conviction. But the local lawmaker, keenly appreciative of the value of a poor man's labor, stipulates that in such appeals, if unable to pay costs or give bond, the prisoner shall not be discharged. Then it is true that before his cause, with all of its importance, could have been heard, had the petitioner survived, the punishment would have been suffered, and the judgment on appeal would have been worthless, even had he prevailed. Besides, the sentence against him is void. Void for want of due process of law. Void because one man cannot adjudge infamy. Like thousands of the oppressed and down-trodden, through all the centuries since that glorious day in the history of human liberty when the Great Charter made forever imperishable the principle that "no free man may be taken or imprisoned, but by the lawful judgment of his peers or by the law of the land," he applies for the great writ of right, the writ of habeas corpus; and he humbly seeks the portals of that court whose judges are sworn to know no difference between the rich and the poor, where justice ever bends the listening ear to catch the plaint of the humble and the lowly, and through all whose generous and benign jurisprudence is heeded the admonition of the Master, "Inasmuch as ye have done it to one of the least of these my brethren, ye have done it unto me." If the prayer of this man must be denied, then the statutes authorizing the United States courts and the judges thereof to issue the writ of habeas corpus to protect the rights of the citizen guarantied by the national Constitution have at last been successfully nullified, and hereafter the petitioner in like case must have recourse alone to the courts of the state.

Not a little has been said in the argument to the effect that the majority of those who are sentenced to this chain gang merit all the punishment they receive. One witness, formerly a road commissioner, who was familiar with the operations on the chain gang, testified that, in his opinion, while a sentence there would forever ruin a white man previously respectable, it had no such effect on a respectable negro. Such considerations do not appeal to a court charged with the equal enforcement of the law. Nor do I believe that they meet the approbation of the reflecting people of the Southern states. Nor are such sentiments conducive to our welfare or hopeful for our future. Twenty-one years ago, when at the bar, in an argument to a jury, in the great case of *Ex parte Yarborough*, I declared the conviction that:

"Never in the history of the world has any considerable class of people been debased and degraded by force and lawlessness, but that the entire people suffered because of that degradation. The white people of this country control the government, state and federal. They enjoy every conceivable advantage. They have superiority in wealth, education, social influence, everything. A magnanimous people, a just people, they owe it to themselves to be magnanimous and just to the colored people."

It was true then. It is true now. I further declared:

"For my part, I love my country. I am proud of its traditions. I glory in the heroism and manhood of its people. I know that they despise cruelty and barbarity to the helpless and oppressed."

This was true then. It is true now. Though the color-line expert may so paint it, this is no color-line case. It is a negro to-day.

It may be a white man—aye, a white child or a white woman—to-morrow. In this court the law is equal for all.

Judgment absolute will be ordered in favor of the petitioner, and he will be discharged from custody and be permitted to go hence.

BARCUS et al. v. GATES et al.

(Circuit Court, E. D. Virginia. March 11, 1904.)

No. 500.

1. ATTORNEY AND CLIENT—CONTRACT FOR SERVICES—CONSTRUCTION.

Where a written contract for the employment of an attorney, to be paid a contingent fee, is uncertain as to the services to be rendered or the manner of payment, parol evidence is admissible to show the surrounding circumstances and situation of the parties, and the nature of the litigation contemplated, as appears from the statements, acts, and conduct of the parties at the time and thereafter.

2. SAME—EXTRA SERVICES.

Petitioner, who was an attorney at law, was employed by defendants, by a written contract, to recover as much as possible for them on account of sums of which they claimed to have been defrauded, for which he was to receive a sum equal to a percentage of what should be recovered by suit or otherwise, either in money or property. It appeared from extrinsic evidence that it was then expected that a settlement would be made and certain property recovered, but a settlement was not effected, and petitioner instituted a suit, which was contested for a number of years, and resulted in the recovery of a money decree. During its pendency, petitioner was compelled to devote a considerable time to looking up evidence which defendants had not supplied, and after the decree to look after its collection, in some cases taking property from the defendants therein. *Held*, that such services were not contemplated by the written contract, and petitioner was entitled to be compensated therefor in addition to the fees therein provided for.

3. SAME—CONTINGENT FEE—MEASURE OF RECOVERY.

Under a contract for legal services to be rendered for a contingent fee equal to a percentage of the recovery, where property was taken in part satisfaction of the judgment obtained, the attorney is entitled to such percentage computed on the fair value of the property, without regard to the price at which it was taken.

In Equity. On petition of John B. Sherwood for allowance of attorney's fees.

This case is now before the court upon the petition filed herein on the 19th day of November, 1901, by John B. Sherwood, one of the counsel for the complainants in the original cause, asking the court to settle the amount of his compensation for professional services rendered in the cause. Subsequently to the filing of this petition, the defendants filed their demurrer thereto, which was overruled, and later, on March 24, 1902, their joint answer thereto; and, upon the issues thus joined, evidence was taken by the petitioner and the defendants in support of their respective claims, and the cause submitted to this court for determination after full argument by counsel for the parties, respectively.

The petitioner bases his claim to a fee, in part, upon a certain agreement for a contingent fee entered into between himself and the defendants in the petition on the 12th of December, 1896, and, in addition, claims that he rendered sundry services not covered by the said contract, for which he should be paid, whereas the defendants insist that the plaintiff's entire service was rendered under said contract, and he is entitled to no compensation other than the 10 per cent. therein referred to. The contract in controversy is as follows:

"Agreement, made this 12th day of December, 1896, by and between James Q. Barcus, John M. Thompson, R. A. Edwards, and H. A. Huston (said Edwards and Huston represented herein by said Barcus and Thompson) of the first part, and John B. Sherwood, attorney at law, of the second part, witnesseth: That said parties of the first part hereby employ said second party to collect of and from the persons residing in the State of Virginia all that is possible to collect, either by suit or other lawful means, that said persons have defrauded said parties of the first part by means of representations, personal or by agent, as to the existence of certain beds of phosphate, that amount being in the sum of about twenty thousand to twenty-five thousand dollars; and in consideration of such services, they agree to pay him a sum equal to ten per cent. of all he shall collect, either in money, land, or any other thing of value that may be accepted by said parties in settlement, of which amount two hundred dollars in cash is paid down upon the signing of this instrument; also to pay all necessary expenses of said Sherwood upon proper vouchers being presented. And said second party hereby and herewith accepts said employment, upon said terms above set forth, and will give his earnest attention at once to the collection of said monies, with the least expense, time, and trouble to said first parties as possible.

"Witness our hands in duplicate the day and date first above written.

"John M. Thompson.

"James Q. Barcus.

"R. A. Edwards } by J. Q. Barcus.

"H. A. Huston }

"John B. Sherwood."

The following is a brief summary of the services performed by the petitioner, as claimed by him to be under the contract, as shown in his petition:

"Your petitioner further shows to the court that he, after the execution of said contract, thereupon entered into a study of the facts and law of the case, and this included an examination of all the books of the American Plant Food Company, and of letters and telegrams leading up to the formation of said company, and a mass of correspondence, and he was busily employed therein from the date of said contract until about the 7th day of January, 1897, when he came to Richmond, and, after consultation with Hon. L. D. Yarrell, who had been employed prior thereto by complainants, filed on the 19th day of January, 1897, in the office of the clerk of this court, the printed bill of the complainants herein.

"Your petitioner further shows that after all the defendants had entered their appearance by counsel, and each had filed demurrers, settling up seventeen grounds of demurrer, and the same had been set down for argument on the 1st day of June, 1897, your petitioner came on to Richmond again, and orally argued said demurrers before Hon. Robert W. Hughes, then presiding as judge of this court, and that said judge, after taking said cause under advisement, in the spring of 1898 sustained said demurrers and dismissed complainants' bill; that thereupon your petitioner, after a consultation with the complainants, against their best judgment, as they all then stated, induced them to pray an appeal to the Circuit Court of Appeals for the Fourth District [89 Fed. 783], and to file a bond and pay the costs; and he thereupon filed the proper papers on appeal, and wrote the brief of the complainants, and also the reply brief of complainants in said cause, and such proceedings were had in said cause that in November, 1898, said Circuit Court of Appeals reversed the cause on all seventeen points of contention, and remanded the same to this court for a hearing on its merits.

"Your petitioner further shows that shortly prior to the 1st day of September, 1899, said complainants were not ready for trial, for lack of material evidence they had neglected to obtain, and thereupon on last said day he again came to Richmond, and, in company with his associate, Hon. L. D. Yarrell, spent between two and three weeks in traveling over the eastern part of Virginia, including Richmond, Tunstalls, Whitehouse, West Point, New Kent Courthouse, Norfolk, and Portsmouth, in obtaining evidence of the facts in the cause; and this petitioner also went alone to New York City and Cincinnati, Ohio, and spent some days in consulting with chemists there who had analyzed said lands and others adjacent thereto.

"Your petitioner further shows that said cause was set down for hearing in open court before Hon. Edmund Waddill, Jr., on the 11th day of December,

1899, and that at this time Hon. C. V. Meredith became associated with your petitioner and said Yarrell, as local counsel, for the purpose of the said hearing before the court; that the defendants were represented by eminent legal counsel of the highest professional standing, and the hearing of the said cause was commenced on the 11th day of December, 1899, and evidence was taken daily, with both day and night sessions, continually until the morning of the 23d day of December, 1899; that all through said trial his associate counsel and the complainants were dependent upon your petitioner for all knowledge of evidence and production of witnesses, owing to the close and intimate study the petitioner had made of said cause, and were also dependent upon said petitioner for authorities necessary for ready use on the trial of said cause; and he further states that on account of the stress of business in said court, and the Christmas holidays, the court continued the case for argument to the 28th day of February, 1900.

"Your petitioner further shows that he expended the month of February in studying one thousand pages of typewritten evidence and in preparing his argument thereon, and came on to Richmond a few days prior to the 28th day of February, 1900, and on that day entered with associate counsel into oral argument of the said cause, which was continued daily for one week, and thereupon each side was granted permission to present printed briefs on the points made in argument, and requested to exchange the same.

"Your petitioner further shows that at once he, with his associate counsel, prepared and filed a written brief, and that when the last of the defendants' briefs had been filed, during the first week in August, 1900, your petitioner prepared, at his home, in Indianapolis, Indiana, a reply brief, and caused it to be filed during the first week in September, 1900.

"Your petitioner further shows that the chief reliance of defendants' counsel in the trial and on the argument was on the subject of ratification by complainants—a subject which had not been suggested by the facts stated to your petitioner on and prior to said 12th day of December, 1896, and prior to your petitioner entering into the contract above set out—and therefore additional and unexpected labor was thrown on your petitioner and associate counsel.

"Your petitioner further shows that on the 6th day of July, 1901, the presiding judge rendered his opinion in said cause, and the settling of the decree in favor of the complainants was set down for argument on the 1st day of August, 1901; that your petitioner thereupon came to Richmond a few days before, and was engaged for three days with his associate counsel in argument upon the form and substance of the decree, and upon a petition filed for a rehearing of the cause, until the close of the 3d day of August, 1901, when the final decree was entered in this cause for about thirty thousand dollars, in the aggregate, of principal, interest, and costs, against each and all the defendants, except the Virginia Marl Phosphate Company, and specifically setting aside said \$27,000 lien and the deed from last said company to the American Plant Food Company."

Services Outside of the Contract.

The petitioner claims, in addition to the services under the contract, he performed great labor, neither covered nor contemplated by the contract, as is fully set forth in said petition, and which may be summarized as follows: First. Services rendered in securing evidence preparatory to the hearing of the cause upon its merits, in Virginia, in which some three weeks' time was taken out of his office. Second. For time occupied in Virginia, after the rendition of the decree in favor of his clients, looking to the sequestration of the property and estate of the defendants, extending from the 19th of September, 1901, to the 21st of October, and from November 6 to November 12, 1901, exclusive of the time spent in going to and returning from Virginia on two trips. Third. In taking sundry trips from Indianapolis to Chicago, New York, Washington, Baltimore, and Cincinnati; the exact number of days employed in each being difficult of ascertainment from the record.

No question is made by the defendants as to the value of the services rendered by the petitioner, or as to the efficiency and promptness with which the same were performed; but their sole contention is that whatever was done was covered by the contract aforesaid, and for which only 10 per cent. should be allowed.

Henry R. & Jno. Garland Pollard and John B. Sherwood, for petitioner.

Meredith & Cocke, for defendants in petition.

WADDILL, District Judge (after stating the facts as above). From the above statement, there are presented for the consideration of the court the following questions: First. Whether the petitioner is limited in his recovery by the contract aforesaid. Second. What services were had in view by the contract of employment; what recovery was contemplated; what was meant by the reference in the contract to "about twenty or twenty-five thousand dollars"; and what is the effect of the use of the language in the contract, "They agree to pay him a sum equal to ten per cent. of all he shall collect, either in money, land, or any other thing of value, that may be accepted by said parties in settlement." Third. What method of valuation should be adopted, and what valuation be placed upon the recovery heretofore had. Fourth. What services were rendered, if any, not covered by the contract, and the value to be placed thereon.

1. That the petitioner would be precluded from a recovery under his contract if the same was complete, plain, and explicit, both as to the services to be rendered and the method of paying for the same, may be conceded, as to the services clearly covered by the contract; but as it is uncertain just what services were to be performed, or what recovery was contemplated, and precisely how payment therefor was to be made, parol evidence should be admitted to show precisely what the parties had in view by their undertaking; and, to this end, the contemporaneous statements, oral and in writing, of the parties, in reference thereto, may be considered. *Maryland v. The Railroad*, 22 Wall. 113, 22 L. Ed. 713; 8 Rose's Notes (U. S.) 503; 9 Rose's Notes (U. S.) 666, 952; *Brick v. Brick*, 98 U. S. 514, 516, 25 L. Ed. 256; *West v. Smith*, 101 U. S. 263, 271, 272, 25 L. Ed. 809; *Walker v. Brown*, 165 U. S. 654, 668, 17 Sup. Ct. 453, 41 L. Ed. 865; *Michels v. Olmstead* (C. C.) 14 Fed. 219; *The Wanderer* (D. C.) 29 Fed. 260; *Bacon v. Poconoket*, 70 Fed. 640, 17 C. C. A. 309; *Harman v. Harman*, 70 Fed. 894, 17 C. C. A. 479; *Peabody v. Bement*, 79 Mich. 47, 53, 44 N. W. 416; *Basshor v. Forbes*, 36 Md. 166; *Greenleaf on Evidence* (16th Ed.) § 284a, and authorities cited; *Id.* § 205 "b" and "f," note 1.

2. From the language of the contract, read in the light of the circumstances under which it was executed, as shown by statements, explanations, and the conduct of the parties thereto leading to the execution thereof, and what was done as a result of such contract, it is quite clear that the real recovery had in view, should litigation become necessary, was the farm Northberry, in New Kent county, Va., on account of which the entire engagements and undertakings sought to be annulled by the defendants in the petition were entered into. The facts are briefly as follows: One Henley, as the representative of a corporation known as the American Plant Food Company, claimed that said farm was immensely valuable, as having upon it certain beds of phosphate, which could be used with great profit in the manufacture of fertilizer, and that the said company had acquired the farm at \$100,000, and owed on account of the purchase money thereof \$27,000; and he succeeded in inducing the defendants in the petition, residents

of the state of Indiana, to take stock in said company, and to become largely interested in the same, and on account of which they paid in cash some \$20,640, and executed their notes for other considerable sums. In the future conduct of the affairs of the company, it shortly became apparent that the defendants in the petition had been defrauded, and that they alone had actually paid their money into the company, and that the other incorporators had used bogus checks in making their supposed payments into the company, which were never used, but, on the contrary, were returned to the makers, and that while the farm was a fine one, having upon it valuable marl beds, the same could not be profitably used in making fertilizer, and that the high grade of analysis shown in the samples of the marl and so-called phosphate beds was the result of "salting" the samples. Upon the discovery of the true condition of affairs, the defendants in the petition entered into the contract aforesaid with the petitioner; their object and purpose at the time being to secure what they had paid, which they hoped they would be able to do without suit, by reason of the prominence of some of the parties to the transaction, and the still greater prominence of others who were supposed by them to be connected with it, and, upon failure to realize in this way, then at least to recover the farm aforesaid, which was believed to be worth not less than \$25,000. The effort at settlement having finally failed, the original suit, in which the petition herein is filed, was instituted, from which it will appear that the primary purpose was to recover the farm, if settlement could not be had. A letter of one of the defendants in the petition, J. M. Thompson, written on the 28th of December, 1898, after the rendition of the decision of the Circuit Court of Appeals on the law of the case, to Judge Yarrell, and filed Exhibit "LDY. No. 4," with Yarrell's deposition, abundantly shows the manner in which the settlement was first hoped for, as it does, also, what the property was supposed to be worth. He says, on the question of values:

"I told Mr. Sherwood in Chicago last week, that we would be willing to accept the property in lieu of all claims against the Virginia parties; * * * and further, I think the property is worth \$50,000.00, but under forced sale it might not bring that, but then we would be able to hold the Virginia parties for the balance of the money."

The result of the litigation was that the court decided that, on account of the fraudulent transactions as charged by the complainants, the entire dealings between the parties should be annulled and set aside, and the defendants in the petition should recover back the amounts paid by them, as far as possible, from the parties participating in the fraud, and that, so far as the farm was concerned, the vendors thereof having sold the same to the American Plant Food Company, and taken a lien thereon for the unpaid purchase money of \$27,000, complainants could only recover, as against the said farm, the money which was paid thereon, out of the amounts paid by them into the company, to wit, the sum of \$3,466.67, with interest from 6th February, 1895, and accordingly decreed that said last-named sum was a lien upon said farm, and that the farm should be sold in default of payment thereof, and a decree entered in favor of the defendants in the petition for the amounts paid by them against those participating in the fraud as aforesaid, with interest from times of payment. The meaning of the language "of

about twenty or twenty-five thousand dollars," in the contract named, was that said farm was believed to be worth that much, and that petitioner, Sherwood, might expect a recovery of property worth that much under his contract; and by the language, "they agreed to pay him a sum equal to ten per cent. on all he should collect, either in money, land, or any other thing of value, that might be accepted by said parties in settlement," that said Sherwood is entitled to an interest equivalent to 10 per cent., under his contract, of the value of whatever might be recovered, and to that extent he took a joint interest with the defendants in the petition in such recovery.

3. In ascertaining the value to the petitioner in the recoveries had, it is clear that, where property was taken in by his clients in order to effect a settlement with their debtors, he should receive a contingent fee on the fair valuation of the property, as distinguished from the price at which it was actually taken; and, so far as Northberry farm was concerned, since the farm was not actually recovered, but a lien secured thereon, and on account of which it was purchased, that the same rule should prevail. Adopting this method of settlement, the petitioner should not receive a contingent fee on the price at which Northberry was brought in by the defendants in the petition, under the lien, of some \$5,200, but upon its real value, which the court ascertains to be at least \$10,000. It is true that the evidence taken by the defendants in the petition fixes the values at from \$8,000 to \$10,000; but the court, in ascertaining this valuation, should not lose sight of the history of the farm, as shown by this previous litigation, and, indeed, of what it knows of its own knowledge, and certainly the figure named is the lowest that should be stated. Defendants in the petition received \$4,000 in cash on account of their money decree, and \$1,125 rents on account of Northberry farm, making \$5,125 received in money, and sundry parcels of real estate from Lefew, one of the defendants in the first-named cause, the value of which is variously estimated at from \$11,500 to \$15,320. The conclusion reached by the court is that the fair valuation of this Lefew property is \$13,314, and that that much could be realized on it at this time, as could \$10,000 on the farm aforesaid. The Lefew property, which was recovered about two years ago, is admirably located, where property is enhancing in value as much or more than in any other point in the city of Richmond. It is all within two blocks of Lee Monument, in which section handsome residences are rapidly being erected. And the farm Northberry, though somewhat run down now, is especially easy of improvement, by reason of the green sand marl beds thereon, and is and has always been considered one of the fine farms of the state. Upon these figures, the petitioner, Sherwood, is entitled to and should receive by way of contingent fee, under his contract, 10 per cent. of the cash received and values aforesaid, amounting to \$2,843.90.

4. That the services for which petitioner claims compensation, independent of or outside of the contract, are not such services as are embraced within the terms of the contract, upon any fair interpretation that can be made thereof, is too plain to admit of serious doubt or cavil. They consist, in effect, of two items—the first, of traveling over the country, spending as much as three weeks on one occasion in Virginia,

nearly 1,000 miles from his office, in search of evidence to be used upon the trial; and the other, of a month or more time spent after the final decree had been entered in the cause on its merits, with a view of ascertaining what, if anything, could be recovered from the different parties against whom the decree had been entered, and professional services in connection therewith. That this character of work and this service were not covered by the original contract would seem to be too plain to be controverted. Indeed, it is hardly among the probabilities that a contingent arrangement for 10 per cent. would have been entered into at all, had any such litigation been in view as this resulted in, if, indeed, employment could have been secured by contingent arrangement for such work at any figure; but to include such services as are now being considered under the 10 per cent. contract would not only be unreasonable, but to do what manifestly could never have been within the minds of the parties at the time, and is clearly neither within the letter nor spirit of the contract made by them. The letters written by James Q. Barcus, the most active of the complainants in the original suit in the prosecution of the case, as late as December 27, 1898, and April 8, 1899 (Exhibits LDY. Nos. 2 and 3 with Yarrell's deposition), long after the litigation had been inaugurated, and subsequent to the rendition of the decree favorable to the complainants in the Circuit Court of Appeals had been entered, shows that it was not the purpose of the parties to impose this sort of work on their counsel, as also that they were without evidence to sustain their case, but for this extra service of counsel.

The court concludes, upon the evidence in this case, taking into consideration the character of the case, and all the circumstances surrounding it, and the success attained, that the petitioner, Sherwood, should be allowed at least the sum of \$2,000 for the work performed by him outside of the contract aforesaid, making a total allowance for professional services rendered of \$4,843.90, from which should be deducted the payments and credits heretofore claimed by the defendants in the petition, amounting to \$2,175.

In what has been said, no special reference has been made to the character of the litigation out of which the claim for fees on the part of the petitioner arose, or to the manner in which he performed his part of the undertaking. The suit was an exceedingly difficult one to maintain, and every question of law and fact arising in it was bitterly and vigorously contested from its institution to its close, many doubtful and difficult legal questions arising; and the best legal talent in the state—seven lawyers, as I now recall—were engaged on the part of the several defendants in the cause. The question of fraud being involved, and plainly charged against prominent and leading business men, who indignantly resented the accusation, the litigation was conducted with an earnestness and asperity that rarely occurs; and it required counsel of high order of talent to maintain the cause of the complainants. The work done in the cause was enormous. The trial alone, which was had before the court, under the equity rules so providing, took over two weeks; and the evidence, as taken by stenographers at the time, covered over 1,000 pages of typewritten matter. While the petitioner, Mr. Sherwood, was not the only counsel in the cause for the complainants—he having associated with him Judge L. D. Yarrell from the

commencement, and Mr. C. V. Meredith at the final hearing—it is doing no injustice to either of these gentlemen, who well and ably performed their duties; to say that the laboring oar in the litigation, from its inception, fell to Mr. Sherwood. He was the counsel near to the complainants, and upon whom they mainly relied. He did most of the work—indeed, his master mind directed and controlled it; and it is only just to him to say that he showed great skill as a lawyer in the performance of his duties, and spared no labor that would inure to the benefit of his clients.

The court is satisfied the fee herein allowed is as small compensation as was ever allowed an attorney for like services, and that the amount thus named, with what the defendants in the petition admit they have paid for counsel in the cause, is only what would have been a very small fee, upon a cash basis, for the work performed by the combined counsel, or if performed by one of them. In this case, if the court were called upon to allow compensation to counsel out of the recovery had, or of funds under its direction, uncontrolled by the terms of any contract between parties, it would not, in view of the doubtful and unpleasant character of the litigation, the onerous services performed, and the success attained, think of allowing less than 50 per cent. of the recovery had, or of the amount under its control. To do otherwise would be unjust and unfair to counsel.

A decree may be entered in favor of the petitioner, Sherwood, against the defendants in the petition, for the amount hereinbefore allowed, less the sum received by him as aforesaid.

In re THORP.

(District Court, E. D. Virginia. July 18, 1902.)

No. 365.

1. BANKRUPTCY—SECURED CLAIMS—VALIDITY OF SECURITY—RECORD—RIGHTS OF TRUSTEE.

Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], provides that the trustee in bankruptcy shall be vested by operation of law with the title of the bankrupt to property which, prior to the filing of the petition, he could have by any means transferred, or which might have been levied on and sold by any judicial process against him. Section 67a, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], provides that claims which, for want of record, would not have been valid liens as against the claims of creditors of the bankrupt, shall not be liens against his estate; and section 67d declares that liens given or accepted in good faith, and not in contemplation of or in any fraud of the act, and for a present consideration, which have been recorded according to law, if record is necessary to impart notice, shall not be affected by the act. *Held*, that though, under section 70a, the title acquired by a bankrupt's trustee was only that held by the bankrupt at the time of the filing of the petition, yet where a lien on certain of the bankrupt's property was void as to any of his creditors under the state law by reason of a failure to record the same, such lien was void as to the trustee, under sections 67a, 67d, as to which he occupied the position of a bona fide purchaser for value.

In Bankruptcy. On objection of the trustee in bankruptcy to the allowance of any part of the claim of the John L. Roper Lumber Company as a secured claim.

The following is the opinion of Bernard, Referee:

Among the claims proven before the referee is that of the John L. Roper Lumber Company for the sum of \$2,608.61, to secure a part of which, to wit, the sum of \$1,412.74, the bankrupt, by a deed of trust dated April 17, 1899, and executed on or about that date, conveyed certain personalty to W. B. Roper, trustee, which deed, however, was not admitted to record until the 29th day of January, 1902, some twelve days after the bankrupt filed his petition and was adjudged a bankrupt. To the allowance of any part of this claim as a secured claim the trustee objects, and bases his objection on several grounds, only one of which need be mentioned, to wit, the failure of the trustee under the deed of trust to have the same admitted to record until after the debtor was adjudged a bankrupt. In this state of things, the trustee in bankruptcy contends that the deed, under the provisions of the bankruptcy act (Act July 1, 1898, c. 541), is invalid as against his, said trustee's, claim of title; section 70a (30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) of the act providing that the trustee "shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except so far as it is to property which is exempt, to * * * property which prior to the filing of the petition he could have by any means transferred or which might have been levied upon and sold under any judicial process against him"; and section 67a (30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]) further providing that "claims which for want of record or other reasons would not have been valid liens as against the claims of creditors of the bankrupt shall not be liens against his estate." The bankrupt, says the counsel for the trustee, could have transferred the property conveyed by the deed of trust at any time before he was adjudged a bankrupt and the same might have been levied upon and sold under any judicial process against him. The counsel for the trustee further urges that the deed of trust, not having been admitted to record, was not valid against certain of the bankrupt's creditors, and therefore is not a lien against his estate. His contention is that the trustee in bankruptcy as to property conveyed by a deed of trust not recorded has the rights of an innocent purchaser for value without notice. In support of his contention the counsel for the trustee cites as authority the following decisions: In *re J. S. Booth's Estate*, 3 Am. Bankr. R. 574, 98 Fed. 975, decided by the District Court of Oregon in January, 1900, and In *re Pekin Plow Company*, 7 Am. Bankr. R. 369, 112 Fed. 308, 50 C. C. A. 257, decided by the Circuit Court of Appeals, Eighth Circuit, in November, 1901. The John L. Roper Lumber Company, in answer to the objection of the trustee to the allowance of a part of its claim as a secured debt, insists that section 70a of the bankruptcy act gives to the trustee only such title to property as the bankrupt had at the date of his adjudication, and that, as the bankrupt had at that date no title to the property conveyed by the deed of trust, except an equity of redemption, only this equity of redemption passed to the trustee. This creditor further contends that section 67a has no application to a case like that under consideration. In support of its contention the counsel for said creditor cites the following decisions, between which and those cited by the counsel for the trustee, there is conflict: *National Bank of Chattanooga v. Rome Iron Company*, 4 Am. Bankr. R. 441, 102 Fed. 755, decided by the United States Circuit Court, Northern District of Georgia, in May, 1900; In *re Economical Printing Company*, 6 Am. Bankr. R. 615, 110 Fed. 514, 49 C. C. A. 133, decided by the U. S. Circuit Court of Appeals, Second Circuit, in August, 1901; and In *re Kellogg*, 7 Am. Bankr. R. 270, 112 Fed. 52, decided by the District Court of the United States for the Western District of New York in November, 1901.

For the better understanding of the question under consideration some paragraphs from the opinions of the courts whose decisions are cited as authority will be quoted, taking first some from the opinion of the court in the case of the *National Bank of Chattanooga v. Rome Iron Company*, in which an un-

recorded mortgage was upheld as against the trustee in bankruptcy. District Judge Newman, delivering the opinion of the court in this case, said:

"Since the argument of this case I have been handed by counsel for the trustee a recent decision by Judge Bellinger, of Oregon, in the case of *In re J. S. Booth's Estate*, 3 Am. Bankr. R. 574, 98 Fed. 975, in which it is said, without citing authority, that the trustee in bankruptcy stands in the position of an innocent purchaser without notice. If this is the law, it would seem to defeat this lien, because it seems entirely clear that an innocent purchaser from the Rome Iron Company, without notice of the pledge to the Chattanooga National Bank, would have obtained a good title; but I must, with the utmost respect, differ with Judge Bellinger as to his opinion of the position in this respect of the trustee in bankruptcy."

After stating that "this question arose frequently under the bankrupt act of March 2, 1867 [chapter 176, 14 Stat. 517]," and citing several authorities to show this, Judge Newman, concluding his opinion, says:

"But counsel for the trustee contends that the bankrupt act of 1898 is different in this respect from the act of 1867, and he relies upon section 70a, par. 5, to sustain this view. The language of the provision relied on is as follows:

"Section 70a. The trustee of the estate of a bankrupt, upon his appointment and qualification * * * shall be vested by operation of law with the title of the bankrupt * * * to all (5) property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him."

"The provision of the bankrupt act of 1867 as to the title vesting in the assignee is as follows:

"All property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent rights and copyrights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal; and for any cause of action which he had against any person arising from contract, or from the unlawful taking or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate; together with the like right, title, power, and ability to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee." Rev. St. § 5046.

"I am unable to see how any distinction can be drawn, favorable to the contention of counsel for the trustee, between the two acts. The purpose of both acts, although different language is used, seems to be to vest in the trustee the title to the entire estate of the bankrupt; and no distinction can be perceived which justified the inference that under the last act the trustee takes the property of the bankrupt as an innocent purchaser without notice, and that in the former he did not. The conclusion is that the demurrer to the bill, upon all the grounds taken therein, must be overruled."

The learned district judge in the opinion from which the foregoing extracts are made shows very clearly that under the act of 1867 the assignee in bankruptcy did not take title to the bankrupt's property as an innocent purchaser for value without notice; but does he show that under the act of 1898 the trustee in bankruptcy does not practically take such title? Does he show that a claim under an unrecorded deed of trust is a lien against a bankrupt's estate, and should be so allowed?

Let us, however, draw further from the opinions of the courts in the cases cited by the counsel for the John L. Roper Lumber Company. In the case of *In re Kellogg*—the most recent of those cited by him, and the one in which the other two cited and relied upon by him were discussed and approved—District Judge Hazel, delivering the opinion of the court, and referring to section 70a, says:

"Counsel for trustee claims that by reason of this section the trustee acquires a greater title than the bankrupt himself had, to wit, a perfect title, which the bankrupt, under the present state of facts, might have transferred prior to the filing of the petition; that the trustee acquires, not the title of the bankrupt to all his property, but the title which he might have conveyed.

The most reasonable construction would seem to be that this section simply vests in the trustee the title which the bankrupt had to the property described in the section. It cannot be construed to grant to the trustee a higher title than was in the bankrupt at the time the property passed by operation of law to the trustee. The interest of the creditor in this property is affected by no other section of the bankruptcy statute, and his claim must stand or fall upon its proper construction. This view has recently been upheld by the Circuit Court of Appeals for this circuit.

"In *Re New York Economical Printing Company*, 6 Am. Bankr. R. 615, 619, 110 Fed. 514 [49 C. C. A. 133], the court said:

"The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act which is fraudulent as to creditors or invalid as to creditors for want of record, it is invalid as to the trustee."

"The case of *Chattanooga National Bank v. Rome Iron Co.* (C. C.) 4 Am. Bankr. R. 441, 102 Fed. 755, seems directly applicable to the case at bar. In that case the court directly holds that, except in cases affected by fraud or illegal preference, a trustee in bankruptcy, under the act of 1898, takes only the interest of the bankrupt in the assets of the estate, and holds such assets subject to the valid claims, liens, and equities enforceable against the bankrupt. There is no claim of fraud or illegal preference before the court in this case. The debt represented by the contract for the machines is set forth in the bankrupt's schedules as one secured by the machinery. The attorney for the trustee endeavors to distinguish the cases applicable to the question under discussion, decided under the act of 1867, and which were cited upon the argument, favorable to the contention of the creditor. The *Chattanooga National Bank Case*, supra, says upon this point, quoting section 70a of the act of July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], and Rev. St. § 5046, which is the section applicable under the act of 1867:

"I am unable to see how any distinction can be drawn favorable to the contention of counsel for the trustee between the two acts. The purpose of both acts, although different language is used, seems to be to vest in the trustee the title to the entire estate of the bankrupt; and no distinction can be perceived which justifies the inference that under the last act the trustee takes the property of the bankrupt as an innocent purchaser, without notice, and that in the former he did not."

"The cases under the act of 1867 seemed all to agree that no title would pass to the trustee superior to that of the bankrupt in a similar case, where the title to property under a conditional sale is governed by similar statutes."

The reasoning of the court in the case from which the foregoing paragraphs are taken and that in the cases cited in the opinion of the court sustains the contention that in the act of 1898 there was no purpose to extend the powers of the trustee beyond those given to the assignee under the act of 1867, but, on the contrary, an intention to give the trustee only such title to the property defined in section 70a of the new act as the bankrupt had. But do these decisions sustain the contention that the provisions of section 67a, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], have no application to the case at bar, no bearing upon the question at issue?

In the opinion of the referee the provisions of this section (67a) present the vital questions in this case. They do not appear, nor is there anything similar to them, in words or substance, in the act of 1867, or in any previous bankruptcy act. They are found for the first time in the act of 1898. What is their meaning? What their effect? What did the framers of the statute intend when by the section they provided that "claims which for want of record or for other reasons would not have been valid liens as against the claims of creditors of the bankrupt shall not be liens against his estate"? The claim under a deed of trust which has not been recorded is invalid against certain creditors of the grantor; section 2465 of the Code of Virginia of 1887 providing that every "deed of trust, or mortgage, conveying real estate or goods and

chattels, shall be void as to subsequent purchasers for valuable consideration without notice, and creditors, until and except from the time that it is duly admitted to record in the county or corporation wherein the property embraced in such * * * deed may be," and the courts having construed the word "creditors" as used in this statute and in like statutes of other states as meaning not creditors at large, but only such creditors as have valid liens by judgment or otherwise giving them the right to charge the debtor's property specifically. See *McCandlish v. Keen*, 13 Grat. 615, and *Dulaney v. Willis*, 95 Va. 606, 29 S. E. 324, 64 Am. St. Rep. 815. See, also, *In re Pekin Plow Company*, supra, in which District Judge Adams, delivering the opinion of the court, and referring to the statute of Nebraska, quoted the language of the court in *Bank v. Anthony*, 39 Neb. 343, 57 N. W. 1029, wherein it was said that "the term 'creditor' in this statute means a judgment, execution, or attachment creditor; that is, a creditor who is using the courts of law and their processes for the collection of his debt."

If an unrecorded deed of trust is invalid against some of the debtor's creditors, its lien is invalid "as against the claims of creditors." We are not called upon to give the word "creditors," as used in section 67a, a meaning different from that which it has been in several jurisdictions judicially held to have, but, on the contrary, may safely adopt the view of the Circuit Court of Appeals of the Eighth Circuit, when, speaking through District Judge Adams in *In re Pekin Plow Company*, supra, having quoted the language of the section, it says:

"This language is direct, clear, and free from all ambiguity, and seems to have been chosen by the lawmakers with special reference to statutes relating to fraudulent conveyances, like that of Nebraska. It means that any liens which would not have been invalid if other creditors had a right, before bankruptcy, to avoid the same, either for want of record or otherwise, shall not constitute a lien against the estate in bankruptcy. This section fully comprehends the claim of the petitioner, and prevents the assertion of any lien by it against the bankrupt's estate."

But, contends the counsel for this creditor, section 67d, which provides that "liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary to impart notice, shall not be affected by this act," was inserted in the act of 1898 "to safeguard the validity of liens in states where record was not necessary, or only necessary as against lien creditors, as is the case in Virginia."

Assume, as appears to be true, that the deed of trust under consideration was given and accepted in good faith for a present consideration, and was not executed in contemplation of or in fraud upon the bankruptcy act. Is the lien thereby created one of those not affected by the provisions of the bankruptcy act? The writing was not admitted to record until after the adjudication, and the recordation thereof was necessary to impart notice to a certain class of creditors and to a certain class of purchasers. Subdivision "a" of section 67, which provides that "claims which for want of record or otherwise would not have been valid as against creditors of the bankrupt shall not be liens against his estate," must be read in connection with subdivision "d" of the same section, referred to by counsel for the John L. Roper Lumber Company. By the two subdivisions of the section the intention of the lawmakers manifestly was to allow no lien which requires recordation to give it validity against any class of creditors or purchasers to stand unaffected and good against the estate of the bankrupt. Their purpose clearly was to invalidate all such liens, and to this extent to affect and rid of incumbrances the property passing to the trustee. Unless we so construe these two subdivisions of section 67, they are meaningless, as the construction of section 70a which vests the trustee in bankruptcy with only the title of the bankrupt in his property would, without the help of subdivision "d" of section 67, protect all liens not created in contemplation of or in fraud upon the bankruptcy act. Let us illustrate: If Thorp's equity of redemption in the property conveyed by his deed of trust alone passed to the trustee in bankruptcy—and this seems clear—the deed stands unaffected by the adjudication, unless affected by some provision of the act other than 70a, and therefore no provision such as subdivision "d"

of section 67 is necessary to protect or safeguard it. It cannot be true that the provisions of subdivision "d" of section 67 were inserted for the purpose of protecting or safeguarding any lien which no provision of the act impairs, as this would have been needless legislation. We must rather infer that they were made a part of the statute for a purpose, and that this purpose was that, whilst protecting all liens duly recorded, and not contravening any provision of the bankruptcy act, they should be read along with subdivision "a" of the same section, and operate to invalidate any lien which, under any statute of any state whose laws govern the transaction, would, for want of recordation, be invalid against any class of creditors or purchasers. Section 70a gives to the trustee only the rights of the bankrupt, but subdivisions "a" and "d" of section 67 invalidate an unrecorded lien, and thus practically place the trustee in the position of an innocent purchaser for value, without notice, as held in the cases cited by the counsel for the trustee in bankruptcy.

The foregoing views are believed to be in accord with the well-settled principles governing the construction of statutes. "That construction is favored which gives effect to every clause and every part of the statute, thus producing a consistent and harmonious whole. A construction which would leave without effect any part of the language used should be rejected if an interpretation can be found which will give it effect." See Am. and Eng. Encyclopedia of Law, vol. 23, p. 309, and the notes citing as authority Sedgwick's Stat. Law, 199, and numerous decisions; among them *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139, in which Rhodes, J., delivering the opinion of the court, said that "a statute must be so construed as to give effect, if possible, to every portion of it, and without rejecting any part as surplusage, or treating it as a repetition of a provision already made"; and *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391, 27 L. Ed. 431, in which Mr. Justice Harlan, delivering the opinion of the court, said that "it is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the Legislature was ignorant of the meaning of the language it employed." To treat section 67a as having no bearing upon section 70a and upon the validity of the deed of trust under consideration, and section 67d as merely safeguarding the validity of liens in certain jurisdictions, would be to disregard the well-settled rules of construction laid down in the foregoing authorities. For these reasons the referee sustains the trustee's objection to the allowance of any part of the claim of the John L. Roper Lumber Company as a secured debt.

This ruling makes it unnecessary to pass upon other questions raised by the trustee in bankruptcy or in the able arguments, oral and written, of the counsel for the John L. Roper Lumber Company, and the counsel for the said trustee.

Bartlett Roper, Jr., for trustee in bankruptcy.

S. S. Lambeth, Jr., and Richard B. Davis, for John L. Roper Lumber Co.

WADDILL, District Judge. The ruling of the referee as set forth in the foregoing report is approved, and his opinion is adopted as that of the court. Let decree be entered accordingly.

In re STEIN.

(District Court, E. D. Pennsylvania. May 24, 1904.)

No. 1,944.

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—AMENDMENT OF PETITION.

A petition in involuntary bankruptcy, which does not show on its face that the claims of the petitioners amount in the aggregate to \$500 or over, does not give the court jurisdiction, and it has no power to allow an amendment joining other creditors having claims sufficient to make up the requisite amount.

In Bankruptcy. On demurrer to involuntary petition.

Reber & Downs, for petitioning creditors.

Ben-Zion D. Oliensis, for alleged bankrupt.

HOLLAND, District Judge. An involuntary petition was filed in this court against Samuel Stein on the 9th day of May, 1904, with all the necessary averments to give the court jurisdiction, with the exception that the total amount of the creditors' provable claims set forth is \$418.24. Subsequently, on May 16, 1904, petitioning creditors' counsel presented the petition of other creditors, amounting to \$110, asking leave to join in the original petition. The alleged bankrupt on the same day, to wit, May 16, 1904, filed a demurrer to the jurisdiction of the court because of this defect in the petition. It is alleged in the petition for intervention that these claims were filed with the original petitioners' counsel, and that his clerk inadvertently omitted them in the original petition for involuntary bankruptcy. The reasons given for their omission cannot affect the question of the validity of the petition as a basis for invoking the jurisdiction of the court. The law requires that there shall be certain averments specified by Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], and, if they are omitted, the court has no jurisdiction in the matter.

An examination of the cases reported as to this class of amendment where intervention was allowed to continue the proceedings, establishes the fact that the original petition sets forth and alleges that the petitioners were either sufficient in number, under the circumstances, or had provable claims in excess of \$500.

In *Re Romanow* (D. C.) 92 Fed. 510, it appears from the reading of the decision that the averments therein were sufficient to give the court jurisdiction, but, after it had been filed, it appeared that some of the petitioners were not qualified. Judge Lowell permitted intervening petitioners to sustain the proceeding. He also laid down the rule that additional intervening creditors to join in the petition subsequent to its filing and before adjudication thereon can be reckoned in making up the amount of the claims necessary to give the court jurisdiction. It nowhere appears in this decision that a petition which, upon its face, shows less than the statutory amount, can be cured by subsequent intervention.

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 128.

In *Re Bedingfield* (D. C.) 96 Fed. 190, the decision above set forth in *Re Romanow* (D. C.) 92 Fed. 510, was reviewed and approved. In the former case the claims of the petitioning creditors amounted to \$505.70, which was set forth in the petition. Subsequently it was reduced below the statutory amount, but the court permitted an amendment prior to the adjudication; and in commenting upon the power of the court to allow amendments under the act this language was used:

"I think the objection to such practice, which Judge Lowell says was urged before him, that this would allow an insufficient number of creditors to bring a proceeding, and afterward build it up to the necessary amount by amendment, is not very serious. It would be necessary in every case, of course, that a petition in involuntary bankruptcy should, on the face of it, show that creditors participated to the amount of five hundred dollars, before a petition could be filed or a rule obtained; and these, of course, would have to be participating in good faith. Then, if afterwards, and before adjudication, it should appear that for some reason one or more of the petitioning creditors did not have debts, or their debts were not provable, and other creditors came in sufficient to make the amount necessary, they could be allowed, and the proceeding stand."

In *Re Mercur* (D. C.) 95 Fed. 634, the petition alleged there were less than twelve in number and one creditor filed the petition. It was subsequently ascertained that there were more than twelve creditors in number, and Judge McPherson allowed other creditors to come in to make up the necessary statutory number. This court, however, had jurisdiction upon the face of the petition, and the subsequent amendments were valid and proper.

In *Re Mammoth Pine & Lumber Company* (D. C.) 6 Am. Bankr. R. 86, 109 Fed. 308, the amounts set forth in the petition were over \$500, as was the case in *Re Edward S. Ryan* (D. C.) 7 Am. Bankr. R. 562, 114 Fed. 373. In both of these cases the subsequent proceedings developed that the provable claims of the original petitioners did not amount to the sum set forth in the petition, to wit, over \$500, and the court permitted an amendment prior to an adjudication. The same appears in the case lately decided by Judge Bradford in *Re Mackey*, 6 Am. Bankr. R. 577, 110 Fed. 355.

In many of these cases the language is so broad that at first blush it would seem to sanction the doctrine that amendments as to the amount can be made at any time before adjudication, whether the original petition set forth creditors with provable claims either above or below the sum of \$500; but an examination of the cases show that in each one of them the discussion was confined to amendments allowable upon a petition containing the necessary averments required by the act, in which it was subsequently developed that there were an insufficient number of creditors, or that the provable claims were less than \$500.

Section 59b, Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445], expressly states three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to \$500, or over; or, if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such

amount may file a petition to have him adjudged a bankrupt. One person holding a provable claim against an alleged bankrupt in excess of \$500 may file a petition in involuntary proceedings, provided it is alleged in the petition that the creditors are less than twelve. If it should turn out subsequently that there are more creditors than alleged in the petition, others may join, and the case may proceed; or, if three creditors present a petition averring that they hold provable claims against the alleged bankrupt in excess of \$500, and subsequently it should appear that one or more of these claims are not valid against the bankrupt's estate, or by some arrangement one of them should be paid off and desire to withdraw, and thereby reduce the amount below the statutory requirement, it is just and proper that an amendment should be allowed. In all the cases, under these circumstances, this has been done. It is proper that it should be, in order to carry out the objects of the act, and to prevent sham petitions from being presented and held in control to the disadvantage of the general creditors of the bankrupt.

Amendment refused. The demurrer is sustained.

IN RE CARLSEN'S PETITION.

(District Court, E. D. Pennsylvania. May 27, 1904.)

1. HOSPITALS—DETENTION OF PATIENTS—HABEAS CORPUS—RETURN.

Where, on the arrival of a British ship, petitioner, a seaman, was admitted to a hospital through the intervention of the British consul, to be treated for an injury received on the vessel, allegations in a return to a writ of habeas corpus that he was not fully cured at the time he applied for his discharge from the hospital; that, if discharged, he would be likely to become a public charge, and that the master of the vessel had directed that he be detained until he might be returned to the port from which he came, were insufficient to justify the hospital authorities in restraining petitioner of his liberty.

2. SAME—ALIENS.

Where the immigration authorities were not parties to a writ of habeas corpus by an alien seaman to procure his discharge from a hospital to which he had been admitted for treatment for an injury sustained on board his vessel, the fact that he had never been admitted to the United States by such immigration authorities, and that under the immigration laws of the United States it was the duty of the master of the vessel to return him to the port from which he came, was no ground for refusing to discharge petitioner from detention at such hospital.

Joseph Hill Brinton, for relator.

Edward Brooks, Jr., for respondent.

J. B. McPHERSON, District Judge. The relator's petition sets out the following facts:

"That he is a minor of the age of about nineteen years, and a subject of the King of Norway and Sweden, and as such on or about November 8, 1903, shipped and hired as a seaman on board the British steamship Teviotdale.

"That the said steamship, with your petitioner on board, proceeded thence on her voyage, and arrived at the port of Philadelphia on or about February 16, 1904. On said date, whilst said vessel was lying in the port of Phila-

delphia, your petitioner, pursuant to the order of his superior officers on board said vessel, placed himself in a position of exposure, whereby the fingers of his hands were frozen. Later in the same day, at the request of the British consul, Wilfred Powell, resident in Philadelphia, your petitioner was sent to and admitted in the St. Agnes Hospital, of said city, where he received medical treatment for the injuries thus sustained.

"Your petitioner has since remained at the said hospital undergoing treatment for the said injuries, and on May 11, 1904, requested the proper authorities of said hospital for a discharge, so that he might institute legal proceedings against the said vessel for the recovery of damages for the injuries sustained by him as aforesaid, but said request was denied on the ground that no discharge or leave of absence could be given without the consent of the said consul, which discharge the said consul refused to give, alleging that your petitioner was, by virtue of his shipment, a British subject; therefore under his exclusive jurisdiction.

"Your petitioner avers that he is illegally and wrongfully deprived of his liberty by the mother superior and other officials of said hospital, contrary to the Constitution and laws of the United States, and prays that a writ of habeas corpus may be forthwith issued directed to the mother superior, resident at and in charge of the St. Agnes Hospital, Philadelphia, commanding her to bring before your honorable court his, your petitioner's, body, to do and abide such order as the court may direct."

The material parts of the return made by the mother superior of the hospital are as follows:

"That your respondent is credibly informed and verily believes that the petitioner, Adolph Carlsen, is an alien, and that he shipped and hired as a seaman on board the British steamship Teviotdale at Antwerp, in the kingdom of Holland.

"That on or about February 16, 1904, the said Carlsen, under an arrangement with Wilfred Powell, Esquire, his Britannic Majesty's consul residing at Philadelphia, was sent by the master or captain of said steamship Teviotdale to the St. Agnes Hospital, and admitted therein as a patient, with instructions that said Carlsen should be detained there until cured, and, when ready to be discharged, should be turned over to the custody of said Wilfred Powell, to the end that he be returned to the port of shipment. That at the time of admittance said Carlsen was suffering with a severe case of frost-bitten hands or fingers, and unable to perform his duties as seaman in said steamship. That since said time said Carlsen has been undergoing medical treatment for said injuries, and has since been supported and maintained at said hospital at the expense of the master and owners of said steamship Teviotdale. That said Carlsen is still suffering from the effects of frostbite, and is not well enough to be discharged from said hospital. That the said Carlsen is a person likely to become a public charge if discharged from said hospital by reason of his present physical condition.

"That your respondent is credibly informed and verily believes that under the laws of Great Britain it is the duty of masters and owners of British vessels to provide at their own expense medical treatment in hospitals on shore for disabled seamen where injured in service on the ship. That under an act of Congress of March 3, 1903, entitled 'An act to regulate the immigration of aliens into the United States,' the master of all vessels bringing aliens to this country is required to detain said aliens on said vessels, and to return such aliens to the countries whence they respectively came, and for neglect to detain them thereon or neglect to return them to the foreign port from which they came such master or owner shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine not less than three hundred dollars for each and every such offense.

"That on or about February 24, 1904, the said Carlsen was given his discharge from said steamship Teviotdale on account of said disability, and since then has been detained at the request of said master at said St. Agnes Hospital for treatment, to the end that, when cured and ready to be discharged, he might be turned over to the British consul, to be returned to the foreign port from which he came.

"That your respondent is credibly informed and verily believes that said Carlsen has never been duly admitted into the United States by the commissioner of immigration, or by any immigrant inspector.

"That your respondent is credibly informed and verily believes that to give said Carlsen his discharge from said hospital would be a menace to his health, and possibly his life, and in violation of the above act of Congress. That the friends and legal advisers of said Carlsen have never been denied access to him, and your respondent is advised that it is unnecessary that said Carlsen be discharged from said hospital in order to institute legal proceedings against said vessel, particularly in view of the fact that he is a minor, and that such proceedings must be instituted by a guardian or next friend.

"That your respondent is credibly informed and verily believes that the commissioner of immigration is opposed to the release of said Carlsen on the ground that he is an alien, that he has never been duly admitted into the United States, and that by reason of his present physical condition he is a person likely to become a public charge.

"Your respondent humbly prays that, if your honorable court should make an order discharging the said Carlsen from St. Agnes Hospital, that the said Carlsen be turned over to the custody of the commissioner on immigration, in order that there may be no violation of the immigration laws, to the end that the master, owners, or agents of said steamship Teviotdale may not become liable for the penalty provided for by the act of Congress.

"Your respondent therefore, in answer to the command contained in the writ of habeas corpus to her directed, brings before your honorable court the body of the petitioner, Adolph Carlsen, to do and abide such order as the court may direct."

It is clear that the respondent's return sets up no legal justification for interfering with the relator's liberty. If he desires to leave the hospital, he has the right to do so, no matter how imprudent the step may be, nor how his health may be affected thereby, and although the British consul may disapprove. The question suggested in the return concerning the effect of the immigration laws cannot arise on this record, to which the proper official is not a party.

It is therefore ordered that the relator be discharged from confinement in the St. Agnes Hospital; but, in order that the commissioner of immigration may be enabled to take such steps as he may be advised are desirable, it is also ordered that the hospital authorities give him 24 hours' notice of the time when the relator will be set at liberty.

In re ADAMS.

(District Court, D. Massachusetts. May 20, 1904.)

No. 7,207.

1. BANKRUPTCY—PROVABLE DEBTS—TIME OF ACCRUAL OF CLAIM.

A claim against a bankrupt for work done under a contract after the filing of the petition cannot be proved as a debt against the estate, although the contract was entered into prior to the filing of the petition, but was at that time wholly executory.

In Bankruptcy. On review of decision of referee.

Charles A. McDonough, for creditors.

Charles A. Castle, trustee, pro se.

LOWELL, District Judge. Before bankruptcy the creditors here seeking to prove had contracted with the bankrupt to build for him cer-

tain houses at a price to be paid from time to time during construction. No work had been done under the contract before the petition in bankruptcy was filed. Thereafter, and before adjudication, the creditors, in ignorance of the pending petition, furnished materials and labor under the contract. For this they seek to prove. But a creditor cannot prove for an indebtedness arising between the filing of the involuntary petition and adjudication. This appears from the analogy of section 63a (1), (2), (3), and (5), as applied to the interpretation of clause (4), Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]. In clauses (1) and (4), for example, the limit of time must be the same, inasmuch as clause (4) includes clause (1), and, if clause (4) were less limited in point of time, the limit imposed upon clause (1) would become nugatory. See *In re Swift*, 112 Fed. 316, 321, 50 C. C. A. 264. The same result is indicated by the analogy of section 59b, d, and f. Can it be supposed that these creditors could have joined in an involuntary petition? See *In re Coburn* (D. C.) 126 Fed. 218; Forms 31-36, 59; *In re Burka* (D. C.) 104 Fed. 326; *Brandenburg on Bankruptcy*, §§ 978, 984; *Collier on Bankruptcy* (4th Ed.) p. 443; *Loveland on Bankruptcy*, § 109; *In re Garlington* (D. C.) 115 Fed. 999; *In re Bingham* (D. C.) 94 Fed. 796. The construction just stated was that put upon section 19, Act March 2, 1867, c. 176 (14 Stat. 525), first by the courts (*In re Patterson*, Fed. Cas. No. 10,815; *In re Crawford*, Id. 3,363; *In re Ward* [D. C.] 12 Fed. 325; *In re Nounnan*, 7 N. B. R. 15), and then by Congress (Rev. St. § 5067). Yet the language of that act seemed explicit in the other sense—"all debts due and payable from the bankrupt at the time of the adjudication in bankruptcy." If there be anything to the contrary in *Re Hinckel Brewing Co.* (D. C.) 123 Fed. 942, I am not able to agree with it. That the bankrupt estate was there liable for the rent of premises occupied by the receiver in bankruptcy is plain. This was part of the receiver's expenses in administering the estate. But that a landlord, as an ordinary creditor, can prove against the bankrupt estate for rent falling due between the filing of the petition and adjudication, I do not believe. The cases cited do not support the proposition, and, as adjudication, ipso facto, does not ordinarily terminate a lease, the latter part of the argument is not applicable. The creditors here urge that adjudication does not necessarily follow upon a petition in bankruptcy, and that they could not be expected to suspend work under an executory contract in order to await for weeks and months a decision upon a creditor's petition. Their inconvenience, though real, cannot control the general principles governing the proof of debts under the existing bankrupt act. Similar laws in other jurisdictions have fixed different limits of the right to prove. See *Williams on Bankruptcy*, p. 114; Rev. Laws Mass. c. 163, § 31. But with these we need not concern ourselves.

The creditors seek also to prove their damages for breach of the executory contract. If the contract was broken at or before bankruptcy, they can prove. *In re Stern*, 116 Fed. 604, 54 C. C. A. 60. It seems that this contract was broken by bankruptcy as of the date of filing the petition. *In re Swift*, 112 Fed. 316, 50 C. C. A. 264. The damages have been liquidated by agreement of parties.

The judgment of the referee is affirmed in both respects.

In re ANDREWS.

(District Court, D. Massachusetts. April 30, 1904.)

No. 8,277.

1. BANKRUPTCY—EXAMINATION OF THIRD PERSONS—RIGHTS OF CREDITOR.

Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], while it authorizes the court on a creditor's application to summon a third person for examination regarding the affairs or estate of a bankrupt, does not give a creditor an unqualified right to demand the issuance of such a summons, the awarding of which is in all cases discretionary.

In Bankruptcy.

Warren & Garfield, for creditor.

Lee M. Friedman and Percy A. Atherton, for trustee.

LOWELL, District Judge. A creditor requested the trustees of the bankrupt estate to examine the bankrupt's former common-law assignee regarding his management and disposition of the bankrupt's property while in his hands. The trustees refused to take action as requested, whereupon the creditor applied for a summons to the assignee, proposing himself to conduct the examination. After a hearing, the referee refused to issue the summons, and the creditor has appealed to me. It may be taken that both the trustees and the referee believed that an examination was neither necessary nor desirable in the interest of the estate. No evidence has been certified by the referee, or introduced before me, and the referee's judgment must be affirmed unless every creditor has an unqualified right to examine third persons concerning the bankrupt estate. At the argument I told the appellant that he might have the evidence taken before the referee certified for my consideration, but he declined the offer, and elected to stand on his right to a summons irrespective of evidence. This right does not exist. Section 21a of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]), enables the court, upon a creditor's application, to summon a third person for examination; but this provision is not intended to give the creditor an unqualified right to demand the issuance of the summons. Ordinarily, the examination is made by the trustee, and after his appointment a creditor should ordinarily apply to him. If the trustee refuses to undertake the examination, the creditor may apply to the court for an order directing him to do so. To order the trustee to examine is manifestly a matter of discretion. Doubtless the creditor may apply to the court in order to carry on the examination himself, but the court is not wholly without discretion to refuse the application. The examination of third persons concerning the bankrupt estate is anomalous, and, if it were wholly beyond the control of the court's discretion, would be oppressive. See *Lowell on Bankruptcy*, § 147; *In re Krueger*, 2 Low. 66, Fed. Cas. No. 7,941; *Ex parte Alexander*, 1 De Gex, J. & S. 311; *Chamberlain v. Hall*, 3 Gray, 250. In the case at bar it is not unfair to presume that at the hear-

ing before the referee it was made to appear that the summons was applied for in an interest other than that of the bankrupt estate.

No opinion is here expressed concerning a trustee's right to examine any person or concerning a creditor's right to examine the bankrupt.

Judgment of the referee affirmed.

In re SAWYER.

(District Court, D. Massachusetts. May 20, 1904.)

No. 8,027.

1. BANKRUPTCY—LIENS—CONSIDERATION FOR MORTGAGE.

Under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], which requires a "present fair consideration" to support a mortgage given within four months prior to bankruptcy, a mortgage securing notes for \$1,500, bearing 6 per cent. interest, for which the consideration was a loan of \$1,310, the remainder being for additional interest and bonus, will be sustained, where taken in good faith, but only to the extent of the money actually advanced, with interest.

In Bankruptcy. On review of decision of referee.

Leon R. Eyges, for Wyner.

Alfred W. Putnam, for trustee.

LOWELL, District Judge. Adjudication September 10, 1903. On May 11, 1903, the bankrupt gave a mortgage of personal property to Wyner to secure a debt of \$1,500, payable in five installments in two, three, four, five, and six months, with interest at the rate of 6 per cent. By the decree of adjudication this mortgage was decided to have been given with intent to hinder, delay, and defraud the bankrupt's creditors. The referee has found that Wyner accepted the mortgage in good faith. The sum actually advanced by him to the bankrupt was \$1,310. Of the balance of \$190 included in the mortgage note, Wyner testified that \$90 was added by way of interest for six months at the rate of 12 per cent. and \$100 as a bonus. He further testified that no other interest was payable on the note. The referee was of opinion that Wyner's claim was good only for \$1,310, with interest at 6 per cent., and ordered him to pay the balance arising from the foreclosure sale to the trustee. Twelve per cent. interest and a bonus of \$100 are not terms so unconscionable as to justify a court of equity in setting aside a mortgage for inadequacy of consideration. Wyner may be able to prove as creditor for \$1,500. We are here considering, not the validity of the debt as against the bankrupt and his estate, but the validity of the creditor's security as against other creditors. Section 67e of the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]) is much stricter than the rule in equity. It requires, for the validity of a mortgage given within four months of bankruptcy, "a present fair consideration." Where the security is taken for a loan of money, the present fair consideration cannot ordinarily be greater than the sum of money lent—in this case \$1,310, with interest. The \$90 cannot be

treated as a discount of interest at 12 per cent., because the note provides for payment in five installments, and, even at the rate of 12 per cent., the discount of \$90 was excessive.

Judgment of the referee affirmed.

In re HENDERSON.

(District Court, E. D. Pennsylvania. May 20, 1904.)

No. 1,532.

1. BANKRUPTCY—ORDER TO TURN OVER PROPERTY—CREDIBILITY OF TESTIMONY.

An order of a referee requiring a bankrupt to turn over to his trustee a part of a sum of money which he was shown to have had prior to his bankruptcy will not be disturbed, where the bankrupt's testimony in explanation of his disposition of the money was wholly uncorroborated, although, if true, it apparently could have been, without difficulty.

In Bankruptcy. On certificate from referee.

Julius C. Levi, for trustee.

David W. Henderson, in pro. per.

J. B. McPHERSON, District Judge. The question certified by the referee is purely a question of fact, and depends so largely upon the credibility of the testimony that his decision is entitled to more than the usual weight. If the bankrupt's explanation were true concerning the manner in which he spent the large sum of money that he received in a single month, it would certainly have been possible for him to produce some corroborating evidence, and the referee lays proper stress upon the absence of any witness who could speak of the bankrupt's habits of gambling and dissipation, to which he attributes the loss of the money.

The order of the referee directing the bankrupt to return \$5,000 to his trustee is approved.

DEBRO et al. v. JAMES LEE'S SONS CO.

(Circuit Court, E. D. Pennsylvania. May 21, 1904.)

No. 70.

1. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE.

Plaintiff, who was employed to operate a winding machine in a woolen factory, had been instructed in the operation of the machine for 3½ days, after which she did the work satisfactorily for about 3 weeks before the accident happened. In the course of the winding the strands would sometimes be broken, when it was necessary either to stop the machine and join the ends, or to throw the broken strand over the others, which would accomplish the same result. Plaintiff had been instructed how to throw the strands over, but at the time she was injured she attempted to push the broken strand into place, and, in doing so, placed her hand too near the roller, when it was caught and injured. *Held*, that the accident was the result of plaintiff's contributory negligence, precluding a recovery.

Motion to Take Off Compulsory Nonsuit.

Bertram D. Rearick and Maxwell Stevenson, for plaintiffs.
Morton Z. Paul and George L. Crawford, for defendant.

J. B. McPHERSON, District Judge. The right forearm of the plaintiff Annie Debro was injured while she was working in the defendant's employ at a machine used for winding large strands of woolen yarn into balls at an early stage of some manufacturing process. She complains in her statement of claim that, although the defendant's duty was to keep the machine in good repair and instruct her how to operate it, "the defendant wholly neglected its said duties, and entirely failed and refused to instruct the said plaintiff Annie Debro, and to maintain its said machine in a reasonable condition of safety and good repair." Of these charges there was no evidence whatever. So far as appears, the machine was in thorough order, and the plaintiff herself testified that for $3\frac{1}{2}$ days she was instructed by another employé how to operate the machine—which is a very simple affair, indeed, and easy to understand—and that she learned her lesson with such success that she did satisfactory work upon it for about 3 weeks before the accident happened, making several thousands of balls in that time. It is, I think, perfectly clear how her hand came to be caught. While passing around a roller, one of the strands sometimes breaks—there are four of them, each as thick as a man's wrist, moving side by side—and then it becomes necessary that continuity shall be re-established, in order to avoid trouble in the next stage of the process. The machine moves rapidly, winding a large ball in about half a minute, and therefore the absolutely safe way is to stop it and make the readjustment while it is at rest; but there is another method, which is also safe if reasonable care be taken. This is to take up the end of the strand that is attached to the source of supply, and throw it over the remaining three strands that are still moving. These unbroken strands invariably carry the new end to its proper place immediately, and nothing more is required. The plaintiff had been instructed how to act if a strand should break. She was to "throw it over," as she testified several times; but on this occasion she evidently forgot her lesson, or had grown careless, for she attempted to push the strand into place, put her hand too near the roller, and was thus caught and injured.

Under such circumstances, I could not have sustained a verdict against the defendant. No negligence on its part was proved; proper instruction had been given, and the machine was in good repair, while the contributory negligence of the plaintiff appeared clearly from her own testimony. As I thought at the trial, and still think, it was my duty to enter a nonsuit.

The motion must be denied.

RIDGELY v. RICHARD et al.

(Circuit Court, S. D. New York. March 30, 1904.)

1. ACTIONS—BOOKS AND PAPERS—PRODUCTION—PLEADING.

Where a complaint failed to charge the falsity of certain statements in a circular, on which it was averred plaintiff relied in making a subscription to the stock of a company organized by defendants, complainant was not entitled to an order compelling defendants to produce certain accounts, nautical charters, and other books before trial, in order to enable plaintiff to prove the falsity of such statements at the trial.

2. SAME—RECORDS IN POSSESSION OF ANOTHER.

Where a complaint alleged that certain nautical charters and contracts had been sold by defendants to a corporation which was not a party to the action, complainant, in the absence of anything tending to indicate that such charters, etc., had not been transferred to the corporation, was not entitled to an order directing defendants to produce the same, together with the stockbook, minute book, and all papers and bank and check books of the corporation, for plaintiff's inspection before trial, under Rev. St. § 724 [U. S. Comp. St. 1901, p. 583], authorizing the court to require the "parties to the action" to produce for inspection books or writings in their possession or power.

Application for the Production of Books and Papers under Section 724, Rev. St. [U. S. Comp. St. 1901, p. 583].

Roger Foster, for the motion.

Kurzman & Frankenheimer, opposed.

LACOMBE, Circuit Judge. The action is brought solely against Oscar L. Richard and Edwin H. Richard, individually and as members of the firm of C. B. Richard & Co. The application is for an order requiring the defendants to produce in court, for inspection by the plaintiff, certain books and papers, which are divided, in the application, into four classes:

(1) The ledger, cashbook, book of check stubs, and other books of account of the firm of C. B. Richard & Co., which show the profits and loss, the receipts and disbursements derived by said firm from all the steamers, contracts, and charter parties described in and referred to in said circular, a copy of which is set forth in paragraph 4 of the complaint. The only statement in the circular to which this description is at all relevant is that C. B. Richard & Co. had chartered for their own account a number of steamers, some on time charter and others for one voyage only, with the result that their books showed for 18 consecutive trips an average profit of over \$860 per steamer. It is asserted that plaintiff wants this inspection in order to put himself in a position to show on the trial that the above-recited statement in the circular, upon which it is averred that plaintiff relied in making a subscription to the stock of a company organized by defendants, was false. The complaint, however, fails to aver that said statement was false, and, upon a careful study of its language, it is difficult to escape the conviction that the pleader intentionally and carefully avoided making such averment.

(2) The charter parties and contracts therein referred to. The situation as to these is the same as in class 1.

(3) The charter parties and contracts for transportation described and referred to in paragraphs 2 and 4 of said complaint, which are designated as "Keystone Line Contracts." The fifth paragraph of the complaint, under the heading "Second Cause of Action," avers that the Keystone Line Charters and contracts were sold by defendants to the corporation Manhattan Shipping Company for \$21,000 and 100 shares of stock, and there is nothing to indicate that they were not transferred by defendants to the company, in whose possession, presumably, they still remain.

(4) The stockbook, the minute book, and all papers, bankbooks, and checkbooks of the Manhattan Shipping Company. Section 724, Rev. St. [U. S. Comp. St. 1901, p. 583] authorizes the court to require "the parties" to the action to produce for inspection "books or writings in their possession or power." The Manhattan Shipping Company is not a party to this action, and its books and papers cannot properly be said to be in the power of the firm of C. B. Richard & Co., or of either of its individual partners, although it happens that one of those partners is also an officer of the company. He is not sued as such officer.

The application is denied.

HUBGES v. BELASCO et al.

(Circuit Court, S. D. New York. March 26, 1904.)

1. COPYRIGHT—INFRINGEMENT—PRELIMINARY INJUNCTION.

Motion for a preliminary injunction to restrain the performance of a play as an infringement of copyright denied on the ground of insufficiency of evidence to show infringement.

In Equity. Motion for preliminary injunction to restrain the performance of the play known as "Sweet Kitty Bellairs," on the ground that it is, in part, an infringement of complainant's copyrighted play known as "Sweet Jasmine."

John M. Gardner, for plaintiff.

Dittenhoefer, Gerber & James, for defendants.

LACOMBE, Circuit Judge. There is no direct evidence of copying either language or dramatic situations. As to such indirect evidence as a comparison of the two plays affords, it is sufficient to say that they are wholly dissimilar in plot, in characters, in text, and in dramatic situations. The climax of one act in each piece was principally relied upon in argument, where the unexpected discovery of the title character in a place where she should not be makes a dramatic situation which is presumably helpful to the success of both plays. That is an old device. It was common property of all playwrights when Sheridan employed it in the "School for Scandal." Analyzing the details of that situation as presented in these two plays, the points of essential difference so far outnumber the points of similarity that it is difficult to understand how any one could persuade himself that the one was borrowed from the other.

The motion is denied.

SCRIBNER et al. v. STRAUS et al.

(Circuit Court, S. D. New York. April 22, 1904.)

1. COPYRIGHT—SUIT FOR INFRINGEMENT—PLEADING.

There is such an analogy between actions under the patent laws and actions under copyright laws that like rules of practice should be applied in both classes of cases.

2. SAME—DEFENSES.

That a complainant is a member of an illegal combination, in violation of the anti-trust laws, state or federal, is no defense to a suit for infringement of a copyright.

In Equity. On exceptions to clauses in answers which set up the anti-trust statutes, state and federal.

Stephen H. Olin, for the motion.

John G. Carlisle, opposed.

LACOMBE, Circuit Judge. If, as defendant contends, the bill does not set forth a cause of action under the copyright laws, this court will have no jurisdiction, there not being the requisite diversity of citizenship; and either upon plea or demurrer, or at hearing on bill and answer, or on bill and answer and proofs, the action may be dismissed. That question is not now properly presented, and, assuming that the bill sets forth, as it evidently undertakes to do, a cause of action under the copyright statutes, the exceptions to the parts of the answer specifically indicated appear to be sound. There is such an analogy between actions under the patent laws and actions under copyright laws that like rules of practice should be applied in both classes of cases.

CONSOLIDATED RETAIL BOOKSELLERS v. WARD et al.

(Circuit Court, S. D. New York. April 25, 1904.)

1. PRELIMINARY INJUNCTION—TIME OF APPLICATION FOR.

Unless under special circumstances, a motion for preliminary injunction will not be entertained when complainant has completed testimony for final hearing, leaving defendant to oppose by affidavits only.

In Equity. On motion for preliminary injunction.

George E. Morse, for the motion.

Dittenhoefer, Gerber & James, opposed.

LACOMBE, Circuit Judge. The practice of moving for preliminary injunction when complainant has completed testimony for final hearing, leaving defendant to oppose the motion by affidavits only, should not be encouraged. When defendant's proofs also are complete, application should be on interlocutory hearing, not by motion, so that each side may have equal opportunity to appeal.

Motion denied.

RANKIN v. HEROD.

(Circuit Court, S. D. New York. May 12, 1904.)

1. NATIONAL BANKS—ACTIONS BY RECEIVER—JURISDICTION.

Act Cong. March 3, 1875, c. 137, 18 Stat. 470, provides that the United States Circuit Courts shall have jurisdiction of suits in equity, where the matter in dispute exceeds \$500, arising under the Constitution or laws of the United States. By Act March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 514], the limit of jurisdiction was raised to \$2,000; but the act provided that such section should not be held to affect the jurisdiction of the courts of the United States in cases commenced by direction of any officer thereof, or cases for winding up the affairs of any national bank. *Held*, that the word "section," as used in the act of 1887, should be construed to refer to the entire act, and therefore such act did not deprive United States Circuit Courts of jurisdiction of a suit in equity brought by a receiver of a national bank, where the amount involved exceeded \$500, of which the court had jurisdiction under the former act.

Carter, Hughes, Rounds & Schurman (William Alden Smith and Taggart, Denison & Wilson, of counsel), for complainant.

Charles H. Sherrill (Herod & Herod, of counsel), for defendant.

HOLT, District Judge. As the amount demanded in the complaint is less than \$2,000, this court has no jurisdiction under the general provisions of the act of March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 514], conferring jurisdiction in cases where the matter in dispute exceeds \$2,000, arising under the Constitution or laws of the United States, or in which there shall be a controversy between citizens of different states. By the original national bank act and the Revised Statutes, a receiver of a national bank has, and has always had, authority to sue in an action at common law in the United States Circuit Court, without regard to the amount involved, on the ground that he is an officer of the United States. Rev. St. U. S. § 629, subd. 3 [U. S. Comp. St. 1901, p. 503]. The United States Circuit Court had originally jurisdiction of suits in equity brought by a receiver of a national bank, under Rev. St. U. S. § 629, subd. 10 [U. S. Comp. St. 1901, p. 505]. *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476. By the act of March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508], the United States Circuit Courts were given jurisdiction of suits in equity where the matter in dispute exceeded \$500, arising under the Constitution or laws of the United States. A suit brought by a receiver of a national bank is such a suit, and more than \$500 is involved in this case. This suit therefore may be maintained under the act of March 3, 1875, unless its provisions have subsequently been repealed. The act of July 12, 1882, c. 290, 22 Stat. 162 [U. S. Comp. St. 1901, p. 3457], provided that the jurisdiction for suits thereafter brought by or against national banks should be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States; but this provision, in my opinion, did not repeal the existing law authorizing suits by receivers of national banks to be brought.

¶ 1. Actions by and against receivers and agents of national banks, see note to *McCartney v. Earle*, 53 C. C. A. 398.

Hendee v. Connecticut & P. R. R. Co. (C. C.) 26 Fed. 677. The act of March 3, 1887, raised the limit of jurisdiction in suits arising under the Constitution or laws of the United States from \$500 to \$2,000. This, standing alone, would deprive this court of jurisdiction in this case; but the fourth section of that act provides that national banking associations shall be deemed citizens of the state in which they are located, and that the United States courts shall not have jurisdiction over them, other than such as they would have in cases between individual citizens of the same state, and then adds:

"The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States, or by direction of any officer thereof, or cases for winding up the affairs of any such bank." 24 Stat. 554, c. 373 [U. S. Comp. St. 1901, p. 514].

I think that the word "section" should be construed to refer to the entire act, and that this court, therefore, under this provision, still has jurisdiction of a suit in equity brought by a receiver of a national bank, if the amount involved exceeds \$500, under the act of March 3, 1875.

The other ground of demurrer alleged—that two causes of action are improperly joined in the complaint—has not been discussed in the defendant's brief or on the oral argument, and appears to be abandoned. In any event, I think it is untenable.

My conclusion is that the demurrer should be overruled, with leave to the defendant to answer within 20 days upon payment of costs.

BAER v. UNITED STATES.

(Circuit Court, S. D. New York. December 16, 1903.)

No. 3,218.

1. CUSTOMS DUTIES—CLASSIFICATION—FLITTERS—BRONZE POWDER.

So-called flitters, which are produced by hammering metal clippings into minute flakes, and are used on wall paper, are not dutiable as bronze powder, under paragraph 175, Tariff Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 165 [U. S. Comp. St. 1901, p. 1644], nor as a color or pigment, under paragraph 58 of said act, § 1, Schedule A, 30 Stat. 154 [U. S. Comp. St. 1901, p. 1630], but as manufactures of metal, under paragraph 193 of said act, § 1, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645].

Application to Review a Decision of the Board of General Appraisers.

The decision in question was that in the case of *In re Baer, G. A. 4,941*, T. D. 23,112, which affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Baer Bros. Note *Meier v. United States* (C. C.) 128 Fed. 472. The opinion of the Board of General Appraisers reads as follows:

FISCHER, General Appraiser. The merchandise in question consists of so-called flitters. Duty was assessed thereon at the rate of 45 per cent. ad valorem, under the provisions of paragraph 193 of the act of July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645]. It is claimed to be dutiable at the rate of 12 cents per pound under the provisions of paragraph 175, c. 11, § 1, Schedule C, 30 Stat. 165 [U. S. Comp. St. 1901, p. 1644].

as bronze powder, or at the rate of 30 per cent. ad valorem, under provisions of paragraph 58, c. 11, § 1, Schedule A, 30 Stat. 154 [U. S. Comp. St. 1901, p. 1630], as a pigment or color.

The process of manufacture of the article is described by one of the importers' witnesses as follows: "After the metal has been smelted and is in sheet form, it is cut up into clippings; and after the metal, in the shape of clippings, is under the hammer for about an hour or so, we get flitters; and, if the clippings are kept under the hammer five or six hours longer, then we get bronze powder." Its manner of use is thus described by the same witness: "The principal uses of flitters are by wall paper manufacturers—window shade manufacturers. They would put on a size first, and afterward brush on the flitters. * * * The size is applied first, and afterward the flitter is brushed upon it in the following manner: The wall paper will pass under a certain box, and the box will contain the flitters, with a big brush, and the wall paper strikes the brush, and the flitters are dusted or brushed on." When asked if these flitters are ever mixed with oil or water before they are used, the witness answered that it was not feasible. He stated, also, that flitters were used in the dried condition only.

From this testimony it is clear that, while subsequent manufacture might convert the flitters into bronze powder, they are not bronze powder in the condition imported. It is also clear, from the testimony quoted, that the articles cannot be used as a pigment or color, but must be used in a manner similar to that of applying metal leaf.

We accordingly find (1) that flitters are not bronze powder; (2) that they are not a color, nor susceptible for use as a color.

The protests are overruled, and the decisions of the collector affirmed.

Howard T. Walden, for the importers.

D. Frank Lloyd, Asst. U. S. Atty.

Before PLATT, District Judge.

At the close of the argument, the court affirmed the decision of the board, without opinion.

KRAUT v. UNITED STATES.

(Circuit Court, S. D. New York. December 17, 1903.)

No. 3,335.

1. CUSTOMS DUTIES—CLASSIFICATION—PRINTED PAPER BAGS—MANUFACTURES OF PAPER—PRINTED MATTER.

Paper bags with incidental printing thereon are not "printed matter," within the meaning of paragraph 403, Tariff Act July 24, 1897, c. 11, § 1, Schedule M, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], but are dutiable as "manufactures of paper," under paragraph 407 of said act, § 1, Schedule M, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673].

On Application to Review a Decision of the Board of General Appraisers.

These proceedings were brought by Adolph Kraut, an importer, to review a decision of the Board of General Appraisers, which affirmed the assessment of duty by the collector of customs at the port of New York. The opinion of the board, so far as pertinent to the question raised in this case, reads as follows:

FISCHER, General Appraiser. The merchandise in question consists of (1) paper bags. * * * Duty was assessed as follows: On the paper bags at the rate of 35 per cent. ad valorem, under paragraph 407 of the act of 1897, c. 11, § 1, Schedule M, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], as manu-

factures of paper. * * * The importer claims that said merchandise is properly dutiable * * * at the rate of 25 per cent. ad valorem, under paragraph 403, § 1, Schedule M, 30 Stat. 189, c. 11 [U. S. Comp. St. 1901, p. 1673]. We find from the evidence and samples before us, as follows: First. That the paper bags are manufactures of paper properly dutiable at the rate of 35 per cent. ad valorem, under paragraph 407. The fact that such bags have had printed matter thereon will not make them dutiable under paragraph 403. The articles are paper bags, and have become, by a process of manufacture, a distinct article for use as such, and the printing thereon is merely incidental thereto and not a controlling feature. * * * The protests are accordingly overruled as to the articles enumerated in our first finding. * * *

Howard T. Walden, for importer.
Charles D. Baker, Asst. U. S. Atty.
Before PLATT, District Judge.

At the close of the argument the court affirmed the decision of the Board of General Appraisers on the opinion of the board.

DOWNING v. UNITED STATES.

(Circuit Court, S. D. New York. December 16, 1903.)

No. 3,363.

1. CUSTOMS DUTIES—CLASSIFICATION—BOOKS IN FOREIGN LANGUAGES—UNBOUND PORTFOLIOS.

Held, that the provision in paragraph 502, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 196 [U. S. Comp. St. 1901, p. 1681], for "books and pamphlets printed exclusively in languages other than English," includes certain portfolios of two kinds, made up of loose sheets not intended to be bound together in book form, and containing, respectively, 19 and 24 sheets of pictures and prints, and accompanied, respectively, with 4 and 12 loose pages printed in foreign languages; each portfolio having a loose outside covering, bearing the title of the work.

Application to Review a Decision of the Board of General Appraisers.

The decision in question affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by R. F. Downing & Co. The nature of the questions at issue appears from the opinion of the board, which reads as follows:

FISCHER, General Appraiser. The merchandise in question consists of portfolios made up of loose sheets of printed matter, photogravures, and lithographic prints. In the portfolio entitled "Palast-Architektur von Ober-Italien und Toscana," there are four loose pages of print in foreign languages, twelve loose sheets of photogravure pictures of Italian palaces, and seven loose sheets of lithographic prints representing the architectural detail thereof. In the portfolios entitled "Die Mustergiltigen Kirchenbauten des Mittelalters in Deutschland," there are twelve loose pages of print in the German language, eight loose sheets of photogravure pictures of church edifices, and sixteen loose sheets of lithographic prints representing the architectural detail of the same. Both portfolios are covered by a loose outside covering of paper, bearing the titles above mentioned.

The importers claim that the assessment of duty on the articles under paragraph 403 of the act of July 24, 1897, § 1, Schedule M, 30 Stat. 189, c. 11 [U. S. Comp. St. 1901, p. 1673], at the rate of 25 per cent. ad valorem, as printed matter, or under paragraph 400, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1672],

as lithographic prints, was erroneous, and that the merchandise is entitled to free entry under paragraph 502, § 2, Free List, 30 Stat. 196 [U. S. Comp. St. 1901, p. 1681], as books printed exclusively in a foreign language. The portion of paragraph 502 upon which the importers rely provides as follows: "Books and pamphlets printed exclusively in languages other than English." It is unnecessary to discuss the question whether these articles are publications printed exclusively in a language other than English, for, even if they be such, they are clearly not books. They are loose sheets, apparently not intended to be bound or fastened together in book form. They are portfolios or collections of pictures, and do not fall within the provisions of paragraph 502 at all. The protests are accordingly overruled, and the decisions of the collector affirmed. Note G. A. 4,970 (T. D. 23,194).

W. Wickham Smith, for importers.

Henry C. Platt, Asst. U. S. Atty.

Before PLATT, District Judge.

At the close of the argument the decision of the Board of General Appraisers was reversed, without opinion, on the authority of *Macmillan Company v. United States* (C. C.) 116 Fed. 1018, and *Read v. Certain Merchandise*, 103 Fed. 197, 43 C. C. A. 178.

MARTIN v. NEW TRINIDAD LAKE ASPHALT CO., Limited.

(Circuit Court, S. D. New York. May 2, 1904.)

1. FOREIGN CORPORATIONS—SERVICE OF SUMMONS.

A court does not acquire jurisdiction of a foreign corporation by service of summons on its officers or directors in a state where it is not doing business and has no office.

On Motion to Set Aside Service of Summons.

Niles & Johnson, for plaintiff.

Kellogg & Rose, for defendant.

COXE, Circuit Judge. The referee finds that at the date of the service of the summons the defendant was not doing business in the state of New York, and had no office for the transaction of business therein. These findings are fully justified by the proofs.

The report of the referee is confirmed and the motion to set aside service of the summons is granted. *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113.

¶ 1. Service of process on foreign corporations, see note to *Eldred v. American Palace-Car Co.*, 45 C. C. A. 3.

See Corporations, vol. 12, Cent. Dig. § 2613.

CRAWFORD v. ILLINOIS CENT. R. CO. et al.

(Circuit Court, W. D. Kentucky. March 29, 1904.)

1. REMOVAL OF CAUSES—FRAUDULENT JOINDER OF DEFENDANT TO PREVENT REMOVAL.

The right of removal cannot be defeated by the joinder of a resident with a nonresident defendant, even though a joint cause of action is alleged, where the court finds as a fact that the averments on which the joint liability is asserted are palpably untrue, and were not made in good faith, but for the sole purpose of preventing a removal, and in fraud of the jurisdiction of the federal court.

On Motion to Remand to State Court.

S. M. Payton, for plaintiff.

Pirtle, Trabue, Doolan & Cox, for defendants.

EVANS, District Judge. The defendant the Illinois Central Railroad Company, a citizen of Illinois, has removed this case from the state court, where it was commenced, into this court, upon the ground that its codefendant, Joseph Warren, a citizen of Kentucky, and the engineer in charge of its train when plaintiff's intestate was injured, was joined as a defendant for the sole purpose of preventing the removal of the action to this court. The plaintiff has moved the court to remand the case. Upon the issue thus raised we have heard the evidence, and have reached the conclusion that whether or not, under the Constitution and laws of Kentucky, there exists a technical right to sue the defendants jointly, yet that in point of fact the defendant Warren was joined for the sole purpose of preventing a removal to this court; and the court finds further from the evidence that the averments of fact on which the joint liability is asserted are so palpably untrue and unfounded as to make it improbable that the plaintiff could have asserted them in good faith. This brings the case within the opinions of the Circuit Court of Appeals for this circuit in the cases of *Hukill v. Maysville, etc.*, R. R. Co. (C. C.) 72 Fed. 747, and *Warax v. Cincinnati, etc.*, R. R. Co. (C. C.) 72 Fed. 637. It would, indeed, be discreditable to the judicial acumen if it could be deceived by a claim so palpably unfounded as that Warren was joined with any expectation of a recovery against him.

It is urged, as is usual in such cases, that in many opinions the Supreme Court has held that the motive of a plaintiff cannot be inquired into if a pleading shows a case apparently within his legal rights; but it will be remembered that each of those decisions plainly recognized an exception to the rule, namely, cases where it is alleged and proved that the joinder was made for the sole purpose of preventing a removal, thus attempting to defraud the jurisdiction of the court, and thereby prevent a removal, to which the citizen of another state would otherwise be clearly entitled. *Kansas City Suburban Ry. Co. v. Herman*, 187 U. S. 70, 23 Sup. Ct. 24, 47 L. Ed. 76; *C. & O. Ry. Co. v. Dixon*, 179 U. S. 135, 138, 21 Sup. Ct. 67, 45 L. Ed. 121; *L. & N. R. R. v. Wangelin*, 132 U. S. 601, 10 Sup. Ct. 203, 33 L. Ed. 473; *Plymouth*,

¶ 1. See Removal of Causes, vol. 42, Cent. Dig. § 79.

etc., *Co. v. Amador, etc., Co.*, 118 U. S. 270, 6 Sup. Ct. 1034, 30 L. Ed. 232; Black's Dillon on Removal of Causes, § 76. Such a right cannot be defeated by a fraud, either clumsily or ingeniously contrived. The cases of *Gustafson v. Chicago, etc., Ry. Co.* (C. C.) 128 Fed. 87, and *Shaffer v. Union Brick Co.* (C. C.) 128 Fed. 97, are much in point.

It follows that the motion to remand this action to the state court must be, and it is accordingly, overruled.

THORNTON N. MOTLEY CO. v. DETROIT STEEL & SPRING CO. et al.

(Circuit Court, S. D. New York. May 12, 1904.)

1. EQUITY PLEADING—MULTIFARIOUSNESS.

A bill against two defendants which joins a cause of action at law against one defendant for breach of a contract with one in equity against both defendants for conspiracy to deprive complainant of the benefit of such contract is demurrable on the ground of multifariousness.

2. REMOVAL OF CAUSES—SUIT IN EQUITY—REDRAFTING PLEADINGS.

On removal of an equitable cause, the complaint or bill should be redrafted to conform to the equity practice in the federal courts.

In Equity. On demurrer to bill.

Luce & Davis, for complainant.

Butler, Notman, Joline & Mynderse, for defendant Detroit Steel & Spring Company.

Simpson, Thacher, Barnum & Bartlett, for defendant Railway Steel Spring Company.

HOLT, District Judge. I think that the complaint in this suit is multifarious. The allegations are not very clear or concise, and it is somewhat difficult to ascertain the exact grounds of the action. But as I understand the complaint, in the first cause of action a claim at law is alleged or attempted to be alleged against the Detroit Company for damages for its breach of an alleged contract between the Detroit Company and the plaintiff, made November 18, 1901, whereby the Detroit Company constituted the plaintiff its sole agent for the sale of certain articles in a certain territory until November 18, 1902. In the second cause of action, a claim in equity is alleged, or attempted to be alleged, against both defendants for conspiracy to deprive the plaintiff of the benefit of the contract. In other words, one cause of action is against one defendant at law, and the other cause of action is against both defendants in equity. In my opinion, for these reasons the bill is multifarious, and the demurrer should be sustained, with leave to the plaintiff to amend the complaint within 20 days on payment of costs. The bill in any case, I think, should have been redrafted, on removal, in order to make it conform to the equity practice in the federal courts.

CITY OF NEW YORK v. NEW YORK & E. R. FERRY CO.

(District Court, S. D. New York. May 11, 1904.)

1. COLLISION—STEAMBOAT AND FERRYBOAT—STEAMBOAT TOO CLOSE INSHORE.

A steamboat proceeding through Hell Gate from Hart's Island to New York held in fault for a collision with a ferryboat which had just left her slip at Astoria on her trip to Ninety-Second street, New York, on the ground that she was proceeding too close to the shore, and for want of a lookout; also for not keeping her course as required under the starboard-hand rule.

2. SAME—RIGHT OF FERRYBOAT TO SPACE FOR MANEUVER IN LEAVING SLIP.

A ferryboat is entitled to the space requisite for her proper maneuver in leaving as well as entering her slip.

In Admiralty. Suit for collision.

John J. Delany and E. Crosby Kindleberger, for libellant.
James J. Macklin, for respondent.

ADAMS, District Judge. This action was brought by the City of New York to recover damages caused to its steamboat Fidelity, by collision in Hell Gate, with the ferryboat Steinway, owned by the respondent, on the 22nd day of October, 1903, about 12:30 P. M. The Fidelity was proceeding through the Gate from Harts Island to New York, intending to go through the channel on the west side of Blackwells Island. The Steinway was making a trip from her slip on the Astoria shore to the foot of 92d Street, New York. The collision occurred about 400 feet above the ferryboat's slip and from 100 to 200 feet off the Astoria shore, the port bow of the Steinway coming in contact with the port bow of the Fidelity. The day was clear. The tide, at the time of collision, had been running ebb a little over an hour.

The Fidelity was pursuing a course close to the Astoria shore intending to stop at Blackwells Island on the west side. She was seen by the Steinway, as the latter moved out of her slip, under a hard-a-port wheel, fastened in a becket. The Steinway blew a signal of one blast to the Fidelity, indicating an intention to pass under the latter's stern. This signal, however, was supposed by the Fidelity to be intended for another tug in the vicinity, the Stone, which was towing two scows on a hawser through the Gate to the westward. She was about 500 feet outside of the Fidelity and as much further down the river. The Stone also supposed the signal was for her and replied. The Steinway then slowed down and blew another signal of one blast to the Fidelity, which the latter recognized as being intended for her. She did not reply but shortly afterwards blew alarm signals and stopped and reversed. The Steinway also stopped and reversed but the collision ensued, doing the damage to the Fidelity which is complained of. The Steinway was practically stopped at the time of the collision, but the Fidelity had not overcome her headway entirely.

The trouble arose through the Fidelity's too close navigation to the Astoria shore and through her failure to have a lookout properly stationed and attending to his duties. For the latter reason, the Steinway was not seen by the Fidelity until too late and then instead of keeping her course, which would probably have avoided the collision, the latter

starboarded her wheel, intending to pass under the Steinway's stern. Then seeing the latter's intention to pass inside, the Fidelity ported, which, with the reversing, presented her port side slightly to the Steinway. The Fidelity was in fault in the respects indicated.

It is contended by the Fidelity that the Steinway, after leaving her slip, went outside of the Fidelity and then got nearer the Astoria shore again by making a half circle. The preponderance of the testimony shows that the Steinway did not get outside of the Fidelity's course, but even if she did, it was obvious that she was swinging up the river all the time and intending that the Fidelity should pursue her course and that she, the Steinway, in fulfilling her duty, under the starboard hand rule, should pass inside. Such theory of the case instead of convicting the Steinway of a fault, places another one upon the Fidelity for her failure to keep her course. Moreover, apart from the starboard hand rule, the Steinway was entitled, as a ferryboat, to the space requisite for her proper manœuvre in leaving, as well as entering, her slip. The John S. Darcy (D. C.) 29 Fed. 644, 647; The Breakwater, 155 U. S. 252, 262, 15 Sup. Ct. 99, 39 L. Ed. 139. The Fidelity's change to port deprived the Steinway of the space required for her usual and necessary swing. The Fidelity's manifest fault sufficiently account for the collision.

Libel dismissed.

VON VOIGHT v. MICHIGAN CENT. R. CO.

(Circuit Court, S. D. New York. May 11, 1904.)

1. JURISDICTION OF FEDERAL COURTS—ALLEGATION OF FOREIGN CITIZENSHIP.

An allegation that plaintiff is a citizen of the British Empire is not a sufficient allegation that he is an alien, and a citizen or subject of some one foreign state, for the purpose of conferring jurisdiction on a federal court in a suit against a citizen of a state.

2. SAME—DISTRICT OF SUIT—WAIVER OF OBJECTION.

The right of a defendant to be sued in the district of which he is a resident is not strictly jurisdictional, but is a personal privilege, which may be waived, and which is waived by a general appearance.

On Demurrer to Complaint.

James Donovan, for plaintiff.

Edwin D. Worcester, Jr., for defendant.

HOLT, District Judge. The allegation that the plaintiff is a citizen of the British Empire is not a sufficient allegation that the plaintiff is an alien, and the subject or citizen of some one foreign power. *Stuart v. Easton*, 156 U. S. 46, 15 Sup. Ct. 268, 39 L. Ed. 341; *Rondot v. Township of Rogers*, 79 Fed. 676, 25 C. C. A. 145. If the complaint had properly alleged that the plaintiff was an alien, the court, in my opinion, would have jurisdiction. The defendant, being a corporation organized under the laws of Michigan, could object

¶ 1. Averments of citizenship to show jurisdiction of federal courts, see note to *Shipp v. Williams*, 10 C. C. A. 261.

¶ 2. See Appearance, vol. 3, Cent. Dig. § 114; Venue, vol. 48, Cent. Dig. § 49.

to being sued in this district; but the right to be sued in the district of which it is a resident is not strictly jurisdictional, but is a personal privilege, which can be waived. *St. Louis, etc., Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659. I think it was waived by a general appearance.

My conclusion is that the demurrer should be sustained, with leave to plaintiff to amend within 20 days upon payment of costs.

THE GANOGA.

(District Court, S. D. New York. May 12, 1904.)

1. TOWAGE—LIABILITY OF TUG FOR SINKING OF TOW—NEGLIGENT MAKING UP OF TOW.

A tug crossing from Jersey City to East river, during a strong breeze from the southeast, with a tow consisting of six scows and canal boats on hawsers, arranged in two tiers, *held* liable for the loss of a canal boat laden with coal, which was in the center of the front tier, on the ground of negligence, in view of the condition of the sea, in so making up the tow as to subject the canal boat to being filled by water thrown on her open decks by a light scow on her starboard and rear, which also struck and injured her; and also for not landing the canal boat, on request of her master, when the danger became apparent.

In Admiralty. Suits against tug for loss of tow and cargo.

Wilcox & Green, for libellants.

Robinson, Biddle & Ward and W. S. Montgomery, for claimant.

ADAMS, District Judge. The first of the above entitled actions was brought by Thomas Herbert, owner of the canal boat John T. Hawkes, to recover for her loss through alleged negligent towing, on hawsers, by the steamtug Ganoga, belonging to the Easton & Amboy Railroad Company, on the 22nd day of July, 1903. The boat sank off the Staten Island ferry slip, at the foot of Whitehall Street, New York. John Tracy, the master of the boat was also a libellant in the first action to recover the value of his personal effects, alleged to have been lost at the time. The second action was brought by the owners of the cargo of coal to recover for its loss.

The Hawkes was one of six boats composing the tow, which was made up at the Packer Dock, foot of Morris Street, Jersey City, and bound for points in the East River. The boats were two large scows, a box and three canal boats, all loaded excepting one of the scows. They were arranged in two tiers of three boats each, the Hawkes being the middle boat of the hawser tier. The box, about 60 feet long, was on her starboard side and one of the scows on her port side. There was a light scow, about 12 feet out of the water, on the starboard side of the other tier, which lapped the starboard quarter of the Hawkes.

There were two hawsers from the tug, running from her stern bitts to the outside boats of the first tier, the scow Derringer and the box Curtis. The light scow, astern of the box, was called the Marion. She was partly made fast to the Hawkes.

At the time of starting between 1 and 2 o'clock, there was a south-east breeze blowing at the rate of from 21 to 25 miles an hour. The tow proceeded across the river, turning up somewhat towards Liberty Street on the New York side, and then turned to go around the Battery. The tide was ebb and the river was quite rough from the effect of the wind. Water was taken in by the Hawkes and when the tow got opposite the ferry slip, she sank and became a total loss, with her cargo and the captain's effects.

The libellants allege negligence:

"1. In making up said tow improperly by placing the Hawkes in the first tier; also, in that the space between the box and the scow hereinbefore mentioned permitted the wash of said boats to enter the 'Hawkes', also, in that the said scow was permitted to strike and bump against the 'Hawkes.'

2. In starting out with her tow in the face of the weather conditions then prevailing, when it was apparent that the safety of her tow would be endangered.

3. In keeping on when it was apparent that she was thereby endangering the safety of her tow.

4. In not landing the said canal boat as the master requested and prudence required after it began to fill."

The claimant denies any negligence and alleges that the accident was due to the age and unseaworthy condition of the boat.

The testimony sustains the libellants' charges, but there is nothing to establish the defense, beyond the fact that the Hawkes was quite an old boat. She was, however, in a fair condition, with about 20 inches of freeboard amidships and free from water when she started. It is probable that she would have escaped loss, as did the other boats, if it had not been for her position in the tow, which subjected her to being filled with water thrown into her open deck by the Marion, which also broke her fenders and injured her somewhat by contact. A plank was started and some water thus admitted into the hold. There was an open space of about 25 feet on the Hawkes' starboard side between the stern of the Curtis and the bow of the Marion, and when the latter pounded in the sea, she threw the water into the Hawkes, which was about 25 tons short of a full cargo of coal and she must have taken in more than that much water. In the two ways, the greater portion doubtless by the latter, she took in enough water to cause the sinking.

I do not find that the Hawkes participated in the negligence in any way. The master protested against the towing under the circumstances and the manner of making up the tow. He did all the pumping he could and requested that his boat be taken out of the tow, but was overruled by the master of the tug in all respects.

Decrees for the libellants, with orders of reference.

FIRST NAT. BANK OF NASHVILLE v. NATIONAL SURETY CO.

(Circuit Court of Appeals, Sixth Circuit. May 9, 1904.)

No. 1,250

1. APPLICATION OF PAYMENTS—RIGHTS OF SURETY—INDEMNITY INSURANCE FOR SPECIFIC TERM.

Defendant, a surety company, executed a bond to plaintiff bank by which it undertook, for the term of one year, to indemnify plaintiff against loss sustained by the dishonesty of employes. Action was brought thereon to recover for loss alleged to have occurred during the term through the action of a bookkeeper in falsifying the account of a depositor so as to increase his apparent credit balance, by which he was enabled to and did overdraw his account to a large amount. Such false entries and overdrafts continued through four years, but defendant's bond covered only about three months of the last part of the bookkeeper's employment, there having been bonds with different sureties covering a portion at least of the previous time. The depositor's account was the ordinary running account, subject to check, and continuous during all the time, and no application of deposits to any particular item of debit was made by either party, nor by implication, there having at no time been an overdraft as shown by the books. The false entries and overdrafts continued for a part of the time after defendant's bond went into effect, but subsequent deposits made prior to the time the bookkeeper's employment terminated exceeded the checks paid during the same time in an amount greater than such overdrafts. *Held*, that the ordinary rule in such cases between debtor and creditor, that payments should be appropriated to the oldest item of indebtedness, could not be applied as against a surety whose obligation covered a distinct portion of the time during which the account was running, but that as between plaintiff and defendant all deposits made during the currency of the bond would be applied by the court to the debit items made during the same time, and, it appearing that they exceeded the sums drawn out, there was no loss to the bank during the term for which defendant was liable.

2. SAME—DISTINCT BONDS FOR DIFFERENT TERMS.

When there are different bonds given by a bank official, covering different periods of time, with different sureties, an unappropriated payment made by the common principal is not to be always applied by the court to the oldest obligation. Regard must be had to the responsibility of the different sureties, as limited by the period for which they respectively contract, as well as to the injustice that would ensue if collections received under one obligation are applied to the discharge of a liability under a preceding or succeeding term, with distinct sureties.

In Error to the Circuit Court of the United States for the Middle District of Tennessee.

Walter Stokes and James C. Bradford, for plaintiff in error.
Granbery & Trabue, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, delivered the opinion of the court.

This was an action by the First National Bank of Nashville, Tenn., against the National Surety Company, on a bond of indemnity made by the latter company, to recover a loss sustained through the dishonest conduct of one W. W. Lea, an individual bookkeeper in the service of the bank. Upon the pleadings and evidence Judge Clark directed a verdict for the surety company.

By the bond the surety company agreed to pay to the bank "the amount of any loss or damage that shall happen to the employer, in respect of any funds, property or estate belonging to or in the custody of the employer, through the dishonesty of any of the employees, or through any act of omission or commission of any of the employees, done or omitted in bad faith, and not through mere negligence, incompetency, or any error of judgment," etc. The bond covered a number of the bank's employes, of whom W. W. Lea was one. Lea was the bookkeeper, and kept the individual ledger containing accounts of those depositors the initial letters of whose names were one of the letters of the alphabet from A to K, inclusive. Among those depositors whose accounts were kept by him was the mercantile firm of Connor & Brady. This firm did business with the plaintiff for a number of years. Their account was what is called an "active" one, and almost daily deposits were made and checks drawn thereon. Lea neither received nor paid out any money. Deposits were paid to the receiving teller, who, during same day, turned over to the assistant teller memoranda of the deposits called "deposit slips." A list of these was made out by the assistant teller, which was handed to the individual bookkeepers, who entered therefrom, on a book called the "scratcher," the amount of each deposit and the name of the depositor. Checks were paid by the paying teller, who, after payment, turned same over to the assistant teller, who, after making a list of them, handed them to the individual bookkeepers. The latter then entered them on the scratcher. At the close of each day the individual bookkeepers transferred from the scratcher to the individual ledgers the deposits and checks thus recorded thereon. This ledger should therefore show deposits and checks corresponding with the entries made on the scratcher. The account of each customer was balanced at the end of each day, and, if properly kept, showed the precise condition of the depositor's account after crediting each deposit and charging each paid check. The account of Connor & Brady was in this way kept by Lea. There was evidence tending to show that in the interest of Connor & Brady, and for the purpose of defrauding the bank, the account of that firm was falsified in three distinct ways, the object being to give Connor & Brady fictitious credit balances against which they could draw. One of the methods was to post from the scratcher a larger deposit than shown. To illustrate: On July 2, 1900, the firm deposited \$503.70, which was honestly entered by Lea on the scratcher from the deposit slips handed him by the assistant teller. In posting this to their account on the individual ledger, this deposit was entered as \$1,503.70. Another method was by charging a check as for a less amount than shown by the scratchbook entry. Thus, on June 29, 1900, checks drawn by them were paid which aggregated \$631.10, and were properly entered on the scratcher, but posted in their ledger account as \$331.10, thus increasing their credit balance by \$300. A third method was by false extensions of footings and balances. An example is this: On May 7, 1900, by false additions, their credit balance was increased \$1,000. This system of false entries was begun and continued for nearly five years, and on May 1, 1900, Connor & Brady had overdrawn their account \$50,029, although the account on the ledger did not show

any overdraft at all, in consequence of the skill with which fictitious credits had been given them through Lea's methods. Detection had been successfully avoided by methods not necessary to state, and on May 1, 1900, Lea bore an untarnished reputation, and was so represented for the purpose of securing the bond now in suit, which went into force, as of that date, for the term of one year. For the loss which had or might be sustained as a consequence of Lea's dishonest methods prior to the currency of this bond, it is not sought to hold the appellee responsible. For the two years preceding May 1, 1900, a bond with a different surety had been in force, and during that term of two years it is shown that Connor & Brady had increased their overdraft by about \$21,000, and for that loss a claim was made against the surety company responsible. This suit is for the loss incurred through the continuance of Lea's dishonest practices during the currency of the bond made by the National Surety Company.

The contention is that, through false entries made after May 1, 1900, the credit balance of Connor & Brady was fraudulently increased to the extent of \$3,384.71, and that for this amount the surety company is liable. Lea neither received nor paid out a dollar of the bank's money. He was only a bookkeeper, and his dishonesty consisted only in so falsifying the account of Connor & Brady as to enable that firm to overdraw its account. The mere fact that Lea fraudulently increased the balance in favor of Connor & Brady by any of the methods described is not enough to fasten responsibility upon his surety. The bond is to indemnify the bank against any "loss" through his dishonesty. It follows, therefore, that unless Connor & Brady, through Lea's fraudulent practices, did draw out more money by check than they deposited, no loss would be shown. Now the plaintiff says that this is just what did occur, and that Connor & Brady did draw out \$3,384.71 more than they deposited. And so it was shown that between May 1, 1900, and July 16, 1900, the checks drawn by Connor & Brady and paid by the bank exceeded their deposits by \$3,384.71. If the account had then been closed and Connor & Brady did not make this overdraft good, a case of a "loss" under the bond would be made out. But the defendant says the account was not then closed, and that Connor & Brady continued to make deposits and draw checks, and that by August 6, 1900, their aggregate deposits after May 1, 1900, had exceeded their checks by more than \$500, and that, when the account was finally closed by the bankruptcy in November of 1900, their excess of deposits over checks was more than \$10,000, and that the bank did not, after the bond went into effect, sustain any loss by reason of Lea's practices.

During what period of this time was the bond operative as an indemnity? The term contracted for was one entire year. But it was evidently subject to termination by the discontinuance of Lea's services, for in that event there would be no one upon which it could operate. On July 16, 1900, Lea was given a two-weeks vacation, in pursuance of a general custom of the bank, during which his salary went on. He was due to return August 1st. He did not return then or at any other time. Whether his vacation was extended does not appear. No reason for suspecting his books was entertained when he went

away, and the testimony of Mr. Watts, the cashier of the bank, was that between August 8 and 12, 1900, it was ascertained that his books "were out of balance with the general ledger, and thereupon an expert was put upon the books to ascertain whether or not this information was the result of fraud and dishonesty upon the part of Lea." That the bank did not regard Lea as out of its service prior to this discovery is clear, for as late as August 17th the cashier wrote to the surety company, saying, among other things:

"Mr. Lea left our offices recently to take his vacation under custom recently adopted and has not yet returned. There is a chance for his accounts to be irregular and we are now beginning an investigation."

He was absent on leave, and with salary, up to August 1, 1900. Manifestly his employment continued up to that date. The account exhibited shows that up to July 26th there was a gain in deposits over checks paid of \$1,767.75, and the cashier testifies that by August 6th the deposits exceeded checks by more than \$500. There was no suspicion as to the correctness of Lea's books before August 8th, and no reason for regarding his employment as ended until his absence beyond his leave was explained by discovery of his frauds. We therefore conclude, as an inference of law and fact, that his employment did not terminate prior to the discovery of facts casting suspicion upon his books. The bond was therefore in force at least up to August 6, 1900, at which date the deposits during its currency exceeded checks drawn and paid during same period.

Now, if we are to segregate the account of Connor & Brady during that period beginning May 1, and ending August 6, 1900, no loss resulted from Lea's fraudulent entries, because the deposits during that time exceeded checks drawn against the account. But the bank contends that the account of Connor & Brady shows that on July 16, 1900, it was overdrawn \$3,384.71, and that this overdraft was made possible only by the concealed fraudulent posting of their account by Lea, and that at that date the bank had actually sustained the loss for which it now sues, and that the deposits made after July 16, 1900, should be applied as payments upon the oldest items of overdraft, and not in satisfaction of the overdrafts occurring during the currency of the bond. This presents a question of appropriation of payments of much perplexity. The account of Connor & Brady did not on its face show any overdraft, either before or after the bond in suit went into effect. The deposits made were not made under any special arrangement. The account was the ordinary running banker's account. Deposits were entered on one side as credits and checks, on the other as debits, and by the custom of the bank a balance was struck at the close of each day. This account ran along in this way for years. If the account had been honestly kept, there would have appeared an overdraft of \$50,000 against Connor & Brady on May 1, 1900, and all deposits after that date would, according to the method of keeping such accounts, go in the diminution of the overdraft, in the absence of some other arrangement. But as this overdraft did not appear, the deposits after May 1, 1900, apparently constituted a fund subject to check. Neither did the account as it appeared on July 16th show the overdraft of \$3,384.71, which in fact existed, though concealed by Lea's fraud.

Thus at no time was there even an apparent application of deposits to the payment of an overdrawn account. There was therefore no express or implied appropriation of the deposits made by Connor & Brady by the bank or the depositor to any particular purpose, and counsel for the bank concede that this is a case where "it remains for the law to make the application according to its own notions of justice."

Upon an examination of the decided cases bearing upon the rule which should control a court in making an appropriation when the parties have made none, we confess to a sense of disappointment that the definite principles which should guide a court are so few and subject to so many qualifications. The artificial rules of the civil law have sometimes been applied by American and English courts, but not with such uniformity as to furnish a safe rule of decision. Story, Eq. Jurisprudence, §§ 459c and 459d; *Blackmore v. Granbery*, 98 Tenn. 277, 39 S. W. 229.

The learned counsel for the bank insists that the general rule laid down in many cases, and particularly in *United States v. Kirkpatrick*, 9 Wheat. 720, 737, 6 L. Ed. 199, is applicable here. That rule, as stated by Justice Story in the case referred to, is "that, when there are long and running accounts where debits and credits are perpetually occurring, and no balances are otherwise adjudged than for the mere purpose of making rests, that payments ought to be applied to extinguish the debt according to the priority of time, so that credits are to be deemed payments pro tanto of debts antecedently due." But this rule has many qualifications, and it remains to be seen whether it is applicable under the circumstances of this case. This account was, it is true, a running account. It may also be conceded that the relation of banker and depositor, in the absence of some special arrangement, is that of debtor and creditor, and that when money is deposited it becomes the money of the bank. *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693; *Grissom v. Comm. Nat. Bank*, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669. So, too, checks drawn by a depositor are not drawn against any particular item of deposit theretofore made, but against the account generally, and between banker and depositor the general rule of appropriation of payments is ordinarily applicable.

In *Clayton's Case*, 1 Merivale, Ch. R. 572, 608, a question arose as to the liability of a deceased partner in a banking firm for a balance due to a depositor at his death. But it appeared that while the business was being carried on by the supervising partners the depositor continued to make deposits and draw checks. The question in the case was whether checks so drawn were to be treated as drawn against the more recent deposits or those made before the defendant's death. It was held that the money drawn out was presumably that first put in, and the debt for which the deceased partner was liable thus paid off, leaving the surviving partners alone liable for the balance due the plaintiff. Sir William Grant, among other things, said:

"Presumably it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act

of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has or has not been discharged, by examining whether payments to the amount of the balance appear by the account to have been made? You are not to take the account backward and strike a balance at the head instead of the foot of it."

If this was a case between the bank and its depositor, and the rights of a surety for a limited period of the time covered by the account were not involved, it would be of easy disposition, for in such a case it would be plain that every deposit would be automatically applied to the credit side of the running account, thereby either enlarging the credit balance or diminishing the debtor balance. Every check would presumptively be paid by the first item of deposit, according to the principles of Clayton's Case. But this is not Clayton's Case, and is quite distinguishable from it, by reason of the fact that this is not a question as to the fund out of which a check is presumably paid, but one of the application of deposits, and the more important fact that the rights and equities of a surety for a limited period cannot be ignored when we come to the appropriation of payments. These practices of Lea's ran on for about four years. For the two years preceding the bond in suit he was bonded by a different surety company. Whether he was under bond prior to that time does not appear. If this doctrine of arbitrarily applying every deposit made by Connor & Brady to the oldest item of overdraft is to be followed, it would be difficult to see how any liability could be fastened upon any preceding surety for Lea, for the deposits made during the currency of the last bond were more than enough to discharge any overdraft during the currency of such prior bonds.

That the general rule of applying every unappropriated payment to the oldest item of debt is subject to qualification where the rights and equities of third persons are involved, is the teaching of such cases as *U. S. v. January*, 7 Cranch, 572, 3 L. Ed. 443, *U. S. v. Eckford's Executors*, 1 How. 250, 11 L. Ed. 120, and *Jones v. United States*, 7 How. 681, 12 L. Ed. 870. In *U. S. v. January*, 7 Cranch, 572, 3 L. Ed. 443, it appeared that the supervisor had kept one general account only against a collector who had served two successive terms under two bonds and with different sureties. At the end of his entire service there was a balance due on this general account of \$16,181, for which suits were started on each of the bonds. By terminating the account with the period ending when the second bond was given, it appeared that only \$6,483.59 was then due. The surety upon the first bond claimed that subsequent payments by the collector should be applied in discharge of this the oldest item in the account, and evidence was offered to show that the supervisor had promised to apply such subsequent payments in discharge of the original liability, and the Circuit Judge instructed the jury that whether an entry had been made showing an express application in accordance with this promise was immaterial; that, if he had promised to so apply subsequent payments, the application should be treated as made. The Supreme Court, after stating the general rule in reference to the application of payments, said:

"In this case a majority of the court is of opinion that the rule adopted in ordinary cases is not applicable to a case circumstanced as this is, where the receiver is a public officer, not interested in the event of the suit, and who receives on account of the United States, where the payments are indiscriminately made, and where different sureties, under distinct obligations, are interested. It will be generally admitted that moneys arising due, and collected subsequently to the execution of the second bond, cannot be applied to the discharge of the first bond without manifest injury to the surety in the second bond, and, vice versa, justice between the different sureties can only be done by reference to the collector's books, and the evidence which they contain may be supported by parol testimony, if any, in the possession of the parties interested. The court is of opinion that the Circuit Court erred in the opinion given, and that it be reversed."

In *U. S. v. Eckford's Executors*, 1 How. 256, 11 L. Ed. 120, it appeared that the collector had served three terms under different bonds with different sureties. At the end of the first term a large balance was charged against him arising under the previous term, and at the commencement of the third term a balance was charged against him arising under the second term. Suit was brought upon the second bond, and a question arose as to whether payments made by the collector after his third term had begun should be applied to the discharge of his liability under his bond for the second term. By the system in which the account had been kept by the Treasury Department, all of the sureties except those for the last term would be discharged, inasmuch as the balance due at the end of one term was carried forward as a charge against the succeeding term, and payments subsequently made credited in discharge of the balance so brought forward. This method was defended as being sanctioned by the general rule which permits the debtor or the creditor to appropriate payments, and *Clayton's Case*, 1 Merivale, 606, was much relied upon. But the court said that it did not regard the doctrine applicable, but that the case was governed by *U. S. v. January*, 7 Cranch, 572, 3 L. Ed. 443, different sureties under different obligations being interested. Among other things, the court said:

"The officers of the treasury cannot, by any exercise of their discretion, enlarge or restrict the obligation of the collector's bond. Much less can they, by the mere fact of keeping an account current, in which debits and credits are entered as they occur, and without any express appropriation of payments, affect the right of sureties. The collector is a mere agent or trustee of the government. He holds the money he receives in trust, and is bound to pay it over to the government as the law requires. And in the faithful performance of this trust the sureties have a direct interest, and their rights cannot be disregarded. It is true, as argued, if the collector shall misapply the public funds, his sureties are responsible. But that is not the question under consideration. The collector does not misapply the funds in his hands, but pays them over to the government, without any special direction as to their application. Can the treasury officers say, under such circumstances, that the funds currently received and paid over shall be appropriated in discharge of a defalcation which occurred long before the sureties were bound for the collector, and by such appropriation hold the sureties liable for the amount? The statement of the case is the best refutation of the argument. It is so unjust to the sureties, and so directly in conflict with the law and its policy, that it requires but little consideration.

"If the collector be in default for a preceding term, it is the duty of the Treasury Department to require payment from him and his sureties for that term. To pay such defalcation out of accruing receipts during a subsequent term, even with the assent of the collector, would be a fraud upon the sureties

for such term. The money in the hands of a collector is not his money. Without a violation of his duty, he cannot appropriate it as such. He pays it over in the performance of his duty—the duty which the sureties have undertaken that he shall faithfully perform. And shall the sureties not be exonerated? The collector has done all that they stipulated he should do. How, then, can they be made responsible? It is contended that their responsibility arises, not from the default of the collector, but from the appropriation of his payments by the treasury. This, at least, is a fair result of the doctrine advanced. For, if such appropriation is properly made by the treasury, in payment of a defalcation of the collector before the commencement of a current term, it must follow that the sureties for such term are responsible for the amount thus paid."

In *Jones v. U. S.*, 7 How. 681, 688, 12 L. Ed. 870, it was held that, when a running account is kept at the Post-Office Department between the United States and the Postmaster, in which all postages are charged to him and credit given for all payments made, this mode of keeping the account amounted to an election by the creditor to apply the payments, as they are successively made, to the extinguishment of preceding balances. But the court, referring to the cases we have cited above, said:

"In instances of official bonds executed by the principal at different times, with separate and distinct sets of sureties, this court has settled the law to be that the responsibility of the separate set of sureties must have reference to, and be limited by, the periods for which they respectively undertake by their contract," etc.

It is a mistake to say that these cases decided by the United States Supreme Court are to be regarded as resting upon any peculiar public policy, or that the principle is applicable only to the bonds given by governmental officials. The fundamental idea upon which the cases rest is that the rights and interests of independent sets of sureties for distinct periods of time would be unjustly sacrificed by applying payments arbitrarily to the oldest debt. That the cases all involved public officials and official bonds seems to afford no reason for limiting them to official bonds.

These judgments are undoubtedly in conflict with such cases as *Gwynne v. Barnes*, 7 Clark & F. Rep. H. L. Cas. 571; *New Jersey v. Sooy*, 59 N. J. Law, 539; *Seymour v. Van Slyck*, 8 Wend. 403; *Stone v. Seymour*, 15 Wend. 19; and *Inhabitants of Sandwich v. Fish*, 2 Gray, 298—in all of which cases it seems to have been held that, when an official has held several successive terms under bonds with different sets of sureties, he may apply the revenue arising in one term to the payment of a balance due under a former term, and thus exonerate one set of sureties at the expense of another. Neither does the fact that the official receiving the payment was aware of the source of the money seem to have been regarded as material. In the *New Jersey Case* the injustice of this unqualified right of the debtor to apply a payment as he pleases, and without regard to its effect upon independent sets of securities, is, in part, put upon the ground that to hold otherwise would subject the public to loss by rascally officials whose honesty had been guarantied by the complaining sureties.

State v. Smith, 26 Mo. 226, 72 Am. Dec. 204, has also been cited by counsel for the bank as an authority supporting the general right of an official debtor to supply his payments on any one of two or more

liabilities. But the Missouri court ruled that, if the treasurer receiving the payment knew that the money arose from current collections, the state would not be permitted to so apply it as to do a wrong to the security upon the current bond. This would seem to be a qualification commending itself to the conscience of a court by reason of principles of common honesty. But in the case at bar neither the debtor nor the creditor has made any appropriation, and the deposits made were of the money of the debtor, and unaffected by any equitable charge in favor of either set of sureties, or the bank as the debtor. It was therefore quite within the general rule that Connor & Brady should have the right to apply their deposits to any debt due by them to the bank. But they made no appropriation whatever, and the right and duty of regarding the rights of successive sets of sureties, when the court is called upon to make an appropriation, is conceded in the cases which maintain most strongly the debtor's right to apply his payments without regard to the source of the money or the rights of sureties. Thus, in *Seymour v. Van Slyck*, 8 Wend. 404, it was held that, where sureties are bound for the payment over of moneys by their principals, and a general account has been kept with the principal in which all debts and credits are entered, the court should not apply the payments to the oldest item of debt, "if in the progress of the account there be a change of sureties," and that in such circumstances, there being no appropriation by either party, "each set of sureties is entitled to the benefit of the moneys received during the period of their respective suretyship." This rule was approved on appeal in *Stone v. Seymour*, 15 Wend. 19, 33, after an elaborate consideration of the principles upon which the courts should proceed in applying payments. In *State v. Sooy*, 39 N. J. Law, 539, 546, it was also recognized that, when the court is called upon to appropriate payments, the equities of third persons should be regarded. How these equities should be regarded is, we think, plainly indicated by the opinions of the Supreme Court in *U. S. v. January*, *United States v. Eckford's Executors*, and *Jones v. United States*, heretofore cited.

Having regard to the terms of the bond, we conclude that the surety company is only liable for the difference between the deposits and checks of Connor & Brady during the running of the bond. If the amount they deposited during that period exceeded the amount they drew out, no loss resulted from the fraudulent practices of Lea during the currency of the bond. The account being thus stated, the court below did not err in directing a verdict for the surety company.

Judgment affirmed.

CHELSEA SAV. BANK et al. v. CITY OF IRONWOOD et al.

(Circuit Court of Appeals, Sixth Circuit. May 21, 1904.)

No. 1,255.

1. MUNICIPAL CORPORATIONS—ISSUE OF INVALID BONDS—LIABILITY FOR CONSIDERATION RECEIVED.

A city which issued and sold bonds for a lawful purpose, and which were within its charter power, but were held invalid because such power was irregularly exercised, is bound, in equity, to return the consideration received.

2. SAME—RIGHT OF RECOVERY—TRANSFER OF BONDS BY PURCHASER.

Where a city issued bonds which were subsequently adjudged invalid for irregularity in the manner of issuance, and sold the same to a firm which paid a part of the purchase price and resold them to others, the right to recover from the city the consideration received by it passed with the bonds to the holders, to the exclusion of a general receiver appointed for the original purchaser.

3. EQUITY JURISDICTION—GROUNDS.

A city issued and sold bonds which proved invalid, receiving part payment of the purchase price. The purchaser resold some of the bonds, and pledged others, after which a receiver was appointed for its property. In a suit by the city against the purchasing firm to recover the bonds, in which it tendered the amount received therefor, the receiver recovered a judgment for such amount, and instituted a new action in the federal court of the district in which the city was situated to enforce such judgment. *Held*, that a court of equity had jurisdiction of a suit by holders of the bonds against the city and receiver to enforce, in behalf of themselves and other holders, their equitable right to the amount due from the city, on either of the following grounds: First, that it sought to charge the receiver as a trustee holding the judgment for the benefit of the bondholders; second, that it sought to follow a fund which had been tendered by the city, and in which complainants claimed an equitable interest; third, because it appeared from the pleadings that there might be conflicting interests between the holders and pledgees of the bonds, which could only be adequately adjusted by a court of equity.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

William Alden Smith, Taggart, Denison & Wilson, and John C. Coombs, for appellants.

Belmont Waples, for appellee city of Ironwood.

Before LURTON and RICHARDS, Circuit Judges, and CLARK, District Judge.

RICHARDS, Circuit Judge. This is an appeal from a decree dismissing the bill of the appellants (complainants below). The case arose out of the following facts: On February 24, 1893, an act was passed to reincorporate the city of Ironwood, Mich. (Loc. Acts Mich. 1893, No. 235, p. 36), under which a new council was to be elected April 3, 1893. The act provided that the new city should succeed to the debts and liabilities of the old. The old council, which was continued in office until the new should be elected, by resolution submitted to the electors on April 3, 1893, the question whether the city,

¶ 1. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1992.

as reincorporated, should issue \$150,000 of bonds "for the purpose of paying its floating indebtedness and making certain public improvements." The act reincorporating the city authorized the issue of bonds for these purposes upon a popular vote. The citizens having voted for the bonds, the new city officers on August 1, 1893, issued, and on October 23, 1893, sold, 150 bonds, of \$1,000 each, to Coffin & Stanton, brokers, of New York City, under a contract providing for the payment of \$25,000 on the delivery of the bonds, and the balance in installments; the entire purchase price, of \$145,275, to be paid by May 15, 1894. Coffin & Stanton paid the \$25,000 cash, took the bonds, and, for value received, in the due course of business, and before maturity, assigned and negotiated them to the complainants and others. A question soon arising as to the validity of these bonds, no further installments of the purchase price were paid, nor did the city liquidate any of the coupons. As a result, a suit was brought by the Manhattan Company, as holder, against the city, on certain bonds, in which this court in May, 1896, affirmed the judgment of the court below, holding the bonds were invalid, not because they were issued for an illegal purpose, or in excess of the city's power to incur indebtedness, but because the old city council was not authorized to submit the question of issuing them to the people. *Manhattan Co. v. Ironwood*, 74 Fed. 535, 20 C. C. A. 642. Coffin & Stanton having failed to pay the balance of the purchase price, on September 19, 1894, the city brought suit in the Supreme Court of the state and county of New York against the firm and others, in which the city tendered \$30,000, being the \$25,000 paid it, with interest, and sued to recover back the \$150,000 of bonds delivered to the firm, alleging their issue was illegal. To this action, Coffin & Stanton, in addition to general denials, specifically denied that at the time of the commencement of the suit they had any bonds whatever remaining in their possession. While this suit was at issue, on July 12, 1896, in an action by Stanton against Coffin, one Thomas P. Wickes was appointed receiver of the firm property. On February 19, 1897, Wickes, intervening, became a party to the suit of the city against Coffin & Stanton, and on April 30, 1897, recovered by default a judgment against the city for \$25,000, with interest from October 23, 1893. Prior to the filing of the bill in this case, November 10, 1900, the receiver had brought suit in the court below to recover upon this judgment.

Substantially the foregoing facts were set out in the bill below, in which the complainants, suing on behalf of themselves and the other bondholders, alleged they had succeeded to the right of Coffin & Stanton to recover back from the city the money paid it for the bonds; asserted the receiver had no equitable interest in the judgment recovered, other than that necessary to secure him for his services and expenses in recovering it; and prayed that the city be adjudged indebted to the complainants in the amount of the judgment, or, if the judgment be held invalid, in the sum of \$25,000, with interest from October 23, 1893, and for general relief. The answer of the city, while denying the validity of the judgment recovered by the receiver, alleged that, if anything was due in the premises, it was due to

the receiver, and not to the bondholders, while the answer of the receiver insisted upon the validity of the judgment, and the exclusive rights of the receiver therein. The decree of the court below dismissing the bill was made July 8, 1902. Subsequently, on January 6, 1903, affidavits were filed showing that on December 16, 1902, the Supreme Court of the city and county of New York, in the suit brought by the city against Coffin & Stanton, upon the filing of a bond by the city in the sum of \$40,000, had set aside the judgment of \$30,381.43 in favor of the receiver against the city, and sent the case to a referee for hearing and report. 77 N. Y. Supp. 907.

1. This is a case for the application of the settled rule that a city may be compelled to pay back money which it has received for bonds illegally issued, when the purpose of the loan was lawful, and the creation of the debt not prohibited by law (*Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659; *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; *Chapman v. Douglas County*, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378; *Read v. City of Plattsburgh*, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. Ed. 414; *Logan County Bank v. Townsend*, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611), and does not come within the exception exempting a city from liability where it has never received the benefit of the money, or the loan itself was in excess of its authority to create a debt (*Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132; *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537; *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. 71, 37 L. Ed. 1044). This court has applied both the rule and the exception—the former in the cases of *City of Gladstone v. Throop*, 71 Fed. 341, 18 C. C. A. 61, and *Andrews v. Youngstown*, 86 Fed. 585, 596, 30 C. C. A. 293, and the latter in the case of *Travellers' Ins. Co. v. Johnson City*, 99 Fed. 663, 40 C. C. A. 58, 49 L. R. A. 123. In the last case mentioned there is a careful review of the authorities up to that time.

In the present case it is conceded that the bonds were for a lawful purpose—to raise money “for paying the floating indebtedness of the city and making public improvements.” The money was paid to the city, and the city has had the benefit of it ever since. Coffin & Stanton having failed to comply with the terms of purchase, the city on September 19, 1894, recognizing its obligation to account for what had been paid it by mistake, tendered the \$25,000, with interest, and brought suit to recover back the bonds. Coffin & Stanton, having negotiated the bonds before that time, were unable to return them.

Subsequently, in the *Manhattan Case*, the bonds were held illegal, and since that time the real question for decision has been, who is entitled to the money which the city got for its invalid bonds, and which it has offered to return? It is not a case where the city loaned its credit to a railroad, or where it exceeded its charter powers in creating the debt. It had the right to borrow this money for the purposes named. It made a mistake, however, in submitting the question of issuing the bonds to a vote of the people through the old

council. It should have waited for the new council to act. The old council was without power in the premises. The defect was not in a lack of power on the part of the city, but in a failure to exercise the power in a regular way. There was ample power to create the indebtedness, and the city got the full benefit of the money. It ought, therefore, *ex æquo et bono*, to pay the money back, since the bonds have been held invalid, and the consideration has therefore failed.

2. The city being thus accountable in good conscience for the return of the money paid it by mistake for its invalid obligations, to whom should the money be paid—to the receiver of Coffin & Stanton, for the benefit of their general creditors, or to the present holders of the invalid bonds, to reimburse them, as far as may be, for what they paid Coffin & Stanton for the bonds? Plainly, in our opinion, to the latter. The claim against the city for money due and received is in lieu of the action on the bonds which would exist if they were valid. An assignment of the bonds carries the right to recover from the obligor the money paid him for them, in case the bonds should prove to be invalid. This equitable right to recover the consideration paid for invalid bonds is recognized as existing in the bondholders in the cases we have cited and others. *Louisiana v. Wood*, *supra*; *Parkersburg v. Brown*, *supra*; *Chapman v. Douglas County*, *supra*; *Travellers' Ins. Co. v. Johnson City*, *supra*; *Hedges v. Dixon County*, 150 U. S. 182, 186, 14 Sup. Ct. 71, 37 L. Ed. 1044.

It is worthy of notice in this connection that although in this case the city denies that the bondholders are the equitable owners of the claim against the city, because of its receipt of the \$25,000, and asserts that the receiver of Coffin & Stanton is, it contended precisely the opposite in its motion to set aside the judgment taken against it by default in favor of the receiver in the New York suit. In the opinion setting aside the judgment in favor of the receiver, the Supreme Court of New York says:

"Upon this motion the city of Ironwood contends that the right to recover the original \$25,000 paid it by Coffin & Stanton rests in the bondholders, and not in the receiver, who holds this judgment, and in support thereof, among others, cites *Hoag v. Town of Greenwich*, 133 N. Y. 152, 30 N. E. 842, and *Gerwig v. Sitterly*, 56 N. Y. 214. It is apparent that the contentions of the plaintiff in this motion and in the actions in Michigan against it are wholly inconsistent, nor are the various attitudes of the receiver in entire harmony. * * * The plaintiff's proposed reply herein contains two defenses, neither of which, if sustained, will terminate the three-cornered war waged between the plaintiff, the receiver, representing Coffin & Stanton's general creditors, and the bondholders. Indeed, this reply, taken together with the city's repudiation of its bonds, and its determined efforts to resist the claims of both the receiver and the bondholders, when by an omnibus suit of some kind the entire controversy would be justly disposed of, indicates a desire or attempt on plaintiff's part to hinder those equitably entitled thereto from recovering the \$25,000, in which the plaintiff itself, in good conscience, would seem to have no right or interest." 77 N. Y. Supp. 909.

The judgment was set aside upon terms, among which was one that the city should stipulate "to commence some action or proceeding in which the conflicting claims of the bondholders and the receiver may be determined." It is stated in the brief of appellants, and not denied, that, in the new trial thus procured, the city succeeded

in obtaining a judgment in its favor against the receiver upon the express ground that the cause of action belonged to the bondholders, and not to the receiver; the referee saying with respect to certain of the bonds:

"It is manifest, under the authorities, that the right to recover the portion of the amount paid to the plaintiff [city] by Coffin & Stanton, represented by said eighteen bonds, is vested in the owners thereof. The right to recover any portion of the amount so paid passed at the time of the pledge of the bonds to the pledgees thereof, as an incident to such pledge," etc.

3. The remaining question of importance is whether the complainants have a remedy at law so adequate and complete that a court of equity will decline to entertain their suit. As was said in *Kilbourn v. Sunderland*, 130 U. S. 505, 514, 9 Sup. Ct. 594, 596, 32 L. Ed. 1005:

"The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances."

This must be determined by the case presented in the pleadings. For, jurisdiction in equity having once attached, the court will retain the case for the purpose of rendering, under the general prayer, such relief as may be required by the changed circumstances, although it be legal in its nature. *Waite v. O'Neil*, 76 Fed. 408, 22 C. C. A. 248, 34 L. R. A. 550. When this suit was instituted, the receiver had a judgment against the city, which he was trying to enforce. The complainants alleged they were the equitable owners of this judgment; that the only interest the receiver had in it was one to secure him for services and expenses in recovering it—in other words, that he held the judgment virtually as trustee for them; and they asked the court to collect it, and, after discharging his claim, distribute the balance of the amount among them. This in itself afforded ground for equitable jurisdiction.

But laying aside the consideration of the judgment, the bill averred that the city had received \$25,000 for bonds which proved to be invalid; that it had tendered this amount, with interest, to the original purchaser; and it is a fair inference from the averments of the pleadings that when this suit was instituted the city still held that amount, prepared to pay it over either to the receiver or to the bondholders, as the court might determine between them. In other words, the bondholders were seeking to follow a fund in which they claimed an equitable interest. This, too, furnished ground for equitable cognizance.

Again, there were 150 bonds, of \$1,000 each, delivered to Coffin & Stanton. Some of these the firm sold, and others it pledged. The terms of sale or hypothecation, the interest transferred, and that retained, are not shown in the record. It does not, therefore, appear that each holder of a \$1,000 bond, no matter how obtained, would be entitled to a 150th part of \$25,000, with interest. The extent of the claim of each complainant, and his share of the amount to be distributed, must therefore be ascertained. These relative rights can be properly determined only by a court of equity. In this connection, it is to be observed that, a limited amount only being available for distribution, the interests of the bondholders may conflict among

themselves. Each bondholder may desire to be heard not only with regard to his own claim, but in respect of the claims of others whom he may consider not entitled to participate in the fund. *Bailey v. Tillinghast*, 99 Fed. 801, 40 C. C. A. 93.

In *Ætna Ins. Co. v. Lyon County* (C. C.) 44 Fed. 329, Judge Shiras said (page 345):

"It seems to me that the only means of solving the difficulties of the situation is for the plaintiff and the other nonresident bondholders to unite in a proper proceeding in equity against the county and such other bondholders as may refuse to act as complainants, and in such suit it can finally be determined for what amount the county can be held liable, and the rights of the respective bondholders in and to this sum can be decreed."

Since the case goes back, it may be well for us to add that we are clear in the opinion there is no set-off against the complainants stated in the answer of the city or presented by the proof. If the items relied on constitute a claim against any one, it is against the receiver; but with respect to that, of course, we are not to be taken as even intimating any opinion.

Having reached the conclusion that the only way to solve the difficulties of the situation presented is through the medium of a court of equity, the judgment of the court below dismissing the bill is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

KERR et al. v. UNION MARINE INS. CO.

(Circuit Court of Appeals, Second Circuit. April 14, 1904.)

No. 178.

1. MARINE INSURANCE—MISREPRESENTATIONS—MATERIALITY.

Where a misrepresentation as to the time of sailing of a vessel on which insurance was requested was made in reply to a specific question asked by the insurer in the application, it will be conclusively presumed to have been material to the risk.

2. SAME—DATE OF REPRESENTATION—EXECUTION OF CONTRACT—RELATION.

Insured requested a broker to inquire the rate of insurance on a barque, loaded with logwood, at and from Black River, Jamaica, to New York, in pursuance of which, on November 4, 1901, the broker made answer to a written question, asked by insurer, that the vessel had not sailed. Insurer's agent named the rate of premium, and indorsed it on the application, which was placed on file, and on December 12th insured, after being advised that the barque had cleared on December 3d, immediately instructed the broker to procure insurance, but did not inform him that the vessel had already sailed, whereupon the broker requested the underwriter to bind the insurance, which he did by erasing the original date from the application, and dating it December 12, 1901, the effect of which was to create a present contract of insurance subject to a printed policy. The vessel sailed on December 4th, and on the 7th was wrecked. *Held*, that the representation that the vessel had not sailed should be regarded as continuing and effective on the date the insurance was effected, insurer not having been advised to the contrary, and, being false as of that date, avoided the policy.

¶ 1. See Insurance, vol. 28, Cent. Dig. §§ 575½, 1651.

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 124 Fed. 835.

Albert A. Wray, for appellant.

Wilhelmus Mynderse, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from a decree, in an action in personam, in favor of the libelants. In disposing of the case we do not find it necessary to consider whether there was any concealment of the loss of the vessel on the part of the libelants, as we are satisfied there was a misrepresentation which avoided the contract of insurance.

The insurance was against loss by perils of the sea upon a cargo of logwood on board the barque *Elida*, "at and from Black River, Jamaica, to New York." It was obtained at New York City, where the libelants resided, upon an application made by a broker who was acting for them. Pursuant to instructions to make an inquiry for the rate of insurance, he applied to an agent of the underwriter at New York City on November 4, 1901, having prepared a formal inquiry upon an application blank. The application was made upon one of the printed blanks of the underwriter, containing various inquiries about the particulars of the insurance desired and the nature of the risk, and the answers were filled out by the broker for the libelants, in writing. Among the inquiries was one as to the time of the sailing of the vessel (from Black River), and to this inquiry the answer inserted was, "Not sailed." Upon receiving the application from the broker of the libelants, the agent of the underwriter named the rate of premium, and indorsed it upon the application, and placed the application on file. December 12th the libelants were advised by letter from Black River that "the *Elida* clears to-day," meaning December 3d, the date of the letter. They immediately instructed their broker to procure insurance at once, without regard to rates, but did not inform him that the vessel was ready to sail, or that they had received any advices. Thereafter, and on December 12th, their broker requested the agent of the underwriter to bind the insurance, and the latter indorsed the application "binding," erased the original date, which was November 4, and dated it December 12, 1901. The effect of this was to create a present contract of insurance, "subject to the conditions of printed form of policy used by this company [the underwriters] and its New York agents at this date." The form of policy then in use would have covered the risk from the time of loading the cargo upon the vessel to its arrival at New York. At this time the vessel and cargo had been lost. She had sailed from Black River December 4th, and on December 7th had been wrecked on the southwest coast of Cuba.

If the representation as to the time of the sailing of the vessel had not been made in response to a specific inquiry on behalf of the underwriter, it would be difficult to conceive how the statement could have

influenced the mind of the underwriter. If the vessel had sailed, the period of the risk would have been shorter, and, so far as appears, the circumstances would not have affected the rate of insurance. In *McLanahan v. The Universal Insurance Company*, 1 Pet. 188, 7 L. Ed. 98, Mr. Justice Story said:

"That the time of sailing is often very material to the risk cannot be denied; that it is always so is a proposition that will scarcely be asserted, and certainly has never yet been successfully maintained."

There may be circumstances that would render the fact highly material; as, if the ship were a missing ship, or out of time. *Foley v. Moline*, 5 Taunt. 145. None appear by the proofs; and the testimony of the witnesses who were called upon to testify upon the subject is wholly undeterminative. If the question were one of concealment, we should incline to the opinion that the time of the sailing of the vessel was not a material fact. But the question, in our view, is not whether there was a concealment, but whether there was a misrepresentation; and this depends upon quite different considerations. When a representation is made spontaneously by the insured in the course of negotiations for insurance, it cannot be certainly known whether or not the underwriter has relied upon it, and its materiality, therefore, becomes a question of fact; and that question is whether it was one that would naturally and reasonably influence the insurer either in making the contract or in his estimate of the risk. When, however, the representation is elicited by a specific inquiry, a different rule obtains:

"If the misrepresentation is made in reply to a specific question, the question of materialness is excluded, on the ground that the insurers, by asking the question, imply that they think it material, and that it is their right to judge for themselves as to what is material to the bargain they are asked to make, and that the insured, by asking the question, is estopped from denying that it is material." 1 *Parsons on Marine Insurance*, 413.

This court has recently had occasion to reiterate and apply this rule in *Carrollton Furniture Manufacturing Company v. American Credit Indemnity Company*, 124 Fed. 25, 59 C. C. A. 545. The authorities referred to in that opinion fully sustain the rule, and need not be cited here. It is more tersely stated in *Miller v. Mutual Benefit Life Ins. Co.*, 31 Iowa, 216, 232, 7 Am. Rep. 122, than in any other of the adjudged cases, in the following language:

"A misrepresentation by one party of a fact specifically inquired about by the other, though not material, will have the same effect in exonerating the latter from the contract as if the fact had been material, since by making such inquiry he implies that he considers it material."

The court below decided in favor of the libelants, upon the theory that the representation was to be treated as though it had been that the vessel had not sailed on November 4th, the time when the representation was originally made. In this view we cannot concur. If it was material, as the basis of a proposed insurance, that the underwriter be correctly informed as to the time of the sailing of the vessel when its agent was asked to name the premium, the parties must have understood that it was equally so when he was asked to bind the contract. As nothing was said by either agent, or took place in

the interim, to indicate the contrary, the case should be governed by the general rule that a representation once made in the progress of a negotiation continues in force until it is withdrawn. The rule is thus stated in Duer on Representations in Marine Insurance (see pages 70, 71):

"A representation once made is construed to be binding upon the party until it is altered or withdrawn before the insurance is effected. The completion of the policy is therefore the time to which the representation is construed to refer; that is, it is construed to mean that the facts represented were then true, and that no other material facts were then known to the assured."

Again:

"That until the contract is executed the insured may withdraw or modify a previous representation, is hardly necessary to be stated. When a material alteration in the facts has occurred, or he has discovered them to be untrue, such is not merely his right, but his imperative duty."

Mr. May says:

"A representation is a continuous statement from the time it is made, during the progress of the negotiations, to the time of the completion of the contract; so that, in point of fact, if the representation be true when actually made, yet by some change intervening between that time and the time of the completion of the contract it then becomes untrue, it will void the contract, if the change be material and to the prejudice of the insurers, or, being true, might probably influence their opinion as to the advisability of accepting the risk. The law regards it as made at the instant the contract is entered into." May on Ins. (4th Ed.) 190.

The case of Insurance Company v. Higginbotham, 95 U. S. 380, 24 L. Ed. 499, cited in his opinion by the learned District Judge, does not trench upon this rule. Undoubtedly a contract understood and intended by the parties, when it was actually made, to take effect by relation at an earlier date, will have that effect; and that was the gist of the decision in that case. It appeared that on October 1st the insured had applied to the agent of the insurer for a renewal of a policy on his life, which had expired the preceding July 16th, paid the premium and received a receipt, and at that time gave the agent his certificate of health. The agent forwarded the certificate to the office of the insurance company in another city, and the latter, on October 12th, sent the renewal receipt to the agent, and, on October 14th, the latter gave it to the insured. The receipt was dated as of July 16th preceding. The defense was that the applicant did not disclose any derangement of his health occurring between October 1st and October 14th, and that the representation in the certificate was a continuing one, and, if not true at the latter date, avoided the policy. The court held that the facts referred to, and others mentioned in the opinion, would have warranted a jury in finding that the contract was understood and intended by the parties to take effect by relation as of October 1st. Obviously the negotiation, so far as the applicant and the agent of the insurance company was concerned, was closed on that day, and no suggestion that the representation was to be considered as continuing could reasonably be indulged from the delay of the insurance company in transmitting the renewal to its agent. The case might as well have been decided upon the ground that the company at the later date ratified the contract which

had been previously made by its agent, in which event the ratification would of course have related back to the time of the agent's contract.

In the present case there was a proposition of insurance at the time the representation was made, and nothing more. When the proposition was accepted, the original date of the application was obliterated and the date of the acceptance inserted in lieu, thus indicating unequivocally the understanding of the agent of the underwriter that the application should be considered as of that date. The contract was in all respects inchoate until December 12th. It is fair to assume that, if the broker for the libellant had been aware that the vessel had sailed, he would have changed the statement in the application. Both agents acted upon the assumption that the application, unaltered, was the basis of the contract, and nothing was said or done to indicate that either regarded the contract as one made on November 4th.

The decree is reversed, with costs, and with instructions to the court below to dismiss the libel, with costs.

GUILD et al. v. PRINGLE.

(Circuit Court of Appeals, Fourth Circuit. May 25, 1904.)

No. 497.

1. EVIDENCE—RES GESTÆ—STATEMENT OF PERSON INJURED.

A declaration by a man who had fallen into an excavation for a sewer in the night, and received a fatal injury, that there was no light there, made some 10 minutes after the fall, during a conversation with a person above, and in answer to a direct question, goes beyond a statement respecting the immediate cause of the injury, which was the fall, and is inadmissible as a part of the *res gestæ*.

In Error to the Circuit Court of the United States for the District of South Carolina, at Charleston.

See 118 Fed. 655; 119 Fed. 962.

P. H. Nelson and R. W. Shand, for plaintiffs in error.

D. W. Robinson (Wm. H. Lyles, on the brief), for defendant in error.

Before GOFF, Circuit Judge, and BRAWLEY and McDOWELL, District Judges.

McDOWELL, District Judge. This was an action for damages instituted in the State court by the administratrix of R. S. Pringle against Guild & Co., and removed by the defendants below (plaintiffs in error here) to the federal court.

The city of Columbia, S. C., early in 1902, entered into a contract with Guild & Co. to lay a considerable quantity of sewer pipe. On August 4, 1902, about half past 8 o'clock at night, one R. S. Pringle

¶ 1. See Evidence, vol. 20, Cent. Dig. §§ 373, 375.

fell into an excavation which had been made by Guild & Co., and was so injured that he died on the 15th of the same month. At the time of the injury, Pringle was returning from a meeting held at a church on the north side of Indigo street to his home, which was west of the church, and on the south side of Indigo street. In Indigo street, from a point nearly opposite the church to a point west of Pringle's house, a trench had been dug by Guild & Co., 14 feet deep and 3 feet wide, at the side of which was an embankment from 7 to 9 feet high, made by piling the earth excavated from the trench. The only crossing place left in the length of this trench was a railroad crossing of Indigo street. At this point the contractors, for the purpose of tunneling under the two railroad tracks, dug a hole between the two tracks. This hole, into which Pringle fell, was about 4 feet wide, 5 feet long, and about 14 feet deep. The earth removed therefrom had been entirely, or almost so, thrown outside of the tracks. In crossing at this point, Pringle was taking a convenient route home, and one at that juncture, because of the long trench, much used by the public. This hole appears to have been open from the 1st of August until after the accident in question. It was never covered over with planks at night, nor was any precaution taken to prevent such accidents, unless it was that a red light was left at the side of the hole, and as to this there is a conflict of testimony. Fencing this hole seems to have been impracticable, as the distance between the two railroad tracks was insufficient to leave requisite "car clearance." There was an electric arc light about 85 feet from this hole, which appears to have been in operation at the time of the accident. But apparently this light was at times insufficient to enable travelers to observe or correctly locate the hole. There is, as above stated, a conflict of testimony as to the presence of a lantern at the hole on the night of the accident and on the preceding nights. The witnesses for the defendants below, testifying that the lantern was there, much outnumber those for the plaintiff below, testifying to the contrary. At the time in question there was in force an ordinance of the city of Columbia, reading, so far as is now of interest: "Excavations in any street or alley shall be securely covered at all times when persons are not at work therein. * * *" In the contract made between Guild & Co. and the sewer commissioners for the city are the following clauses:

"The contractor shall observe and obey all city ordinances in relation to obstructing streets, keeping open passage ways, and protecting the same where exposed.

"Suitable barriers shall be placed around all excavations, and sufficient danger signals maintained at night to prevent accidents to street passengers.

"All the responsibility for the entire line of sewers and accidents occurring therewith shall rest with the contractor building the works until the completion and acceptance."

The jury returned a verdict of \$5,000 against the plaintiffs in error, and judgment in accordance therewith was entered.

The first assignment of error is to the action of the trial court in admitting the testimony of W. R. Henderson, who repeated a declaration made by Pringle, and to the subsequent admission by the

court of similar testimony by other witnesses. This testimony, as preserved in the bill of exceptions, is as follows:

"On the trial of this cause, the plaintiff called as a witness on her part one W. R. Henderson, who testified as follows: Q. How soon after the accident did you see him [plaintiff's intestate] on the night of August the 4th? A. It was ten minutes before I got there. The reason of my delay was caused by the fact that when I heard it I went back to secure ladders. * * * Q. When you went to the hole on the night of August 4th, what did you find? A. Well, I found that Mr. Pringle was down at the bottom of the hole, and some people gathered about there. Q. What did you do? A. Well, by that time they had brought the ropes and ladders, and we tried to get him out. Q. Can you tell us who was there that you knew? A. By the time I got there, Mrs. Pringle, my sister, Morgan Hooper, and Oscar Alexander, two men employed in the mills stables, and a man employed to oversee, and the foreman of the street gang was in the hole at the time. All these and Preston Tredwell was present. Q. Was Mr. Alston Pringle there? A. Yes, sir; and watchman of the A. C. L. Q. Did you go down in the hole? A. I did not. Q. What was Mr. Pringle's condition, as far as you could ascertain, at that time? A. I could see in the hole; there being a lantern. I could see he was in the corner, in a crouching position, with his leg doubled under him, struggling to sit up, and groaning, and laying as he fell. Q. Did he have any conversation with you? A. Yes, sir. Q. Was it intelligent? A. Perfectly so, sir. Q. Did he state anything in regard to the accident, and how he came there at that time? A. Yes, sir. (Defendants' counsel objects to any statement made by Mr. Pringle being given. * * * Counsel for the plaintiff and defendants argued the admissibility of the statement made by Mr. Pringle being given.) The Court: I will admit the question as part of the *res gestæ*. (Defendants' counsel excepts to the ruling.) Q. Where was it? A. Right on the edge of the hole. Q. Was he suffering much at that time? A. Undoubtedly. He was groaning. Mrs. Pringle asked him the question, 'How did you come to fall in here?' He said, 'No lamp put there.' He said he was coming back from the meeting, and there was no lamp at the hole at all. I think that was about the drift of the conversation. (To which ruling of the court, in overruling said objection and permitting said witness to give said testimony, the defendants duly excepted.)

"And after said ruling was made, plaintiff introduced as a witness Alston Pringle, who testified as follows without objection: A. When he [plaintiff's intestate] asked me to get him out as soon as possible, I turned around to go to the fire department to get Mr. Henderson to bring his hands, ladder, and a rope to get him out, and I met him about one-half way between his house and my brother's, and I told him what had happened, and asked him to telephone for a doctor, and then I returned to the hole; and, in a few minutes, parties came with the ladder, and it was put down, and I went down, and I was the first one to go down in the hole. I said, 'Bob, how in the world did this happen?' He said, 'I was coming from the meeting, and I stepped with my left foot and dropped in.' I said, 'Are you hurt?' And he said, 'My hip is broken, or I am paralyzed.' The men commenced coming down. They spread a blanket, and I went up. Q. Did he make any statement about the light? A. I asked the question, 'Was there any light?' and he said, 'No light.' This watchman—this man—said, 'There was a light.' I said, 'No use to have a discussion here. We will adjust it later.'

"Plaintiff also introduces as a witness Mrs. R. S. Pringle, who testified, without objection, as follows: Q. Did you make any remark to your husband while he was in the hole? A. I did. Q. What did he say? A. He said he was suffering great agony, and I asked him how it happened, and was there no light? And he said, 'No light,' and the foreman said, 'There was a light,' and he said, 'There was not a light,' and that was all that was said. Q. Where was the foreman standing when he made the remark? A. To my left, at the top of the hole. Q. And he answered to that? A. Yes, sir; he did.

"Also Miss E. L. Henderson, who testified as follows: Q. Did you hear any conversation or speech by Mr. Pringle from down in the hole to his wife in regard to the accident? A. Mrs. Pringle said: 'Papa, how did you fall down?'

Was there no light?" The man in the hole said: "There was no light. There was when I went, but none when I came back." And she said: "Are you hurt? Where are you hurt?" And he said: "I don't know. I am in agony."

It should be here added that the absence of the lantern after the accident is accounted for by the testimony of several of the witnesses for defendants below that the first person to arrive at the place after the injury picked up and carried away the lantern, in search for means of getting Pringle out of the hole.

The question here presented is not free from difficulty. The facts in this case are in many respects so closely similar to the facts in *Insurance Company v. Mosley*, 8 Wall. 397, 19 L. Ed. 437, that it is not surprising that the learned trial court felt bound, in order to follow that case, to admit the declarations of Pringle. In the *Mosley Case*, it appears that the injured man, after having gone to bed, got up between 12 and 1 o'clock at night and went downstairs for the purpose of going into the backyard. Shortly thereafter—just how long does not appear—Mosley's son found him apparently in great pain, and "asked what was the matter. He replied that he had fallen down the back stairs and hurt himself very badly." A short time later Mosley made practically this same statement to his wife. Some time thereafter Mosley died of this injury. An action founded on an accident insurance policy was brought by his wife, in which evidence that Mosley's death was caused by an accident, and not by disease, was vitally necessary to the maintenance of the plaintiff's cause of action. The Supreme Court held that the evidence of the son and wife, giving Mosley's declaration that his then condition of injury was caused by a fall down the stairs, was admissible as part of the *res gestæ*. The reason given for this ruling is:

"In the complexity of human affairs, what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. There may be fraud and falsehood as to both, but there is no ground of objection to one that does not exist equally as to the other. To reject the verbal fact would not unfrequently have the same effect as to strike out the controlling member from a sentence, or the controlling sentence from its context."

In the case at bar the condition in which Pringle was found was so intimately connected with the immediate cause thereof—the fall into the excavation—that his declaration to Alston Pringle that he fell or stepped into the hole was, under the *Mosley Case*, properly admitted. The part of Pringle's declaration, however, which is complained of, is the statement that there was no light at the hole. In making this statement, Pringle was going back of the immediate cause of his injury—the fall—and was stating the cause that led to the fall. In admitting this part of the declaration, the trial court, as we think, went a step beyond what is authorized by the *Mosley Case*. Had the first part of the testimony of W. R. Henderson, as reported, been an exact account of the occurrence, it would be very difficult, if not impossible, under the ruling in the *Mosley Case*, to say that his testimony was inadmissible. When an injured man, shortly after his injury, while still suffering intensely, is found at the bottom of a deep hole, and is asked, "How did you come to fall in here?" and an-

swers, "No lamp put there," it is difficult to discriminate the case from the Mosley Case. The question assumes a fall as the immediate cause of the injury, and the mind of the injured man is, perhaps for the first time since the injury, directed to the cause of the fall. His answer may have been unpremeditated, spontaneous, involuntary. It enables comprehension of the principal fact—the injury—and is in some sense rather intimately related thereto. However, Mr. Henderson adds that he is giving merely the gist of a conversation, and the testimony of the other witnesses leads us to the belief that the declaration here was not made under the circumstances or in the exact manner indicated by the first part of Mr. Henderson's testimony. The declaration that there was no light was made in answer to a suggestively leading question. It was a part of a conversation on the subject of the presence or absence of a light. Whether Alston Pringle's testimony relates to the same conversation as that between Mrs. Pringle and her husband, or to another, we cannot be sure. But in either event it is clear that Pringle's declaration as to the absence of the light was an apt and reasoned reply to a question. He was clearly not in such pain as to be incapable of reasoning, reflecting, and, if he thought fit, making a possibly untrue and self-serving declaration. In no sense can we consider Pringle's declaration that there was no light as an involuntary, exclamatory, spontaneous "verbal act." He immediately followed this statement with the explanation that there had been a light when he went to the meeting, but that there was no light when he came back. The objectionable part of Pringle's declaration has not the sanction of an extreme probability of truth, coming from an unpremeditated and spontaneous exclamation made at the time of or immediately after the injury, nor is it so intimately connected with the principal fact as to be a verbal act, essentially a part thereof. To admit the declaration as to the light is to extend the doctrine of the Mosley Case beyond the limit warranted by that case, and it is to lose sight of what we think is the true reason for the rule of evidence in question.

We do not base our conclusion on the mere fact that there had been a sufficient interval of time between the injury and the declaration to allow premeditation. To exclude a declaration which might otherwise be a part of the *res gestæ*, there must have been not only time for the manufacture of self-serving evidence, but also opportunity otherwise. If, in a case of personal injury, the declarant has been in such great pain as to be incapable of reasoning and recollecting, his statement made after even a very considerable interval of time may be fully as spontaneous and unpremeditated as if made at the very moment of the injury. See 1 Greenleaf Ev. (14th Ed.) 145, and note "a"; *Beaver v. Taylor*, 1 Wall. 642, 17 L. Ed. 601, 7 Rose's Notes 74; *Delaware R. Co. v. Ashley*, 67 Fed. 213, 14 C. C. A. 368; *Peirce v. Van Dusen*, 78 Fed. 707, 24 C. C. A. 280; *Jack v. Association*, 113 Fed. 54, 51 C. C. A. 36; note 95 Am. Dec. 51; 1 Wharton Ev. (3d Ed.) § 261.

Having reached the conclusion that it was error to admit Pringle's declaration as to the absence of a light, it is unnecessary to consider the remaining assignments of error. Some ten or more witnesses,

nearly all of them apparently wholly disinterested, testified for the defendants below that a red lantern was at the time of the accident on the ground at the edge of the hole. And one of them testified that Pringle himself said that he saw the light, and explained the fall by saying that he thought he was on the railroad, and not between the tracks. For the plaintiff below, there was one witness who stated that there was no light at the hole about 15 minutes prior to the accident, and four who testified as to the absence of a light on nights other than that of the accident. Pringle's declaration may have been given great weight by the jury. Every experienced practitioner knows the force of a declaration made by an injured man, who shortly thereafter dies of his injury. Many juries give such statements undue weight.

We do not intend to intimate that merely placing a lantern by the side of the hole would or would not have been sufficient to excuse the defendants below of the charge of negligence. Nor do we mean to intimate, if a lantern was put there, that there was or may have been contributory negligence on the part of Pringle. But if the jury believed that no lantern was there, they may, in fixing the damages, have been influenced by a very natural feeling of just indignation against the defendants below. To leave such an excavation at such a place unprotected either by covering or by a warning lantern was gross negligence, such as to indicate a wanton disregard for the rights of others. It follows that the question of fact as to the presence of the lantern was of the first importance in respect to the amount to be allowed in damages. As evidence which we think was improper was admitted on this question, we are constrained to reverse the judgment of the trial court, and to direct a new trial.

Reversed.

SHINKLE v. VICKERY.

(Circuit Court of Appeals, Seventh Circuit. April 12, 1904.)

No. 992.

1. PLEDGE—RIGHT OF ASSIGNEE OF PLEDGOR TO REDEEM—EQUITABLE RIGHTS OF PLEDGEE.

Where, as a part of the same transaction, defendant exchanged shares of stock for a farm, with the privilege of reconveying the farm and receiving a certain sum in cash therefor within a year, and also made the other party a loan to pay a mortgage on the farm secured by a pledge of the stock which remained in his name, he has a right, on electing to return the farm, to retain the stock as security for the payment of the agreed price therefor, which right is superior to that of one to whom the other party has sold and transferred his equity in the stock, and of which he is not deprived by the fact that he gave a memorandum reciting the terms of the pledge only in reliance on which the stock was bought by the purchaser.

Appeal from the Circuit Court of the United States for the District of Indiana.

¶ 1. Rights and liabilities of pledgees of corporate stock, see note to *Frater v. Bank*, 42 C. C. A. 135.

For opinion below, see 117 Fed. 916.

The original bill was by Shinkle, a citizen of Kentucky, against Vickery, a citizen of Missouri, setting forth that on the 16th day of July, 1894, Vickery was the owner of four hundred and seventy shares of capital stock of the Hemingray Glass Company, a Kentucky corporation; that on the day mentioned, for a valuable consideration, Vickery sold such shares to Gibson, but without delivering a certificate thereof—Vickery continuing thereafter to hold the legal title for the sole use and benefit of Gibson; that July 20th, 1894, Gibson borrowed of Vickery the sum of ten thousand dollars upon his promissory note, pledging such shares and all his interest therein, as collateral security; that as a part of such transaction, and in consideration of the same, Vickery executed and delivered to Gibson the following writing:

"St. Louis, Mo., July 24, 1894.

"Whereas, I have loaned to Russell B. Gibson the sum of ten thousand dollars, for which he has executed his note for the sum of that amount to me, due and payable six months after date, bearing date July 20th, 1894, and whereas, said Gibson has deposited security to secure the payment of same 470 shares of the par value of \$100 each of the capital stock of the Hemingray Glass Company, of Covington, Ky.: Now, therefore, I, the undersigned Samuel Vickery, do hereby agree to turn over and deliver to said Gibson said 470 shares of stock upon the payment of said note for \$10,000 by said Gibson or his assigns at the maturity of said note, or any other time previous that may be agreed upon.

Samuel Vickery."

—that thereafter, and for a valuable consideration, the time for the payment of the note was extended six months from January 20th, 1895; that for a valuable consideration, February 11th, 1895, such shares were sold by Gibson to Shinkle, subject to the lien of Vickery, Gibson undertaking to procure the transfer and delivery to Shinkle of the necessary certificate; that Vickery was duly notified of the rights thus acquired by Shinkle; and that on the maturity of the note as extended, Shinkle tendered to Vickery the sum of ten thousand dollars, the amount then due, demanding the transfer and delivery of the shares, which demand was refused.

The bill avers that the written instrument of July 24th, 1894, above set forth, estops Vickery from insisting on any right or equity in the shares, and other facts making the case one cognizable in equity.

The prayer of the bill is that a trust be charged upon the legal title of Vickery in such shares in favor of Shinkle, and that Shinkle be declared to be the owner of the same, and have certificate therefor, upon the payment of ten thousand dollars in discharge of the note and pledge of Gibson above set forth.

The answer, so far as it is pertinent to the facts brought out in proof, and the substantial issues involved, pleads a decree of dismissal, rendered by the Circuit Court of the city of St. Louis, affirmed by the Supreme Court of the state, in a suit by Shinkle against Vickery and the National Bank of the Republic, and claims the same as a conclusive adjudication of all the rights of the parties touching the shares set forth in the bill.

A cross bill was filed by Vickery. The cross bill sets forth in detail, the transaction out of which the purchase of the shares by Gibson arose; that portion of the cross bill being as follows: That in the month of July, 1894, your orator was the owner of the said four hundred and seventy shares of stock of The Hemingray Glass Company, and defendant Russell B. Gibson was the owner of a tract of land in the county of St. Louis, in the state of Missouri, bounded on the north by the Missouri river, on the east by R. C. Tandy, on the south by Schustzmeier, and on the west by Coldwater creek and J. J. O'Neill, and containing about 127.97 acres; that said land was at that time subject to an encumbrance of ten thousand dollars; that your orator and said Gibson entered into a negotiation for an exchange of their said properties; that your orator and said Gibson finally came to an agreement for an exchange; that it was part of said agreement that said land should be cleared of said encumbrance by said Gibson before the same should be conveyed to or accepted by your orator; that said Gibson being unable to raise said sum of ten thousand dollars, solicited and induced your orator to make a loan to

him of that sum, wherewith to pay off the said encumbrance, and that the same was paid off with the money so loaned by your orator; that the promissory note mentioned in the bill of said Shinkle, filed in this court, was given by said Gibson to your orator as evidence and in consideration of said loan, and the payment of said loan was secured by the retention of said four hundred and seventy shares of stock in the hands of your orator; that said loan of ten thousand dollars was made by your orator to said Gibson in order to enable him to pay off said encumbrance and to consummate said agreement of exchange as aforesaid, and for no other purpose, and that said agreement was consummated by means of said loan and said land was conveyed by said Gibson to your orator; and that said note was executed and delivered by said Gibson to your orator, and that the receipt or stock contract dated July 24th, 1894, and set out in said Shinkle's bill, was executed by your orator and delivered to said Gibson, all on the same day and as part of the same transaction of exchange.

Your orator further says that it was part of said agreement that, if in one year from the 16th day of July, 1894, your orator should be dissatisfied with his said purchase of land, the said Gibson thereby bound himself to take the said land back and to pay therefor the sum of thirty two thousand dollars. Your orator further says that said stock was worth much more than ten thousand dollars, and said land was worth much less than thirty two thousand dollars; so that there would be a large profit in redeeming said stock from the said pledge to your orator by paying said note for ten thousand dollars; and on the other hand said Gibson would sustain a heavy loss if he should carry out his agreement to buy back said land.

The cross bill prays that an account be taken between Vickery and Gibson; that a decree be entered against Gibson requiring him to pay the amount of damages found due to Vickery; and that a decree be entered against Shinkle, requiring him, in case the said Gibson should fail to comply with such decree, to pay the same before he be allowed to redeem such shares.

The decree appealed from was entered on both bill and cross bill, dismissing the original bill as to defendant Vickery, for want of equity, and dismissing the cross bill without prejudice to another suit.

The further facts are stated in the opinion of the court.

Robert Ramsey, for appellant.

T. R. Skinker, for appellee.

Before JENKINS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

GROSSCUP, Circuit Judge (after stating the facts as above). The Missouri suit was by Shinkle against Vickery, and the National Bank of the Republic; and was based on Shinkle's alleged legal title to the shares in question by virtue of their sale by Vickery to Gibson, and their re-sale by Gibson to Shinkle. The prayer was for a compulsory specific assignment of the shares by Vickery directly to Shinkle.

We are inclined to hold, though not free from doubt, that the suit under review is by Shinkle, not in his own right, but in the right of Gibson to the shares in question, not as holder of the legal title, but as possessing an equity in Gibson's claim of title. The object of the bill, in that view, is not an assignment of the certificate, but an adjustment by the court of Gibson's transaction with Vickery to the extent that Shinkle is entitled, as one having an intervening equity, to such adjustment. In such a view of the two suits, the Missouri suit and this suit would be fundamentally different. In the Missouri suit the issue raised was that Shinkle had no legal title. In this suit the question raised would be the nature of Gibson's transaction, and the extent of his relief, and of Shinkle's interest therein,

against Vickery; and it would follow that an adjudication of the Missouri suit, would be no adjudication of the issues of this suit. But this distinction need not be worked out for we are ready to decide this case on the proofs.

The original contract between Vickery and Gibson was in the nature of an exchange of the shares in question for a farm in St. Louis County, Missouri. The agreed price for each—the farm and shares—was thirty-two thousand dollars. So far as the transaction related to the shares it seems to have been unconditional, but to the extent it related to the farm, it was accompanied with these conditions: That Gibson should, on his part, during the next succeeding year, have a right to re-purchase the farm upon the payment of the thirty-two thousand dollars in cash; and that Vickery should, on his part, during the same period, have a right to tender back the farm, and demand in cash, the fixed price of the shares, thirty-two thousand dollars. Collateral to the latter portion of this agreement, Gibson made to Vickery his deed of another farm in Christian County, Missouri.

After this transaction had been entered into, it turned out that an encumbrance of ten thousand dollars on the St. Louis farm, to be paid off by Gibson under the stipulations of the agreement, was not paid off; whereupon a supplemental agreement was made, under which Vickery advanced to Gibson, to pay off such encumbrance, the ten thousand dollars needed. To secure himself for this advance, it was agreed that Vickery should hold, as collateral, the shares in question, and the memorandum already set forth was delivered, as evidence of that portion of the supplemental agreement.

But before the year stipulated for had expired, and a month or so before the sale of the shares by Gibson to Shinkle, Vickery elected to exercise his option to give back the farm, and take in lieu thereof the thirty-two thousand in money. This he had a clear right, under the agreement, to do. Gibson failed to pay the money, and thus, in this respect, broke his agreement. There can be no doubt that as between Vickery and Gibson, Vickery from that moment had the right to withhold the assignment or delivery of the shares, until Gibson had either performed his contract, or compensated Vickery for the loss suffered by his failure to so perform. The transaction covering the exchange of the shares and farm, with the accompanying options, and the supplemental transaction out of which grew the collateral pledge evidenced by the memorandum, were in essence, a single transaction. Vickery could insist that either the whole of it, or no part of it, should be carried out; and could recoup losses for failure to carry out one part from anything found available in any other part. Such clearly were the rights of the parties, had the rights of Shinkle not subsequently intervened.

Shinkle insists that though he prosecutes this suit in the right of Gibson, he stands, with reference to Vickery, in a right somewhat different from Gibson's. He insists that the memorandum of July 24th, 1894, constitutes an estoppel upon Vickery, whereby his rights against Vickery are augmented beyond those available to Gibson.

The transaction with Gibson, bringing Shinkle into the case, was as follows: Shinkle sold to Gibson, at a price named at fifty thousand five hundred dollars, one hundred and ten lots at Findlay, Ohio; agreeing also to advance to Gibson twenty thousand dollars to purchase a leasehold interest in St. Louis. As security to the twenty thousand dollar advance, Gibson gave to Shinkle title to the leasehold interest; and as part payment of the purchase price of the lots, transferred to him the shares in question at a price fixed at twenty-three thousand dollars, ten thousand dollars of which was to be paid by Shinkle to Vickery to redeem the shares from the pledge already referred to. Upon the entire transaction three thousand dollars was at the time paid down by Shinkle.

Vickery had no knowledge of this transaction between Gibson and Shinkle, and Shinkle claims to have had no knowledge of the transaction, in its entirety, including the option features, between Gibson and Vickery; and lays stress upon the claim that the payment of the three thousand dollars was made solely on the faith of the memorandum shown him.

The memorandum was, as we have already seen, not a transaction by itself, but part of another, and a larger, transaction. It was not meant to be shown to Shinkle, or to be given to the world; it was drawn solely for the eyes of Gibson and Vickery, and as evidence of a supplemental feature of their transaction as an entirety. That Gibson used this detached paper to deceive Shinkle, need not be denied; that the use Shinkle now asks the court to make of it, would be a wrong to Vickery, is equally undeniable. We see in the execution and delivery of the memorandum by Vickery, under the circumstances shown, no failure of ordinary precaution, or negligence of any kind, that in equity and good morals should make him responsible for the use made of it by Gibson. The memorandum had no place outside the Gibson and Vickery transaction; we cannot assume that Vickery ought to have foreseen that Gibson would give it an independent meaning and existence. Thus viewed, Vickery and Shinkle are equally innocent; and their equities to the shares must be settled, not by estoppel, but by priority of claims in point of time, a priority that indisputably is Vickery's.

Had Shinkle in right of Gibson, in apt time, have offered to carry out Gibson's part of his contract with Vickery, or reimburse Vickery for his damages, he might have laid claim to an assignment of the shares. But no such offer was made in the bill, nor in the subsequent proceedings, though the cross bill invited it. Shinkle is, in consequence, without equitable footing on which to ask for relief.

The decree must be affirmed.

JENKINS, Circuit Judge. I concur in the result, but prefer to rest my judgment upon the ground that the appellant sues in his own right, and not in right of Gibson, and is therefore concluded by the Missouri adjudication. The bill nowhere asserts prosecution in right of Gibson, nor does it allege the insolvency of the latter. I am unable to distinguish the claim asserted in the bill from the claim made in the litigation in the courts of Missouri. It is essentially the same,

and not another or different, claim, and is predicated upon the same facts. In my judgment, the doctrine of *res adjudicata* should have full force.

SCOTT v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1904.)

No. 1,299.

1. CONSPIRACY—OFFENSE AGAINST UNITED STATES—VIOLATION OF NATIONAL BANKING ACT.

A conspiracy to violate Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], by causing false entries to be made in the books of a national bank by an officer or agent thereof for the purpose of defrauding the bank or others, or deceiving an agent appointed to examine the affairs of the bank, is one to commit "an offense against the United States," within the meaning of section 5440 [U. S. Comp. St. 1901, p. 3676], and is indictable thereunder.

2. SAME—ELEMENTS OF OFFENSE—ACT OF ONE CONSPIRATOR ACT OF ALL.

An indictment, under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], against two defendants, charging them with a conspiracy to commit an offense against the United States by making certain false entries in the books of a national bank of which one of the defendants was an officer, in violation of Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], is not bad because, in stating the details of the overt act committed by defendants, it is averred that the entries which were made in the books of the bank were made by the hand of the defendant who was not an officer thereof; it being averred that both defendants were present and participated in the carrying out of the plan formed between them to make such entries.

In Error to the District Court of the United States for the Southern District of Ohio.

The plaintiff in error and one Harry J. Hoover were indicted, under section 5440 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3676], for conspiring to commit an offense against the United States; the offense being the making of certain false entries in a book of the People's National Bank of Newark, Ohio, in violation of section 5209 [U. S. Comp. St. 1901, p. 3497]. The plaintiff in error was convicted on a plea of *nolo contendere*, reserving his objections to the sufficiency of the indictment by a demurrer and a motion in arrest of judgment, both of which were overruled.

Section 5440 reads as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court."

Section 5209 provides:

"Every president, director, cashier, teller, clerk, or agent of any association, * * * who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor and shall be imprisoned not less than five years nor more than ten."

The indictment contains three counts, which differ only in the averments of intent. The first count charges that the entries were made with intent to

injure and defraud the banking association; the second, that they were made with intent to deceive certain officers of the association, to wit, the president and directors thereof; and the third, that they were made with intent to deceive any agent appointed in accordance with law to examine the affairs of the association.

The first count reads as follows:

"1st Count. Sec. 5440, R. S. U. S. (1st Supp. p. 264). Sec. 5209, R. S. U. S. The grand jurors of the United States of America, duly impaneled, sworn, and charged to inquire within and for the Eastern Division of said district, upon their oaths and affirmations present that Harry J. Hoover and Harry P. Scott on, to wit, the first day of July, in the year of our Lord, one thousand nine hundred and two, in the county of Licking, in the state of Ohio, in the circuit and Eastern Division of the district aforesaid, and within the jurisdiction of this court, did then and there unlawfully and willfully conspire together and with each other to commit an offense against the United States, that is to say, to violate section 5209 of the Revised Statutes of the United States, by making certain false entries upon the Certificates of Deposit Register of the People's National Bank of Newark, Ohio, which said bank was then and there duly organized and established, and then and there existing and doing business under the laws of the United States, in the city of Newark, county of Licking, division and district aforesaid; and said Harry P. Scott was then and there an officer of said banking association, to wit, teller.

"Said conspiracy was, in substance and effect, as follows, to wit:

"Prior to June 1, 1902, the said Harry J. Hoover was assistant cashier of said People's National Bank, and as such officer had theretofore unlawfully taken from the funds of said banking association, without the knowledge of the other officers or directors thereof, a sum of money in excess of \$30,000. That upon June 1, 1902, he ceased to be an officer and employé of said banking association. That after he had ceased to be an officer of said banking association as aforesaid, and on the dates hereinafter mentioned, he purchased, or caused to be purchased, from the People's National Bank, of Newark, Ohio, a large number of certificates of deposit, some of which said certificates of deposit were made out in the name of fictitious persons. The date of the purchase of said certificates of deposit, the amount thereof, and the person to whom made payable, are as follows:

| No. | Date of Issue. | To Whom Payable. | Amount. |
|---------|----------------|----------------------------|-------------|
| 56,555. | June 12, 1902. | H. J. Hoover, cashier..... | \$10,000 00 |
| 56,577. | June 12, 1902. | H. J. Hoover, cashier..... | 6,000 00 |
| 56,786. | June 27, 1902. | H. J. Hoover, cashier..... | 5,000 00 |
| 56,665. | June 18, 1902. | John R. Morrison..... | 1,446 50 |
| 56,788. | June 28, 1902. | Samuel W. Floyd..... | 725 00 |
| 56,790. | June 28, 1902. | J. R. Dunlop..... | 525 00 |
| 56,791. | June 28, 1902. | H. L. Boring..... | 375 00 |
| 56,793. | June 28, 1902. | Martin L. Sanford..... | 325 00 |
| 56,794. | June 28, 1902. | Martin L. Sanford..... | 50 00 |
| 56,813. | June 30, 1902. | J. G. Smith..... | 900 00 |
| 56,814. | June 30, 1902. | Silas Monroe..... | 900 00 |
| 56,815. | June 30, 1902. | James R. Campbell..... | 830 00 |

"And the grand jurors aforesaid, upon their oaths and affirmations, present that for the purpose of concealing the fact that he had unlawfully taken a large sum of money from the said People's National Bank as aforesaid, and with the intent to make certain false and fraudulent entries upon the books of said banking association, the said Harry J. Hoover and Harry P. Scott conspired together and with each other and agreed that the said Harry P. Scott, then and there an officer of said banking association as aforesaid, was to permit and assist the said Harry J. Hoover in entering said bank after business hours, and after the other officers had left its place of business, for the purpose and with the intention of making certain false entries in the Certificate of Deposit Register of said banking association, a book purporting to show the actual receipts and payments upon interest-bearing accounts and deposits received by the said banking association, which accounts are not subject to check, and for which certificates of deposit are issued, and also pur-

porting to show a memorandum, giving the name of depositor, date of receipt, and payment, with number of certificate and the amount thereof. It was a part of said conspiracy, and agreed to by and between the said Harry J. Hoover and Harry P. Scott, that the said Harry J. Hoover would stamp or mark in the column in said Certificate of Deposit Register, under the word 'Paid,' certain dates, which said dates, placed in said column as aforesaid, would then and there and thereafter show, indicate, and declare that the said certificates so marked with the date in the column under the word 'Paid,' as aforesaid, were upon said dates paid.

"That thereafter, on the first day of July, 1902, said Harry J. Hoover and Harry P. Scott did a certain overt act to effect the object of said conspiracy, to wit, said Harry P. Scott permitted and assisted the said Harry J. Hoover to enter said bank after business hours, and while the officers of said banking association were away, with full knowledge of his intention and purpose, and while he was present in said bank the said Harry J. Hoover marked in the Certificate of Deposit Register, in the column under the word 'Paid,' certain dates, to wit:

"On certificate No. 56,555, issued June 12, 1902, to H. J. Hoover, cashier, in the sum of \$10,000.00, the date 'June 30, 1902,' was entered.

"On certificate No. 56,577, issued June 12, 1902, to H. J. Hoover, cashier, in the sum of \$6,000.00, the date 'June 30, 1902,' was entered.

"On certificate No. 56,786, issued June 27, 1902, to H. J. Hoover, cashier, in the sum of \$5,000.00, the date 'July 1, 1902,' was entered.

"On certificate No. 56,655, issued June 18, 1902, to John R. Morrison, in the sum of \$1,446.50, the date 'June 21, 1902,' was entered.

"On certificate No. 56,788, issued June 28, 1902, to Samuel W. Floyd, in the sum of \$725.00, the date 'July 1, 1902,' was entered.

"On certificate No. 56,790, issued June 28, 1902, to J. R. Dunlop, in the sum of \$525.00, the date 'July 1, 1902,' was entered.

"On certificate No. 56,791, issued June 28, 1902, to H. L. Boring, in the sum of \$375.00, the date 'June 30, 1902,' was entered.

"On certificate No. 56,793, issued June 28, 1902, to Martin L. Sanford in the sum of \$325.00, the date 'June 30, 1902,' was entered.

"On certificate No. 56,794, issued June 28, 1902, to Martin L. Sanford, in the sum of \$50.00, the date 'June 30, 1902,' was entered.

"On certificate No. 56,813, issued June 30, 1902, to J. G. Smith, in the sum of \$900.00, the date 'July 1, 1902,' was entered.

"On certificate No. 56,814, issued June 30, 1902, to Silas Monroe, in the sum of \$900.00, the date 'July 1, 1902,' was entered.

"On certificate No. 56,815, issued June 30, 1902, to James R. Campbell, in the sum of \$830.00, the date 'July 1, 1902,' was entered.

"Which said entries placed in said Certificate of Deposit Register as aforesaid were false and fraudulent entries, and caused the Certificate of Deposit Register in said bank to appear as if all of the aforesaid certificates of deposit had been paid upon the respective dates aforesaid, while in truth and in fact the said entries were false and fraudulent, in this, to wit, that neither of said certificates of deposit aforesaid were paid at the date of said fraudulent entry as aforesaid, but are still outstanding obligations against said banking association, as they, the said Harry J. Hoover and Harry P. Scott, well knew.

"And the grand jurors aforesaid, upon their oaths and affirmations, do further present that said false entries were then and there made as aforesaid in the book of said banking association as aforesaid, and said conspiracy entered into by said Harry J. Hoover and Harry P. Scott as aforesaid, with the intent on the part of them, the said Harry J. Hoover and Harry P. Scott, to injure and defraud said banking association, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

It is contended the indictment is bad: (1) Because a violation of section 5209 is not "an offense against the United States," not being aimed directly at the government itself. (2) Because it does not charge that the defendants below conspired to commit or did commit acts constituting a violation of section 5209. The alleged object of the conspiracy was the making of certain

false entries, not by the plaintiff in error, who was an officer of the bank, but by Hoover, who was not an officer of the bank.

Charles W. Miller and Kibler & Kibler, for plaintiff in error.

Sherman T. McPherson, U. S. Atty., and Thomas H. Darby, Asst. U. S. Atty.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

1. Section 5440 was originally enacted March 2, 1867. Chapter 169, § 30, 14 Stat. 484 [U. S. Comp. St. 1901, p. 3676]. The conspiracy then made punishable was one "to commit any offense against the laws of the United States, or to defraud the United States in any manner whatever." In the revision the phraseology was changed to its present form, "to commit any offense against the United States or to defraud the United States in any manner or for any purpose." This was a mere change of form. The meaning remained the same. The object of the conspiracy must be to commit some offense against the United States in the sense only that it must be to do some act made an offense by the laws of the United States. Such has been the uniform holding of the courts of the United States. *U. S. v. Martin*, 4 Cliff. 156, Fed. Cas. No. 15,728; *U. S. v. Sanche* (C. C.) 7 Fed. 715, 717; *U. S. v. Watson* (D. C.) 17 Fed. 145, 148; *In re Wolf* (D. C.) 27 Fed. 606, 611; *Bannon v. U. S.*, 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494; *Stokes v. U. S.*, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667; *Clune v. U. S.*, 159 U. S. 590, 595, 16 Sup. Ct. 125, 40 L. Ed. 269; *France v. U. S.*, 164 U. S. 676, 17 Sup. Ct. 219, 41 L. Ed. 595; *Reilley v. U. S.*, 106 Fed. 896, 46 C. C. A. 25; *Francis v. U. S.*, 188 U. S. 375, 23 Sup. Ct. 334, 47 L. Ed. 508. A violation of section 5209 constitutes "an offense against the United States," within the meaning of section 5440.

2. But it is insisted that the indictment is bad because it does not directly aver that the false entries were intended to be made, and were made, by the plaintiff in error, who alone of the conspirators was an officer or agent of the bank. The indictment charges the conspiracy broadly, and then sets forth the details. It alleges that the plaintiff in error and Hoover conspired to violate section 5209 "by making certain false entries upon the certificate of deposit register of the People's National Bank of Newark, Ohio," the plaintiff in error then being an officer of said bank, to wit, teller. This is the broad charge. The details follow—that Hoover had been the cashier of the bank, and had unlawfully appropriated more than \$30,000 of its funds; that, to cover up this shortage, the plaintiff in error (then teller) and Hoover entered into a conspiracy to make certain false entries in the certificate of deposit register; the plaintiff in error to admit Hoover into the bank outside of banking hours, lay before him the register, and Hoover to stamp or mark the false entries. It is distinctly averred that it was a part of the conspiracy agreed to by both that the false entries should be made. In criminal as in civil law, the maxim, "*Qui facit per alium facit per se*," is applicable. To violate section

5209, an officer of a bank does not have to make the false entry with his own hand. It is enough if he cause it to be made—if another make it by his direction. *U. S. v. Harper* (C. C.) 33 Fed. 471, 480. In the present case, not only were the entries made by the agreement and direction of the plaintiff in error, but in his presence and with his approval and assistance. He was a trusted officer of the bank, having access to its vault and books, and charged with a duty respecting them. Cognizant of Hoover's defalcation, he conspired with him to cover it up. To falsify the books, he took Hoover to the bank outside of banking hours, laid the books before him, and stood by while the false entries were made. It was as if he opened the book, and Hoover applied the stamp. Done for a common purpose, the act of each was the act of the other. As an instrumentality in carrying out the conspiracy, we can no more separate Hoover from the plaintiff in error than we can the stamp which Hoover held from the hand which applied it. The fact that Hoover could not violate section 5209 by personally making a false entry did not and could not serve to exempt the plaintiff in error from responsibility under that section for Hoover's act, when, by reason of the conspiracy, it became and was his own.

The judgment of the lower court is affirmed

STEEL RAIL SUPPLY CO. v. BALTIMORE & L. RY. CO.

(Circuit Court of Appeals, Third Circuit. June 8, 1904.)

No. 12.

1. ERROR—PRESENTATION OF QUESTION TO LOWER COURT—EXCEPTION TO CHARGE.

An exception to "so much of the charge of the court as states to the jury that the only question for the jury to consider is [a question stated]" will not support an assignment of error based on the failure of the court to submit to the jury a certain other question, as to which no instruction was requested, and which was not called to the court's attention.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

See 123 Fed. 655, 59 C. C. A. 419.

Joseph S. Clark, for plaintiff in error.

Leoni Melick, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This case was before us upon a former writ of error sued out by the plaintiff below to reverse a judgment in favor of the defendant entered upon a reserved question non obstante veredicto. This court reversed that judgment, and directed the court below to give judgment in favor of the plaintiff upon the verdict. *Baltimore & Lehigh Railway Co. v. Steel Rail Supply Co.*, 123 Fed. 655, 59 C. C. A. 419. Judgment having been entered in the court below in accordance with our mandate, the defendant then took the present writ of error.

Our former opinion recited with fullness the facts of the case as shown by the evidence, and it is not necessary to restate them here.

The defendant did not ask the court below to give any special instructions whatever to the jury, but simply requested the court to charge the jury "that, under all the evidence in the case, the verdict must be for the defendant." The court reserved the question involved in this request or point, and submitted the case to the jury upon very full instructions as to the rights and duties of the parties, respectively, under the contract sued on. The only exception taken by the defendant was in the following words:

"Defendant excepts to so much of the charge of the court as states to the jury that the only question for the jury to consider is whether the railroad company had performed its duty."

Upon this exception we are asked by the plaintiff in error (the defendant below) to reverse the judgment entered pursuant to our mandate because the court below did not submit to the jury the question as stated in one of the assignments, "whether the evidence showed a mutual cancellation of the contract for the purchase of the plaintiff's rails," or, as stated in another of the assignments, "whether the evidence showed that the plaintiff assented to the defendant's offer to cancel the contract for the purchase of the plaintiff's rails."

Is the exception relied on sufficient to justify the reversal of the trial judge for his supposed error in not submitting to the jury the question of the cancellation of the contract in suit? There was, be it observed, no request for any instruction upon that subject; nor was it suggested to the court that the question whether the parties had canceled the contract was for the consideration of the jury, or should be submitted to the jury. From the vague language of the exception, how could the judge tell what was in the mind of counsel? If the defendant's counsel thought that the question of cancellation should be submitted to the jury, fairness to the trial court required that such omission should be distinctly brought to the attention of the court. In *Harvey v. Tyler*, 2 Wall. 328, 339, 17 L. Ed. 871, the Supreme Court, speaking by Mr. Justice Miller, declared that:

"Justice itself, and fairness to the court which makes the rulings complained of, require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception."

By repeated decisions the Supreme Court has enforced this rule. In *Express Company v. Kountze Bros.*, 8 Wall. 342, 353, 19 L. Ed. 457, Mr. Justice Davis, speaking for the court, said:

"If the charge does not go far enough, it is the privilege of counsel to call the attention of the court to any question that has been omitted, and to request an instruction upon it, which, if not given, can be brought to the notice of this court if an exception is taken. But the mere omission to charge the jury on some one of the points in a case, when it does not appear that the party feeling himself aggrieved made any request of the court on the subject, cannot be assigned for error."

The trial court is entitled to a distinct specification of the matter, whether of fact or law, to which objection is made, and an exception to "all and each part" of the charge gives no information as to what

is in the mind of the excepting party, and therefore gives no opportunity to the trial court to correct any error committed by it. *Block v. Darling*, 140 U. S. 234, 238, 11 Sup. Ct. 832, 35 L. Ed. 476.

An exception that the court did not charge either of 18 enumerated requests for special instructions, except as it had charged, is an insufficient exception. *Chateaugay Iron Company v. Blake*, 144 U. S. 476, 12 Sup. Ct. 731, 36 L. Ed. 510.

In *Texas & Pacific Railway v. Volk*, 151 U. S. 73, 78, 14 Sup. Ct. 239, 38 L. Ed. 78, the Supreme Court, speaking by Mr. Justice Gray, who quoted the language of Mr. Justice Story in *Pennock v. Dialogue*, 2 Pet. 1, 15, 7 L. Ed. 327, said:

"It is no ground of reversal that the court below omitted to give directions to the jury upon any points of law which might arise in the case, when it was not requested by either party at the trial. It is sufficient for us that the court has given no erroneous directions. If either party deems any point presented by the evidence to be omitted in the charge, it is competent for such party to require an opinion from the court upon that point. If he does not, it is a waiver of it."

In *Allis v. United States*, 155 U. S. 117, 122, 15 Sup. Ct. 36, 39 L. Ed. 91, it was declared that:

"A party must make every reasonable effort to secure from the trial court correct rulings, or such, at least, as are satisfactory to him, before he will be permitted to ask any review by the appellate tribunal; and, to that end, he must be distinct and specific in his objections and exceptions."

In *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 575, 18 Sup. Ct. 445, 42 L. Ed. 853, the Supreme Court, replying to the complaint that the court below had not charged more specifically on the subject of damages, said:

"A sufficient answer is that the respondents did not ask further instructions. All they did was to except to what had been stated. By well-settled rules, no appellate court would, under such circumstances, be required to set aside the judgment of the trial court."

In *Humes v. United States*, 170 U. S. 210, 211, 18 Sup. Ct. 602, 42 L. Ed. 1011, the Supreme Court again said:

"We cannot regard as error the omission of the court to give instructions which were not asked."

We think that the exception here taken by the defendant below was insufficient, in that it failed to state or intimate what other questions or question should be submitted to the consideration of the jury, and did not afford the trial court an opportunity to remove the ground of exception.

As the foregoing views require the affirmance of the judgment brought up for review by this writ of error, we are relieved from any further discussion of the case. The said judgment is affirmed.

LUCAS et al. v. NEW YORK, N. H. & H. R. CO.

(Circuit Court of Appeals, Second Circuit. April 21, 1904.)

No. 94.

1. COVENANTS—CONSTRUCTION—PERFORMANCE.

Defendant contracted with plaintiffs' predecessor in title that, in consideration of his dedicating a strip of land to a village for the making of a roadway designated as "Depot Place," defendant, when it changed its passenger station, would make suitable entrance ways to its station grounds, with suitable roadways and sidewalks, and continue such Depot Place eastward. This the railroad did, but shortly after the dedication the village became a municipal corporation, and thereafter so changed the grade of an avenue at the point where the continuation of Depot Place into its grounds joined the same that the avenue was raised about five feet above the surface of the driveway. The city then built a retaining wall on the easterly side of the avenue, obstructing the entrance to Depot Place, and depriving plaintiffs of the driveway, whereupon defendant opened a different entrance to its grounds. *Held*, that defendant's covenant did not bind it to maintain a permanent entrance and roadway, and defendant, having maintained the same until the grade of the adjoining street was changed, was not liable for breach thereof.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a direction of a verdict in favor of the defendant by the United States Circuit Court for the Southern District of New York.

O. D. Tompkins, for plaintiffs in error.

Edwin E. Sprague, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The plaintiffs herein, as successors in title of one Charles Nettleton, brought this action to recover damages for an alleged breach of contract, based upon the following facts:

In April, 1891, said Nettleton, plaintiffs' predecessor in title, being the owner of a strip of land adjacent to the land of defendant, entered into a contract with defendant, whereby it was provided that Nettleton should dedicate to the village of Mt. Vernon, for highway purposes, a strip of his land varying in width from 26 feet to 33 feet, and that defendant should dedicate to said village for like purposes a strip of its adjacent land sufficient to make altogether a roadway 40 feet wide, to be designated as "Depot Place." Said contract also provided as follows:

"Said railroad company, if and when it changes the present site of its passenger station at Mount Vernon, will make suitable entrance ways to its station grounds, with suitable roadway and sidewalks in continuation eastwardly of its said Depot Place."

At the trial the following stipulation was entered into between the parties:

"That said dedications were made by a suitable instrument duly acknowledged and recorded in the office of the register of Westchester county on the 18th day of November, 1897, after said railroad company had changed the grade and line of its tracks and the site of its passenger station as they ex-

isted on the 15th day of April, 1891, and that said dedications were duly accepted by the city of Mt. Vernon by a resolution of the common council of said city passed on or about the 21st day of December, 1897. That, in accordance with article 6 of said contract, said railroad company, when it changed the site of the passenger station at Mt. Vernon as it existed on April 15, 1891, made suitable entrance ways to said station grounds, with suitable roadways and sidewalks, in continuation eastwardly of said Depot Place."

Shortly after said dedication the village of Mt. Vernon became a municipal corporation, and in 1898 it changed the grade of Third avenue at the point where the driveway in continuation of Depot Place into defendant's grounds joined Third avenue so that the surface of said avenue was raised about five feet above the surface of the driveway. The city of Mt. Vernon built a retaining wall on the easterly side of said avenue, and thus obstructed the entrance to Depot Place, and deprived plaintiffs of their driveway. The defendant refused to grade the continuation or driveway across its land to Depot Place, but built a fence on top of said retaining wall, and opened another entrance to its grounds a short distance north of the point where the former entrance joined Third avenue.

The court, in directing a verdict for defendant, held that, in view of the decisions in the federal courts, the defendant company was not required to restore suitable roadways and entrance ways once made in conformity with the terms of a contract when they had been disrupted by local authority.

The arguments in support of plaintiffs' assignments of error, considered together, are to the effect that in the construction of said contract the court should consider what must have been the mutual intention of the parties, namely, that the roadway and entrance should be permanent, and must therefore construe the contract as one, not only to make, but to forever maintain, said entrance and driveway. Inasmuch, however, as there is no ambiguity in the terms of the contract, there is no occasion for the application of the doctrine of construction, and the apparent meaning of the instrument must be regarded as the one which was intended. *Schoonmaker v. Hoyt*, 148 N. Y. 425, 42 N. E. 1059; *Christopher St. R. Co. v. 23d St. R. Co.*, 149 N. Y. 51, 43 N. E. 538. The case chiefly relied upon by counsel for plaintiffs is *Beach v. Crain*, 2 N. Y. 87, 49 Am. Dec. 369. But there the covenant sued upon provided that Crain should erect the gate and the Beaches should keep it in repair. The contract further provided that Crain might keep the gate there during his pleasure, and that all the repairs necessary to be made to said gate were to be made by said Beaches. The court held that in these circumstances the covenant was substantially one to keep the gate in repair while it was the pleasure of Crain that it should remain, and that, as covenants to repair have been uniformly considered as importing the duty to rebuild, the Beaches were bound to rebuild in accordance with said rule. But the rule thus stated is limited to actions upon covenants to repair, and has no application to entire contracts. *Schell v. Plumb*, 55 N. Y. 594.

It is unnecessary to discuss the federal cases cited by counsel for plaintiffs as to the general rule to be applied in the construction and interpretation of a contract, because his contentions, so far as con-

cerns the case at bar, have been disposed of by the Supreme Court of the United States, and two federal Circuit Courts of Appeals have determined the rule to be applied to such contracts in cases involving the precise question here presented. In *Texas, etc., Railway Co. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385, the city of Marshall agreed to give to the Texas & Pacific Railway \$300,000 in county bonds and 66 acres of land within the city limits for shops and depots; and the company, "in consideration of the donation," agreed "to permanently establish its eastern terminus and Texas offices at the city of Marshall," and "to establish and construct at said city the main machine shops and car works of said railway company." The court held that the contract of the railroad company to permanently establish its eastern terminus and Texas offices at the city of Marshall was satisfied and performed when it established and kept a depot and set in operation the shops and kept them going for a period of eight years and until the interests of the railroad company and of the public demanded the removal of some or all of these subjects of the contract to some other place; and that the words "permanent" or "permanent establishment" do not mean "forever" or "lasting forever." The court further held that such a covenant did not amount to a covenant that the company would never cease to make its eastern terminus at Marshall, and that, whatever might be the changes of time and circumstances of railroad rivalry and assistance, these things alone should remain forever unchangeable; and that such a contract, if not void on the ground of public policy, would be so objectionable as to obstruct improvement and changes, and that such construction should be avoided if possible. To the same effect are the following cases: *Mead v. Ballard*, 7 Wall. 290, 19 L. Ed. 190; *Jones v. Newport News & Mississippi Valley Co.*, 65 Fed. 736, 13 C. C. A. 95; *Texas & Pacific Railway Co. v. Scott*, 77 Fed. 728, 23 C. C. A. 424, 37 L. R. A. 94.

In view of the foregoing decisions it is unnecessary to further discuss the contention of plaintiffs. These cases go much further than we are required to go in the disposition of the present case. Here it is to be observed that not only was there no covenant for repairs, or for a permanent location, but that the plaintiffs' predecessor in title unreservedly dedicated to said village his strip of land in order that it, with the adjoining strip dedicated by defendant, should constitute a new highway, to be known as "Depot Place." The agreement as to the entrance to the grounds was independent of said dedication, and dependent upon an event entirely within the control of defendant.

The judgment is affirmed.

UNITED STATES v. HUNG CHANG.

(Circuit Court of Appeals, Sixth Circuit. May 21, 1904.)

No. 1,287.

1. ALIENS—CHINESE—REVIEW—ERROR.

Where, on appeal from a United States Commissioner in Chinese deportation proceedings, the district judge erroneously treated the case as before him as judge, and not as before the District Court over which he presided, by reason of which no final judgment was entered in the District Court, and no bill of exceptions was filed there, or transcript of the proceedings certified by the clerk of the District Court, the Circuit Court of Appeals acquired no jurisdiction to review the order under Act March 3, 1891, c. 517, § 6, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549], providing that the jurisdiction of that court extends to the review of final decisions of the District Courts and the existing Circuit Courts, though the writ of error, which ran to the judge's order only, might be regarded as running to the District Court.

In Error to the District Judge of the United States for the Northern District of Ohio.

For opinion below, see 126 Fed. 400.

John L. Sullivan, U. S. Atty.

Vessy, Davis & Manak and J. P. Dawley, for defendant in error.

Before LURTON and RICHARDS, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge. Hung Chang, the defendant, was arrested under a warrant in pursuance of section 13, Act Sept. 13, 1888, c. 1015, 25 Stat. 479 [U. S. Comp. St. 1901, p. 1317], by a commissioner of the United States for the Northern District of Ohio, charged with being a Chinese person found unlawfully within the United States. The warrant was returned before the same commissioner, and upon an examination he was found to be unlawfully within the United States, as charged, and ordered to be deported as required by the statute. This judgment was of the date of October 26, 1903. On October 31st the defendant appealed from said finding and order "to the District Court of the United States in and for the Northern District of Ohio, and to the judge of said court." The commissioner made out and certified into the District Court of the United States for the Northern District of Ohio a transcript of the proceedings before him, and also the original papers in the case, and they were filed by the clerk of said court, as shown by the file marks appearing in the transcript of the record before us. Subsequently a hearing was had, and the order of the commissioner reversed, and the defendant ordered to be discharged from custody. The order recites that this hearing was "before the judge of the United States District Court for the Northern District of Ohio." Thereupon an assignment of errors was filed with a petition by the United States praying that a writ of error be allowed, and a transcript of the record be transmitted to this court. A bill of exceptions was settled and duly allowed by the district judge. A writ of error was also allowed, but

† 1. Citizenship of the Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.

only from the order and ruling and action of Francis J. Wing as judge, and the writ itself, instead of running to the District Court, was only to "Francis J. Wing, the judge of the District Court of the United States for the Northern District of Ohio." The transcript of the record filed in pursuance of this writ is certified only by the district judge, and not by the clerk of the District Court.

By the thirteenth section of the act of 1888 it is provided that "any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the District Court for the district." The decisions were in hopeless conflict as to whether this appeal was to the District Court, or to the judge thereof, at the time the learned district judge was called upon to act, and in construing the appeal as to himself as judge, and not to the court, he had the authority of the case of *Chow Loy v. United States* decided by the Circuit Court of Appeals for the First Circuit, and reported in 112 Fed. 354, 50 C. C. A. 279. Pending this writ of error the Supreme Court has finally and authoritatively construed the provision above set out as being in effect an appeal to the District Court, and not to the judge thereof as an individual. In *re United States, Petitioner* (decided May 2, 1904) 24 Sup. Ct. 629, 48 L. Ed. 931.

The jurisdiction of this court is to review "final decision in the District Courts and the existing Circuit Courts," and no provision is made for the review of the decision of a district judge acting as an individual judge. Section 6, Act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549]; *Carper v. Fitzgerald*, 121 U. S. 87, 7 Sup. Ct. 825, 30 L. Ed. 882. Unless, therefore, this writ can be regarded as running to the District Court, we can exercise no jurisdiction to review the action complained of. This we think is inadmissible, in view of the terms of the writ allowed by the district judge. Neither would such a construction avail the United States, because no final judgment has been entered in the District Court, and no bill of exceptions has been filed in that court, nor has any transcript of the record or proceedings in the District Court been certified by the clerk thereof or filed here. We think, therefore, that we cannot sustain our jurisdiction by treating the writ of error as running to the District Court. In the case cited above, the Supreme Court had occasion to consider the same subject, and the chief justice, speaking for the court, said:

"It seems that the judge allowed a writ of error, but only to his action as judge, and, even if it could be held to run to the District Court, it would be equally unavailing, in the absence of final judgment in that court, and of the filing of the bill of exceptions. As we understand the record, if the appeal from the commissioner, under section 13, was an appeal to the District Court, then it follows that the commissioner's transcript and other papers pertaining to the case should be filed and the judgment be entered in that court, and an appeal will bring the case before us. In other words, the District Court will not have lost jurisdiction because of the view taken by the district judge, and the final order may be entered as the final judgment of that court."

Upon the authority of the decision cited above, it is plain that the District Court has not lost jurisdiction under the appeal; and we venture to suggest to the learned judge that he pursue the course pointed out in that case, and cause to be entered in the District Court the order made by him, and the bill of exceptions allowed to be there filed, as

well as all other papers constituting the record, to the end that an appeal may be taken from the judgment so entered. We forego any expression of opinion in respect of the errors assigned upon the proceedings below, not doubting but that such steps will be taken as will enable this court to properly and regularly exercise its appellate jurisdiction.

Writ dismissed for want of jurisdiction.

SHIRK et al. v. ADAMS.*

(Circuit Court of Appeals, Seventh Circuit. April 12, 1904.)

No. 1,044.

1. LEASES—COVENANTS—BREACH—INSURANCE BY LESSOR—RECOVERY OF PREMIUMS—VOID POLICY.

Where an assignee of a lease containing a covenant against a sale of a building on the leased ground without the lessors' consent, and to insure such building, broke the covenant against the transfer, and on failure to procure insurance, after such breach, the lessors caused the building to be insured in the name of the assignee by policies stipulating that they should be void if the insured's interest in the property was other than unconditional and sole ownership, the policies being void for breach of such condition, the lessors were not entitled to recover premiums paid therefor, though it was subsequently held that the transfer by the assignee was ineffectual to free him from his assumption of the covenant in the lease.

2 SAME—MISSTATEMENT OF INTEREST—WAIVER.

Where a covenant in a lease required the lessee and his assigns to keep a building on the leased land insured, such covenant did not authorize the lessors to recover premiums for insurance procured by them, the validity of which rested on their ability to prove a waiver of a condition against a misstatement of insured's interest in the property.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

See 104 Fed. 54, 43 C. C. A. 407; 105 Fed. 659, 44 C. C. A. 653; 117 Fed. 801, 55 C. C. A. 25; and 121 Fed. 823, 58 C. C. A. 159.

Frederic Ullmann, for plaintiffs in error.

William Burry, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. In this action the Shirks had judgment against Adams for rent, taxes, assessments, and attorney's fees under the provisions of a lease that he had assumed; but they were defeated in their effort to recover the amount of certain insurance premiums paid by them, and this writ of error resulted.

The ground and the building thereon originally belonged to one Smith. He conveyed the ground to the Shirks, but reserved the title to the building. Thereupon the Shirks executed to Smith a lease of the ground. Among the covenants on the part of the lessee were

* Rehearing denied May 27, 1904.

these: That he would not assign the lease nor convey the building without the written consent of the lessors, that in case of loss or damage to the building he would repair or rebuild, and that he would keep the building insured.

Adams bought the building of Smith, and took an assignment of the lease, and, though he afterwards attempted to escape by transferring all his interest in the lease and in the building to a third party, it has been adjudicated that he became and remained bound for the performance of all the lessee's covenants. *Adams v. Shirk*, 104 Fed. 54, 43 C. C. A. 407; 105 Fed. 659, 44 C. C. A. 653; 117 Fed. 801, 55 C. C. A. 25.

On March 5, 1900, there being no insurance on the building in force, and Adams having failed and refused to take out any, the Shirks procured the insurance for which they paid the premiums now in question. They caused the policies to be written in the name of Adams, though they knew that Adams had theretofore executed and delivered written instruments in due form which purported to convey the building and assign the lease to another. The policies contained these conditions:

"It is understood that the title and interest of said assured is that of * * * owner of the building * * * insured hereby. * * * This entire policy shall be void * * * if the interest of the insured be not truly stated herein, * * * or if the interest of the insured be other than unconditional and sole ownership."

The court was right in excluding the question of premiums from the jury, if no valid insurance was procured, for, though Adams had covenanted to pay insurance premiums, he had not agreed to pay for what did not insure; and, although he was disclaiming any interest in the property described in the policies, he was deeply concerned, by reason of his covenant to rebuild, in the validity of the insurance contracts. The policies, by the terms thereof, were utterly void, if, when they were written, Adams was not the unconditional and sole owner of the building. He claims that the conveyance above referred to voids the policies. The Shirks, on the other hand, assert that the conveyance, having been made without their written consent, is a nullity, and that the relation of the parties is the same as if the instrument had never been written. In the former cases between these litigants, above cited, we have held that the transfer by Adams was ineffectual to free him from his assumption of the covenants of the lease, and that he was bound for the remainder of the term unless the Shirks should re-enter, or accept some one else as paymaster in his stead. Adams broke his covenant when he made the transfer. But a wrongful act is not a nonexistent one. A covenant not to do a thing really implies the power to do it. An assertion of a breach of covenant affirms that the covenantor has effectively done what he covenanted not to do. The statement in the policies that Adams was the unconditional and sole owner of the building was therefore untrue.

The Shirks insist, however, that the insurance is valid because the insurers' agents knew the true situation. Even if a false statement of title were a matter that could be waived or cured by an ordinary agent or broker, Adams's covenant should not be construed to cover pre-

miums for insurance procured by his adversaries, the validity of which rests on matters in pais, is open to dispute, and is subject to the frailties of human life and memory.

The judgment is affirmed.

TREAT v. CITY OF CHICAGO et al.

(Circuit Court of Appeals, Seventh Circuit. May 4, 1904.)

No. 1,057.

1. FEDERAL COURTS—FOLLOWING STATE DECISIONS—VALIDITY AND CONSTRUCTION OF STATUTE.

The decision of the Supreme Court of a state, holding a local improvement statute valid under the state Constitution, is binding on a federal court in a suit involving an assessment made after such decision was rendered; and decisions construing and applying its provisions, although made after such assessment, will also be followed unless under exceptional circumstances.

2. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—ESTOPPEL.

A property owner who permitted street improvements for which his property was subject to assessment to be made under a contract containing illegal provisions which increased the cost, without objection, the cost of the work, however, being within the assessment of benefits, and who does not offer to pay his share of the just cost, has no standing in a court of equity to enjoin the collection of any part of his assessment.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

For opinion below, see 125 Fed. 644.

George W. Willus, for appellant.

Edgar B. Tolman, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

PER CURIAM. Appellant's bill to enjoin appellees from proceeding to obtain in the county court of Cook county, Ill., a judgment of sale of certain of appellant's realty in Chicago for failure to pay a special assessment for paving the street in front thereof, was dismissed for want of equity.

Three grounds for reversal are pressed in argument.

1. It is claimed that the local improvement statute under which the special assessment in question was made contravenes the Illinois Constitution. Appellant came into the federal court in Illinois solely by virtue of his citizenship of New York. The suit involves the application of Illinois statute law to Illinois real estate; and the decision of the Illinois Supreme Court (*Givins v. City of Chicago*, 188 Ill. 348, 58 N. E. 912), pronounced before the assessment in question was made, and ever since adhered to, that the local improvement act

¶ 1. State laws as rules of decision in federal courts, see notes to *Griffin v. Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

See Courts, vol. 13, Cent. Dig. § 961.

conforms to the requirements of the state Constitution, must be our governor and guide. *Jackson v. Chew*, 12 Wheat. 153, 6 L. Ed. 583; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359.

2. The first resolution of the board of local improvements failed to give an itemized estimate of the cost, as required by the statute. Appellant insists that this omission subjects to collateral attack the judgment of the county court, rendered after due notice to appellant, which declared and fixed the assessment of benefits to appellant's property. But the Supreme Court of Illinois has decided the question otherwise; and correctly, too, we think. *Gage v. The People*, 207 Ill. 61, 69 N. E. 635.

3. The contract under which the pavement was laid contained certain illegal provisions, on account of which the bid was higher and the work cost more than it would if the illegal features had been omitted. How much more the record does not disclose. But the cost was within the assessment of benefits. And appellant not only fails to offer to pay his proportionate share of the just cost, but demands that the city be perpetually enjoined from collecting anything on account of the improvement.

Appellant might have enjoined the city from entering into the illegal contract, or the contractor from doing the work thereunder. In either event, a legal contract could thereafter have been made, and appellant could not then have escaped paying so much of the confirmed assessment as would have been necessary to meet his pro rata share of the cost under the legal contract. His equities certainly are not enlarged by having waited until his property has received the benefits of the improvement. To aid a property owner under such circumstances to escape without paying anything would be offering a premium upon delay through carelessness or through bad faith. *Givins v. The People*, 194 Ill. 150, 62 N. E. 534, 88 Am. St. Rep. 143.

The decree is affirmed.

BURLEE DRY DOCK CO. v. BESSE.

(Circuit Court of Appeals, First Circuit. May 13, 1904.)

No. 525.

1. CONTRACTS—CONSTRUCTION—PAYMENT.

A contract for the purchase of certain vessels provided that in consideration thereof B. agreed to pay to the seller the sum of \$65,750, as follows: \$20,000 by drafts payable on certain dates, "and the note or notes of the A. Transportation Co. for the balance." *Held*, that such agreement was unambiguous, and did not require payment of the whole consideration in money, so as to entitle the seller, on the nonpayment of one of the notes of the transportation company, to recover the amount thereof from B.'s estate.

In Error to the Circuit Court of the United States for the District of Massachusetts.

Walter B. Grant and Martin A. Ryan, for plaintiff in error.

Eugene P. Carver and Addison C. Burnham, for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

BROWN, District Judge. This action was brought to recover the sum of \$10,750 and interest as an unpaid balance of the purchase price of certain vessels sold by the Burlee Dry Dock Company to William H. Besse.

The written agreement contained the following language:

"In consideration whereof the said Besse agrees to pay to the said party of the first part the sum of sixty-five thousand seven hundred and fifty (65,750) dollars in the manner and times as follows:

"\$7,500 in draft to be issued Jan. 15, 1898, and payable on 25th day of January, 1898.

"\$12,500 in a draft to be issued on January 26th, 1898, and payable on 5th day of February, 1898.

"The note or notes of the Atlantic Transportation Company are to be given for the remaining \$45,750 as follows:

"A note for, or notes aggregating \$35,000 dated January 10, 1898, payable on the 1st day of July, 1898, at 6% per annum.

"A note for, or notes aggregating \$10,750 dated January 10, 1898, payable on the 31st day of December, 1898, at 6% per annum."

The last-described note was not paid. It was in the following form:

"Int. \$11,386.05.

New York, January 10, 1898.

"On December thirty-first after date The Atlantic Transportation Co. promises to pay to the order of itself ten thousand seven hundred and fifty ⁰⁰/₁₀₀ dollars at The Western National Bank of New York.

"The Atlantic Transportation Co.

"Edw. P. Meany, President.

H. A. Harvey, Treasurer.

"Value received, with interest
at 6 per cent. per annum.

"No. 19. Due Dec. 31/98."

Indorsed on back: "The Atlantic Transportation Co., by H. A. Harvey, Treasurer. Pay to the First National Bank, of S. I., or order. Burlee Dry Dock Co., W. J. Davidson, Treasurer. Pay Nat'l Bank of the Republic, First National Bank of Staten Island. Protested for non-payment January 3rd, 1899."

There was no indorsement by Besse.

The plaintiff in error contends that upon a proper construction of the contract Besse agreed to pay the full sum of \$65,750 in money; that the word "pay" requires an absolute payment. It is also argued that the language is at least ambiguous, and that parol evidence was admissible to interpret its meaning, and to show that the parties intended that the note which was not paid was given only as conditional payment.

We are of the opinion that the rights of the parties were dependent upon the language of the agreement, that it was not ambiguous, and that the parol evidence offered was inadmissible. The agreement, properly interpreted, does not require a full payment in money, but expressly provides that a part of the consideration is to be paid in the notes of a third party, the Atlantic Transportation Company.

The cases cited to the effect that the giving and acceptance of negotiable notes does not prevent the party from resorting to the orig-

inal cause of action if the notes are not paid are not in point, since, in order to show a cause of action, the plaintiff was required to prove that Besse had not done what the written agreement required him to do. There was no pre-existing debt which could be sued upon as an independent cause of action. The only obligation was that created by the agreement, and that was fully discharged by payment, according to its express terms, in notes of a third party.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers her costs of appeal.

In re MARINE CONST. & DRY DOCK CO.

(Circuit Court of Appeals, Second Circuit. April 3, 1904.)

No. 195.

1. **BANKRUPTCY—MANUFACTURING CORPORATION.**

A corporation incorporated to do a general manufacturing business, and to manufacture, construct, repair, equip, and buy and sell ships and vessels of all kinds, and parts and furniture therefor, and which since its organization has carried on the business of constructing completed boats, and parts and furniture for vessels, such as boilers, masts, tanks, desks, tables, etc., for the most part made from the raw material in its own shops, is principally engaged in manufacturing pursuits, within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], and subject to proceedings in involuntary bankruptcy.

Petition for Revision of Order of the District Court of the United States for the Eastern District of New York.

This cause comes here upon a petition to review an order denying a motion to vacate proceedings in bankruptcy against the corporation. It is a New York corporation, incorporated to do a general manufacturing business, without limitation thereof—to manufacture, construct, repair, equip, buy, sell, lease, mortgage, or otherwise deal in and with ships, vessels, and boats of every kind, together with all materials, articles, tools, engines, boilers, appurtenances, apparel, and furniture of every kind entering into, or suitable or convenient for, the manufacture, construction, repair, equipment, operation, or maintenance thereof.

R. J. Mahon, for petitioners.

C. P. Moses, for respondent.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The motion is made on the ground that the corporation was a shipbuilder, and therefore not engaged in manufacturing, within the intent of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]. These authorities are mainly relied on:

People v. N. Y. Floating Dock, 92 N. Y. 488. This case holds that a corporation incorporated for the purpose of constructing, using, and providing one or more dry docks, or wet docks, or other conveniences and structures for building, raising, repairing, and cop-

¶ 1. What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.

pering vessels, was not within the provisions of an act which exempted "manufacturing corporations" from certain taxes. The court says:

"Its main object, evidently, is building, raising, repairing, and coppering vessels. The principal portion of the work which the corporation is authorized to perform relates to the improvement of vessels which have already been constructed, and not to the construction of the same, and, taking all the parts enumerated together, they cannot be considered as embraced within the term 'manufacturing.'"

In *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937, the Supreme Court held that a screw steam yacht of 372 tons was "not dutiable under the tariff act, and not properly included in the phrase 'manufactures of iron or wood.' A ship is doubtless constructed of manufactured articles, which, if imported separately, would be the subject of duty, but which, put together in the form of a ship, are taken out of the class of 'manufactures.'"

In *Palmer's Shipbuilding & Iron Co. v. Clayton*, L. R. 4 Q. B. 209, it was held that a ship was not an "article," within the meaning of an act forbidding the employment of children to labor in the manufacture of articles or parts of articles, but that an iron plate was an article of metal, even though used in shipbuilding, and the shaping of the plate was a part of the manufacture.

"The susceptibility to bankruptcy of a corporation does not depend upon its charter." *Matter of Quimby* (D. C.) 121 Fed. 139.

The language of section 4b is "any corporation engaged principally in manufacturing * * * pursuits," and that phrase has been recently construed by the Court of Appeals of the First Circuit in *White Mountain Paper Company v. Morse & Co.* (Oct. Term, 1903) 127 Fed. 643. The corporation in that case was organized to manufacture pulp and paper. It had expended a very large amount of money in acquiring lands and erecting buildings necessary and suitable, and intended to be used, for that purpose and no other. It had under construction a pipe line to give power to its mills, had cut a large quantity of timber, and sawed the same into four-foot lengths, and floated part of it some 50 miles down the Saco river, but no pulp or paper had ever been manufactured and sold by it. The court said:

"It is difficult to see how it can be said that the actual getting out of the four-foot lengths of timber suitable for use in the manufacture of pulp, with a design of so using them, was not, in every possible view of the expressions involved, manufacturing, although in its earlier stages. But even this is a narrow aspect, to which we are not limited. The corporation is a business corporation. It undertook to acquire lands and construct mills for a certain purpose, and that purpose must be presumed to be one within the four corners of its organization. It had undertaken a business, and, in view of its charter and of what facts we have stated, that business could be no other than the business of manufacturing. It was not organized for the purpose of constructing mills, so that it cannot be said that its business was that of constructing mills. It was permitted to construct mills only as incidental to its authorized powers, which, so far as this case is concerned, were those of manufacturing. The question being purely a question of fact, and the case addressing itself on that question so strongly to the ordinary mind, it is hardly worth while to pursue it further; so that we are bound to hold that, on any fair construction of the statute, and in every application of the facts as applied thereto, the corporation was not only principally, but wholly, engaged in

manufacturing, although in the early stages of it. To do otherwise would be equivalent to holding that one who had taken his whole capital and employed it loading ships in foreign ports with cargoes destined for his home, had engaged proper stores for warehousing and selling the goods when they arrived, had employed clerks and provided all the incidentals of the business, had abandoned all other enterprises in favor of his purpose to continue indefinitely in the purchasing of goods abroad, bringing them home and there disposing of them, was not principally engaged in importing while the merchandise was afloat, because, according to the construction of the customs statutes, articles purchased abroad are not imports until they have arrived within the domestic harbors for which they are intended."

The record in the case at bar shows that since its organization the corporation has constructed in all 84 boats, ranging in length from 10 to 34 feet, and weighing from 100 to 2,500 pounds. All the various parts of the boats, with scarcely any exceptions, are themselves manufactured from the raw material by the company in its own shops into completed parts, except very small articles, such as blocks, nails, hardware, etc. It has also made a number of boilers, blocks, masks, booms, gaffs, jaws, etc., which were entirely complete within themselves, and intended for use in repair work. A large amount of furniture, such as chairs, desks, tables, bookcases, etc., and a large amount of paint, and a large number of copper tanks, have been manufactured from the raw material in the company's shops, and sold by the company in the usual course of business. In view of these facts, we find no difficulty under the authorities in reaching the conclusion that the corporation was "principally engaged in manufacturing pursuits," within the meaning of section 4b.

The order of the District Court is affirmed, with costs.

BONANNO et al. v. TWEEDIE TRADING CO.

(Circuit Court of Appeals, Second Circuit. April 5, 1904.)

No. 189.

1. SHIPPING—BREACH OF CHARTER PARTY—REFUSAL OF CHARTERER TO ACCEPT VESSEL.

A decision adjudging that upon the facts shown a charterer was not legally justified in refusing to accept the vessel when tendered for loading affirmed on the opinion of the trial court.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. For opinion below, see 117 Fed. 991.

Lorenzo Ullo, for libelants.

Charles S. Haight, for respondent.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. We fully concur in the opinion of Judge Adams in the court below (117 Fed. 991), except upon a single point, and the opinion is otherwise such a complete and satisfactory statement of the facts and the law of the case as to require nothing further to be added to it. The opinion suggests that the charterer may have

precluded itself from insisting upon the failure of the vessel owner to give notice of her readiness to discharge until after 9 a. m. on April 15th, because it had allowed the vessel to proceed to Baltimore, when it knew that she could not reach that place in time to give an earlier notice, if its construction of the contract was correct. This suggestion does injustice to the charterer, and indicates that the previous correspondence between the charterer and the vessel's agents was in part overlooked or misapprehended by the learned judge. It appears by that correspondence that the charterer had explicitly defined its position to the vessel's agents, and that the latter understood that the charterer intended to insist upon its strict rights, and fully recognized the propriety of doing so under the circumstances of the case. The decision, however, was not placed upon the ground of any estoppel or waiver, and it is unnecessary to consider whether the right to cancel the charter would have been in any way affected if the charterer's conduct had been such as was imputed to it. We also concur in the very excellent opinion of the commissioner upon the question of damages, and approve the reasons stated for his conclusions.

The decree is affirmed, with interest, but without costs to either party.

SEAL et al. v. BOOKKEEPER PUB. CO., Limited, et al.
(Circuit Court of Appeals, Sixth Circuit. May 3, 1904.)

No. 1,258.

1. PATENTS—LICENSE—EVIDENCE HELD NOT TO ESTABLISH RENEWAL.

An exclusive license to manufacture a patented article, granted by the owner of the patent for the term of one year, with privilege of renewal on certain conditions, *held*, under the evidence, not to have been renewed within the time agreed upon, wherefore the rights of the licensee terminated at the expiration of the year, and a second licensee, who obtained an exclusive license to run from that time, paying the agreed consideration therefor, was vested during its term with the sole and exclusive right to make and sell the patented article.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

Paul T. Davis (A. Parker Smith, of counsel), for appellants.

Parker & Burton (R. A. Parker, of counsel), for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit for the infringement of a patent, with the usual prayer for an accounting. The patent involved is No. 414,335, for an improved form of adding machine. It was applied for by Lester C. Smith, granted to his assignee, Charles H. Webb, and on January 19, 1894, became, by assignment, the property of Edwin R. Beach, one of the original complainants. In the latter part of July, 1900, Beach granted the complainant below, Nora Seal, an exclusive license to manufacture and sell the patented improvement for a period of three years beginning August 1, 1900. On July 27, 1899, Beach had granted to the Bookkeeper Company, the

predecessor of the Bookkeeper Publishing Company, Limited, one of the defendants, a license to make and sell the patented improvement for one year from that date, "with the privilege of renewal or purchase of the business." The license to Nora Seal was granted and accepted in the belief that the prior license to the Bookkeeper Company had expired, but the latter, claiming a renewal, continued to make and sell the patented device, and accordingly this suit was instituted on January 8, 1901, by Nora Seal and E. R. Beach, the licensee and licensor, against the Bookkeeper Publishing Company, Limited, its officers and directors. After the filing of the bill, Beach and the Bookkeeper Company got together, and on April 3, 1901, the former assigned the latter all his interest in the patent. Since then the Bookkeeper Company has owned the patent. After this sale a supplemental bill setting it up was filed. A motion for a preliminary injunction was submitted, but never decided. The case was finally heard on July 28, 1902, and a decree dismissing the bill rendered on January 10, 1903. On November 4, 1903, after the appeal to this court had been perfected, the opinion of the court below was filed, in which the dismissal was placed upon the ground that the defendant's license was renewed for one year, and therefore in force when the complainant's license was granted and the original bill filed.

1. The validity of the patent is not in question. The dispute is between two licensees, and the sole matter for determination is whether the license of July 27, 1899, to the Bookkeeper Company, was renewed. This license was never executed in written form. A memorandum of the oral agreement reached was made. This was handed over to Elmer H. Beach, the manager of the Bookkeeper Company, to be put in typewritten form of execution. The following is a copy of the memorandum, the words erased being printed in italics and those inserted in small caps:

"Agreement made 27th day of July, 1899, between E. R. Beach, of Jersey City, N. J., OWNER OF PATENT, and The Bookkeeper Company, OR ITS SUCCESSORS, of Detroit, Mich.

"Witnesseth: That the said E. R. Beach, for and in consideration of the following conditions, hereby grants unto the said Bookkeeper Company the sole right of manufacture and sale of the WEBB ADDER for one year with privilege of renewal or purchase of the business.

"The Bookkeeper Company hereby agrees to use proper ways and means to warrant a satisfactory success of the business, and to manufacture a first lot of one thousand adders of *present SUITABLE style and finish*, each adder to bear a number stamped on some part of outside surface, so as to be easily seen and to keep a correct account by numbers of all made and sold by numbers and on or before the 10th of each month render such statement of all sold up to that date and at the same time to pay E. R. Beach a full royalty of 10 per cent. on selling prices on all sold EXCEPT to E. R. B., and to furnish said E. R. Beach such quantities of Adders as he may order (to supply agents with whom he now has a stipulated contract) from the first lot of one thousand, at \$1.50, \$2.00 each, and *from subsequent lots at only 20 per cent. in addition to cost of manufacture.* * * * *No change from present style shall be made without consent of E. R. Beach,* and that no transfer of this agreement shall be made."

Indorsed on back: "Skeleton of Contract. July 27, '99. Mr. E. H. Beach will typewrite contracts and send to me for signature. Conditions mentioned herein agreed upon at personal interview. E. R. B. I send cards by mail."

The memorandum was never put in typewritten form by Elmer H. Beach, and never executed. In April, 1900, E. R. Beach, being dissatisfied with the conduct of the Bookkeeper Company, and having employed an attorney in Detroit, prepared and presented to the Bookkeeper Company a formal draft of the agreement for execution. The Bookkeeper Company never signed this, but, according to the testimony of Beach's attorney, conceded it correctly stated the agreement, with the exception of certain prices. In this formal contract, the following paragraph regulated the right of renewal:

"2nd. That second party shall have the right to renew this sole and exclusive privilege for a further period of one year, after its expiration, upon the same terms and conditions herein contained, by mailing first party, at least thirty days before Aug. 1st, 1900, written notice of its intention so to do, and first party hereby agrees to make, execute and deliver such other or further license papers or transfers as may be necessary and requisite in the premises to render this renewal legal and effective."

Recurring to the memorandum, it is to be noted that the license was granted upon certain conditions. Whatever efforts the company may have made, or money expended, it did not succeed, during the year it held the license, in complying with any of these conditions. It did not turn out a single perfect machine, or pay the licensor a dollar of royalty. The machines it did turn out were not stamped, and no account was ever rendered. Early in 1900, months before the end of the license period, the licensor became dissatisfied with the situation, and employed Mr. Davis, a lawyer in Detroit, to assist him in asserting and protecting his rights as against the licensee. At the same time he began to look about for another licensee. The Bookkeeper Company was not left in doubt as to his demands or intentions. In his letter of April 7, 1900, after calling attention to its failure to comply with the conditions of the contract, he said:

"All I ask is that you live up to the first contract to the letter. Mr. Davis will see you and report to you what I have written him, and if you are disposed to do the right thing we may arrange to go on as per contract, and if not, then our business relations must be cancelled. Nearly a year has gone without satisfactory results, and I will not consent to further business unless I can have fair sailing."

Later, in the letter of June 7, 1900, he said:

"Next month one year will have passed since you arranged with me for the business for one year with privilege of renewal if satisfactory to me. It may be that you have got things in shape to make a success of the business, but I can not stand another such year of mishaps. Are you coming here soon? There are many things to consider and arrange between us if the business is continued by you, and more can be done in an hour's talk than by correspondence or the use of Mr. Davis as a go-between. * * * *I have an offer for my patent, and also to arrange for the business of manufacturing and selling, but will keep my word sacred to you until the 28th of July 1900.* A full statement of sales, etc., ought to be made to me by you as agreed, and I shall expect one on or before the 10th inst. as agreed. I have not received anything from the business since you have had it, and it seems to me that I should be credited with royalties from your sales."

These letters sufficiently notified the Bookkeeper Company that Beach was not satisfied; that he was looking forward to the termination of the license at the end of the year; that he would not consent to its continuance by acquiescence; there must be a formal re-

newal by proper notice. Unless new and satisfactory arrangements were made, he would stand upon his rights. He suggested an interview. The extent of his promise was that he would hold his word sacred to them until the 28th of July, the day after the termination of the license; no longer. Nothing was done in pursuance of this invitation, and in July Beach further defined his position by notifying the Bookkeeper Company to discontinue the manufacture of the machine. This is shown by the testimony of E. R. Beach, the licensor:

"Q. Did you, about the middle of July, 1900, send a notice to the Bookkeeper Publishing Company, Limited, requiring it to discontinue the manufacture of these adding machines on or before July 28, 1900? A. I did."

And of E. H. Beach, the manager of the Bookkeeper Company:

"Q. Did not the Bookkeeper Publishing Company, Limited, receive a notice from E. R. Beach in the month of July, 1900, ordering it to discontinue the manufacture of adding machines under the agreement made between it and E. R. Beach? A. Yes."

But it is said (and much stress was laid on this by the court below in its opinion) that the break between Beach and the Bookkeeper Company, and the granting of the license to Mrs. Seal, was due to the double dealing of one John L. Herring, a cousin of Mrs. Seal, who, to advance his own interest, succeeded in setting them by the ears. Herring acted as the agent for Beach in the sale of these adders before the license was granted to the Bookkeeper Company. He was one of the agents reserved by Beach, who were to be supplied with machines only through Beach. It seems that in the fall of 1899 Herring visited and corresponded with the Bookkeeper Company and its manager, with the view of securing direct relations with it and obtaining machines without the intervention of Beach. The Bookkeeper Company apparently encouraged this correspondence, and from week to week kept promising Herring to get out a perfect machine. Herring on his part was trying to place all the machines he could, and (as he says) "jolly" his customers along with the promise of new machines next week. Finally, along in February, 1900, Herring became thoroughly discouraged, and apparently gave up hope of getting any merchantable machines from the Bookkeeper Company, and from that time on did what he could to get Beach to terminate the license to the Bookkeeper Company and make arrangements with somebody else, and he persuaded his cousin, Mrs. Seal, who had some means, to invest in the business. It is no doubt true that in the fall of 1899, when Herring was trying to ingratiate himself with the Bookkeeper Company, he belittled Beach, and, later, when he had given up hope of the Bookkeeper Company, he turned again to Beach and denounced it. But the cause for his course each time is apparent, and not a little of what he said was justified by the conditions as they affected him. At any rate, what he contributed to the situation matters little. *Stimpson Computing Scale Co. v. Stimpson Co.*, 104 Fed. 893, 895, 44 C. C. A. 241. The situation existed, and, as a result, Beach, acting under legal advice, took the position we have described, with the results mentioned.

2. Although the Bookkeeper Company was thus advised that Beach was standing upon his rights, and that, if it desired to renew the license, it must give a proper notice in due time, no notice was given. The company pursued its usual course of making promises while ignoring demands. What it now claims as a notice is the following letter:

"Detroit, Mich., July the 26th, 1900.

"Mr. E. R. Beach, Jersey City, N. J.—Dear Sir: Yesterday I had a call from Mr. Davis, and I suggested that he write you to come to Detroit at your convenience and look matters over, and satisfy yourself that I am doing everything I can in the matter, and that the conditions are just as I represented them to you. I am promised perfect machines next week, and I think it would be a good idea for you to be here at that time and see that everything is going along all right.

"It will be very foolish on your part to take any action on this matter in view of the circumstances.

"Sincerely yours,

[Signed] E. H. Beach, Editor."

It is to be kept in mind that the license under consideration was not like that in *St. Paul Plow Works v. Starling*, 140 U. S. 184, 196, 11 Sup. Ct. 803, 35 L. Ed. 404, unlimited in duration, which requires mutual consent, or some positive act by one of the parties, to terminate it. *Walker on Patents*, § 308. This license was of limited duration; it ran only for a year; and the positive act required was not one to end, but to extend, it. Bearing this in mind, was the above letter notice of an election on the part of the Bookkeeper Company to renew the license for another year? We think not. It would not have bound the Bookkeeper Company for another year, nor did it bind the licensor. It says, in substance, that the company was doing what it could, and was promised "perfect machines next week." Beach had heard this before. Nothing was said as to what the Bookkeeper Company desired or intended to do if it was again disappointed in the machines. Suppose there had been another failure, could Beach have held it, under this letter, as licensee for another year? Certainly not. The company might have answered: "We never told you we desired to renew. You had notified us that new arrangements would have to be made to continue business with you. We simply informed you of what we had done and what had been promised, and expressed our opinion that it would be very foolish on your part to make arrangements with anybody else until we could see how these machines turned out. If they had proved successful, we would have been glad to enter into arrangements with you for a further license. That was the extent of our letter."

3. During March, Beach wrote to his attorney in Detroit, stating that "for nearly eight months" the Bookkeeper Company had his business in hand, and had "broken every provision of the contract." On March 30th he wrote to Herring, saying:

"If you know of a party who will put up the necessary money to run the business, I will consider a proposition."

On June 30th he again wrote Herring, saying:

"My verbal contract with said company, Beach as manager, ends the 28th of next month (July), and unless new terms are made, and a competent guaranty is given, it will not be renewed. The result of Beach's work with it for

eight months is enough to satisfy me that it is best for me to make other arrangements at once."

He then invites Herring to take an interest in the business, and concludes by saying:

"I have another party who wants to get into the business, so answer me promptly by return mail."

In the latter part of July, the license to Mrs. Nora Seal was granted. This was an exclusive license for three years, beginning August 1, 1900. The machines were to be made in blocks of 1,000, for which Mrs. Seal was to pay Beach \$300 in advance for the first thousand, \$250 in advance for the second thousand, and \$200 in advance for each succeeding thousand. Beach was to be supplied with all the adders he might ask for at a price "to be agreed upon." Each party covenanted not to sell any adders to the Bookkeeper Company. The licensee was to prosecute all infringers. Upon a failure to perform any covenant of the license, it was to be revoked, and the licensee was to forfeit the sum of \$500. Upon the execution of this license by Beach, Mrs. Seal paid him the \$300 for the first thousand machines, and afterwards expended between \$2,000 and \$3,000 in providing tools and paying for the first thousand machines. On August 9, 1900, after Beach had granted the license to Mrs. Seal, the Bookkeeper Company wrote him, sending him extracts from Herring's letters belittling him, and expressing surprise that he should have permitted Herring to come between them. Beach held this letter until the latter part of October, when he answered, expressing regrets, and renewing relations with the Bookkeeper Company. In the meantime Mrs. Seal had expended the money referred to in getting out the new machines. It seems, however, that these machines were more expensive than those manufactured by the Bookkeeper Company, and, since Mrs. Seal's license provided they should be furnished to Beach at a price "to be agreed upon," Beach could not get the machines at the price he was willing to pay. As a result, he turned again to the Bookkeeper Company, and since then has acted as its ally in this litigation.

Mrs. Seal is here standing upon her license, executed for a valid consideration by Beach, after, as he believed, the license of the Bookkeeper Company had expired. It is said, however, she had notice that the Bookkeeper Company had had a license which contained a privilege of renewal, and should have inquired of the company as to its claims under this license. But, if she had inquired, she would have ascertained only what we know now, and from this she would have been warranted in concluding, not only that the Bookkeeper Company had failed to give any notice of a desire to renew its license, but that Beach, the licensor, had taken positive steps, by notice, to prevent any claim of a renewal through acquiescence in the conduct of the company in continuing to act under the license after it had expired.

We have gone a good deal into detail in this opinion. The question is, after all, one of fact—what the parties intended and did. No suit has been brought to cancel Mrs. Seal's license on the ground

of fraud. There is no issue of that kind. Her license was valid, and, so far as appears, she has faithfully performed its covenants, including that requiring her to sue any infringer. Beach's quarrel is with Herring, and Herring is not in the case. Beach must have known Herring had no money to invest in the business. He was and had been a mere agent, interested in getting a licensee who would promptly turn out good machines. If Beach relied upon him to manage Mrs. Seal's business, and thus carry out some private arrangement outside the license, he was doing a foolish thing, for which Mrs. Seal cannot be held liable. She is only responsible for her own agreement, which was set out in the license.

The judgment of the lower court is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

SMEETH et al. v. FOX COPPER & BRONZE CO. et al.

(Circuit Court of Appeals, Third Circuit. March 28, 1904.)

No. 40.

1. PATENTS—INFRINGEMENT—BOSH PLATES FOR BLAST FURNACES.

The Scott patent, No. 452,168, for bosh plates for furnaces, *held* valid and infringed.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

The following is the opinion of the court below (Buffington, District Judge):

This bill was filed by the Best Manufacturing Company, charging the Fox Copper & Bronze Company with threatened infringement of letters patent No. 452,168. On application for a preliminary injunction, this court on February 12, 1901, granted the same. Since then a large amount of testimony has been taken in this and other cases involving the same patent. The device of Scott was meritorious, and has proven a highly useful factor in prolonging the life of a furnace bosh subjected to the rapid driving of modern firing. We will not enter into a discussion of the prior art. It suffices to say that, after a careful study thereof, we are of opinion that the cooling bosh devised by Scott was not shown in the prior art, and that, restricted to a proper construction, all of his claims, except the sixth, involved patentable novelty. The patent, then, being deemed valid, we are not required to express any views upon the question whether Daniel Fox, and through him the other respondents, are estopped to deny the validity of this patent. The proofs show that the respondent company offered to furnish to the Columbus Iron Company and the Globe Iron Company bosh plates of the design shown in the drawing on page 352 of the record. In both cases the bosh plates were not sold or manufactured, but this was owing to the fact that the prospective purchasers declined to buy and incur risk of litigation. The respondent was willing to furnish plates of the design of said drawing. It is well settled that threatened infringement affords ground for relief. *Poppenhauser v. N. Y. Gutta-Percha Comb Co.*, 2 Fish. Pat. Cas. 74, Fed. Cas. No. 11,281; *Sherman v. Nutt* (C. C.) 35 Fed. 149; *Sessions v. Gould* (C. C.) 49 Fed. 855; *White v. Heath* (C. C.) 10 Fed. 291.

It remains, then, to inquire whether the structure of the drawing infringes the Scott patent. We are of opinion it does. The proposed water-cooled bosh plate was adopted to set in a recess in a furnace wall. It was freely removable therefrom. To that extent it embodied the elements of the claim. Did

it have the remaining elements of "a water passage extending through it for the passage of a current of water, and inlet and outlet pipes"? We think it did. From the inlet pipe the water is carried in a closed pipe to the rear of the plate, and then it strikes an acute-angle projecting rib, and is divided into two streams. These streams are carried to the sides of the nose. Here all semblance to the Peters plate, which we have considered in another of these cases, ends. Instead of the water flowing into the general body of the bosh, and finding an unrestrained course to the outlet, it is confined by a cross-diaphragm jutting from each side of the bosh. This carries the two currents together, and the united current passes through the narrow water passage formed by the ends of the diaphragms. But even here the water is not permitted to pass into an open reservoir, but a long diaphragm, placed opposite the last-mentioned opening, serves to confine and direct the water in two streams to points opposite the two outlets. It will thus be seen that the bosh plate in question has interior structural water passages extending through it, and through these the water passes in confined currents from inlet to outlet pipes. The fact that at two points the current is divided does not avoid the patent. Indeed, analysis shows that this device is simply a duplication of Scott's. If Scott's drawing No. 6 is duplicated by one placed beside it—if, for the intake channel made by the bosh side and diaphragm, 10, we substitute an intake pipe—we have in substantial form the proposed infringing device. It will thus be seen that in its confined channels, in the tortuous passages through which the water is led from start to finish, we have a substantial reproduction of Scott's device. Such being the case, a case for a decree is shown.

As to the plate furnished the Maryland Steel Company, we are of opinion it does not infringe. As we view this patent, the test of infringement is whether the plate has an internal structural water passage extending through it, embodying, in substance, the claim element of "a water passage extending through it for the passage of a current of water." It is true, there is in the Maryland plate a water passage leading from the inlet to the front of the plate, but, when that point is reached, the passage, instead of extending further, delivers the water into the general open body of the plate. From that point, not having any passage or channel provided, it is free to pass in a current in any one of the three ways. If it sought the shortest path to the outlet, it would pass diagonally toward the opening between the back wall and the interior side diaphragm. But two other current courses might be followed: It might seek its way across the nose of the plate, and enter the detached water passage leading along the side, or it might be drawn by the inlet current into the rear side opening inlet channel, and again pass through it to the nose. In view of these three divergent courses open to the water when it left the inlet channel, none of which were through a "water passage extending through" the plate, we are of opinion the Maryland device does not embody the limiting element of the claims. The proceedings in the Patent Office made a water passage extending through the plate a matter of substance, and when we find such passage does not extend either wholly or substantially through the plate, as in this case here, we must hold the respondent has found another way to accomplish the desired result.

As to the Maryland device, the bill will be decreed dismissed.

Robert D. Totten, for appellants.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

PER CURIAM. The case brought up by this appeal is ruled by our decision in *Smeeth et al. v. Perkins & Co., Limited, et al.*, 125 Fed. 285. The views we there expressed, and to which we adhere, require the reversal of so much of the decree of the Circuit Court in this case as ordered, adjudged, and decreed that the bill of complainant be dismissed "in so far as it relates to the infringement by defendants by the manufacture, use, and sale of bosh plates known and designated as 'Complainants' Exhibit Maryland Steel Co. Plates,'" and it is so order-

ed and decreed. And the cause will be remanded to the Circuit Court, with directions to modify its decree so as to conform to this order, and for further proceedings agreeably to the views of this court expressed in its opinion delivered in the case of *Smeeth et al. v. Perkins & Co., Limited, et al.*, 125 Fed. 285.

WESTERN ELECTRIC CO. v. NORTH ELECTRIC CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 12, 1904.)

No. 1,256.

1. PATENTS—VALIDITY AND INFRINGEMENT—ELECTRIC ANNUNCIATORS.

The Warner patent, No. 477,616, for an improvement in electric annunciator drops, claim 1, is void for lack of novelty; claim 4, if valid, must be limited to the specific construction described. As so construed, held not infringed.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

This is a bill to restrain infringement of claims 1 and 4 of patent No. 477,616, for an "improvement in electric annunciator drops, issued to James C. Warner, assignor to the Western Electric Company." Upon the pleadings and evidence, Wing, District Judge, dismissed the bill; holding the first claim void for want of novelty, and the fourth, if valid, not infringed.

Edward Rector and De Witt C. Tanner (George P. Barton, of counsel), for appellant.

Albert Lynn Lawrence, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. The patentee recites in his specifications that his invention "relates to electric annunciators of the class usually employed as individual signaling devices in the telephone exchange system," and that his objects, so far as they relate to the two claims involved, are "to provide a soft iron shield about the coil, so as to prevent, as far as possible, inductive effects between the coils of the different magnets when placed near each other," and "to provide for carrying out the ends of the wire of the coil of each annunciator to separate connecting pieces at the rear, so that they may be readily accessible."

The claims in suit read as follows:

"(1) The combination, with the coil or helix, of a soft iron shield surrounding the same, the armature at the rear of the core of said helix, and the armature lever extending forward through a slot or opening in the plate, b, and the drop with which said lever is adapted to be engaged when the drop is lifted, and to be disengaged therefrom when the armature is attracted, substantially as and for the purpose specified."

"(4) The annunciator provided with the armature, d, provided with openings, the ends of the wire of the helix being carried back through said openings in said armature and connected with insulated connecting pieces, h, i, respectively, substantially as and for the purpose specified."

Electric annunciators were well known in the electric art when Warner applied for the patent. One of the constructions most in use was the subject of a patent issued to the same inventor October 24, 1882, serial number 266,405. The magnetic annunciator there shown and claimed is the device of the first claim, except the soft iron tube inclosing the coil or helix. We need not indulge in the scientific aspects of magnetic or electric inductors. It is enough to say that one of the manifestations of magnetic induction, between adjacent annunciators, is to produce between the users of two talking circuits connected with two adjacent electric annunciators a transfer of the voice current from one circuit to the other, called in the vocabulary of the telephone art "cross-talk." This cross-talk is undeniably the result of a considerable degree of induction, and, in proportion as induction is prevented, cross-talk currents are less observable or annoying. While, therefore, the patentee does not refer to cross-talk in his specifications as something which it was his object to suppress or minimize, he does distinctly declare his object to be "to prevent, as far as possible, inductive effects between the coils of the different magnets when placed near each other." Undoubtedly one of the effects of induction is to weaken the force of the current by the waste thus caused. But another effect in telephony was this disagreeable "cross-talk" between users of different talking circuits. Warner proposed to minimize induction as far as possible, and his method for doing it was to surround the magnetic coil with a tube of soft iron. That induction was by this device so minimized as to cause the practical disappearance of cross-talk is established. As one incidental result, it became feasible to arrange such annunciators very closely together in ranks, with one row in line above another, in telephone exchanges. This enabled considerable economy of space in the organization of telephone exchanges where there were a large number of subscribers, and possibly some economy of operator service. But it was not new to surround the magnetic coil of an annunciator with a shield or tubing of soft iron. The English patent of 1875 to Faulkner shows an annunciator magnet inside soft iron tubing. Faulkner's improvements are described as relating to "indicators" as well as electric bells, telegraph sounders, etc., and consists, says the patentee, "in using a round, square, or other shaped iron tube or case to cover the outside of the coil or bobbin." The object, he says, is "to collect, accumulate, and utilize all the magnetic or electric power, thereby preventing the loss of force that takes place in the electro-magnets or magneto-electro magnets as hitherto used." True, he does not say that loss of force by induction was to be thereby prevented, but that is necessarily accomplished by his device, and is but one of the modes of loss of electric force. Figure 6 of his drawings shows an electric indicator not materially different from that of Warner, though not in form adapted to use in telephone exchanges with economy of space. That Faulkner suggested an alternative form by which his tubing might be made in several pieces, or by the employment of an iron segment only, is not destructive of the teaching of his patent. His preferred form is that the tubing shall be in one piece. In that

form the best results against waste of magnetic cross-currents are obtained, and that form is the one used in each of Faulkner's several drawings. That magnetic force will not act across a shield of soft iron seems to have been a well-known fact in the field of electric art, and in an elementary work upon the subject, open and known to the public, we find this stated, and that, "if a small magnet is suspended inside a hollow ball made of iron, no outside magnet will affect it. A hollow shell of iron will therefore act as a magnetic cage, and secure the space inside from magnetic influence." *Elementary Laws in Electricity and Magnetism*, by S. P. Thompson (Ed. 1887). Claim 1 must be held void for want of novelty.

One of the other objects of the inventor, we have already seen, was to provide "for carrying out the ends of the wires of the coil of each annunciator to separate connecting pieces at the rear, so that they may be readily accessible." He further states in his patent that, with this object, his invention consists "in providing an opening or openings in the armature, and an insulated support at the rear of the same, upon which are mounted connecting pieces; the different ends of the coil being carried back to said connecting piece to make the connection readily accessible at the rear." Upon this is based the fourth claim. We agree with the court below in saying that "no change in the operation of the device was effected by thus leading the wires out of the helix through the armature. Nothing was accomplished except possible greater convenience in attachment." To carry the magnet wire back to the rear of the case for the purpose of attachment was not novel. Neither was it new to convey them back through openings in the armature. For such an arrangement, see patents to Barrett, No. 360,266; Shelbourne, No. 342,881; Sawyer, No. 242,055; and British patent to Eldred, No. 676 of February 7, 1883. If the claim is to be sustained at all, which is a doubtful matter, it can only be sustained by confining Warner to the specific device he has described. Thus limited, the defendant does not infringe.

The decree dismissing the bill is therefore affirmed.

**ENCYCLOPÆDIA BRITANNICA CO. v. AMERICAN NEWSPAPER
ASS'N et al.**

(Circuit Court, D. New Jersey. June 23, 1904.)

1. COPYRIGHT—NECESSARY PROOFS.

Where it is alleged that a copyrighted article has been infringed, the copyrighted article and the alleged infringing article, or so much thereof as may be necessary for intelligent comparisons, must be included in the proofs.

2. SAME—EXPERT WITNESSES.

The analyses and comparisons of expert witnesses in a case of alleged infringement of copyrights may be received in evidence, but only as aids to the court, upon whom is imposed the duty of making the final comparisons.

3. SAME—SUBSTANTIAL IDENTITY.

Substantial identity between a copyrighted article and an article alleged to be an infringing one creates a presumption against the publisher of the latter article, which he must overcome.

4. SAME—LACHES.

Laches cannot be successfully invoked in aid of a publisher of an infringing article when it does not appear that the owner of the copyrighted article had knowledge of the infringement, or that he had notice of any facts sufficient to put him upon inquiry.

5. SAME—PRELIMINARY INJUNCTION.

Where there is no doubt of the infringement, and no defense rendering it inequitable to grant the relief prayed for, a preliminary injunction will be granted.

(Syllabus by the Court.)

In Equity. On motion for preliminary injunction.

Frederic R. Kellogg and G. D. W. Vroom, for complainant.

James Buchanan and John G. Johnson, for defendants.

LANNING, District Judge. This is an application for a preliminary injunction, and has been heard on bill, answers, and affidavits, the answers being sworn to and used as affidavits.

It appears that, early in 1875, A. & C. Black, of Edinburgh, Scotland, began the publication in Scotland of the work entitled "The Encyclopædia Britannica, a Dictionary of Arts, Sciences and General Literature, Ninth Edition." In the same year, the copyright laws of this country not then furnishing protection to foreign authors or publishers, one Joseph M. Stoddart, Jr., trading under the name of J. M. Stoddart & Co., of Philadelphia, began the publication of the same work in this country. Some time between 1875 and 1879, the exact time not being shown, the Blacks entered into an arrangement with Charles Scribner, trading as Charles Scribner's Sons, of New York, for the publication in the United States of the Edinburgh edition of the work. Suits were instituted about 1879 between the Blacks and Stoddart, and between Scribner and Stoddart, which led to an agreement dated March 24, 1881, "between Joseph M. Stoddart, Junior, doing business at Philadelphia, Pennsylvania, as J. M. Stoddart & Co., and Charles M. Scribner, doing business at the City of New York as Charles Scribner's Sons." This agreement, after reciting that Stoddart "was

the proprietor and publisher of a certain work called the American Reprint of the Encyclopædia Britannica, Ninth Edition," that Scribner "was the importer of the Edinburgh Subscription Edition of the Encyclopædia Britannica, Ninth Edition, which he purchases of Messrs. A. & C. Black, of Edinburgh, Scotland," and that controversies, disputes, and litigations had arisen between Stoddart on the one side and the Blacks and Scribner on the other side, declares, *inter alia*, that "the said Scribner also agrees that no suit shall hereafter be brought by him, nor by them [the Blacks] with his consent or co-operation, against said Stoddart, or his agents, employees or servants, or book-sellers selling the American Reprint of the Encyclopædia Britannica for any infringement, past or future, or alleged infringement of any copyright law." The agreement further provides that "it is also understood between the parties hereto that this agreement and the several understandings therein shall extend to and bind the representatives and assigns of the respective parties."

Previous to the date of this agreement, articles included in the edition published by Scribner had been written by American authors, and copyrighted, under the following titles, viz.: "Galveston," "Georgia," "Horace Greeley," "Hayti," "Homestead," "Honduras," "British Honduras," "Illinois," and "Indiana." Between the date of the agreement and April 6, 1888, the following articles, also included in the Scribner edition, were written by American authors, and copyrighted, viz.: Articles on "Modern History and Present Distribution of North American Indians," "Indian Territory," "Lafayette," "Abraham Lincoln," "Henry W. Longfellow," "Louisiana," "Maine," "Maryland," "Massachusetts," and "United States, Part 1, History and Constitution." These articles were originally published in book or pamphlet form, and the titles to the copyrights are now, by means of sundry assignments, vested in the complainant, the Encyclopædia Britannica Company, a corporation of Illinois, which also owns and publishes the edition formerly owned and published by the Blacks.

In 1890, Richard S. Peale, of Chicago, commenced the publication of another American edition of the Encyclopædia Britannica. He obtained for it, he says, in the places of the copyrighted articles above mentioned, other articles by other authors on the same subjects. These last-mentioned articles, he further says, were printed and inserted in his edition "exactly as written by the authors." The defendant the Werner Company has succeeded to the rights of Richard S. Peale in the American edition formerly published by Peale, and that company, and the other defendant, the American Newspaper Association, both being New Jersey corporations, are now engaged in publishing and selling that edition, which still includes the articles alleged to have been written in 1890 for Peale.

The complainant insists that the articles written in 1890 for Peale, and now included in the defendants' edition, are infringements of its copyrights. The primary evidence of the infringements must be found, if found at all, in comparisons of the two sets of articles. And these comparisons must be made by the court, or by a master to whom such duty has been referred. The comparisons of expert witnesses may very properly be received in evidence, but only as aids to the court. This

remark is made because no copies of the articles on some of the subjects are included in the proofs, although they do include the affidavits of expert witnesses, containing their comparisons of the articles, and their opinions to the effect that the defendants' articles are largely copies of the complainant's copyrighted articles. The opinions of experts, however competent they may be to discover plagiarisms and piracies, are secondary, and not primary, evidence. It is the court, and not expert witnesses, who must determine the question whether one's copyright has been infringed. *Lawrence v. Dana*, Fed. Cas. No. 8,136. This rule excludes from present consideration the articles on "Galveston," "Horace Greeley," "Hayti," "Illinois," "Indiana," "Modern History and Present Distribution of North American Indians," "Lincoln," "Longfellow," "Maine," "Maryland," "Massachusetts," and "United States, Part 1, History and Constitution."

The articles on the remaining seven subjects cannot be so excluded. As to each of them the proofs contain verified copies of the complainant's copyrighted article and of the alleged infringing article of the defendants. These relate to the subjects "Georgia," "Homestead," "Honduras," "British Honduras," "Indian Territory," "Lafayette," and "Louisiana." Much aid has been had in the work of examining these articles by the comparisons contained in the proofs, and the opinion now reached is that the articles on the last seven subjects named, published in the defendants' edition, were modeled after, and to a very substantial degree taken from, the copyrighted articles on the same subjects contained in the complainant's edition.

In the two articles on "Georgia," the first fact to be noted is the striking resemblance between the headings to the several sections. In some cases they are identical, in others slightly changed in phraseology, but in all cases substantially the same. In the bodies of the two articles there are numerous instances of the duplication of ideas and sentences. As illustrations, some parallel passages are hereunder given:

From Complainant's Edition:

"Georgia has three distinctly marked zones, varying in soil, climate and productions. Her sea coast is similar to that of the Carolinas, being skirted by fertile islands, separated from the mainland by narrow lagoons or by sounds. This section is essentially tropical."

"In the southwest the soil though light and sandy, produces cotton. In southern Georgia there are millions of acres of magnificent yellow pine forests of great value for house or ship building, and in these forests turpentine plantations have been opened. The live-oak, also valuable for ship-building purposes, abounds in the southeast of the State. The swamps afford cedar and cypress, the central region oak and hickory."

"The higher branches of education are well represented. As early as

From Defendants' Edition:

"This variation of surface gives Georgia three distinct zones, differing in soil, productions and climate. Low islands, separated by narrow necks from the mainland, skirt her sea coast and produce cotton of a superior quality, known as sea island cotton. This coast section with the adjacent islands is essentially tropical."

"In the southwest the soil is light and sandy. Millions of feet of yellow pine, of great value in ship and house building, are ready to be used. In the southern part of the state turpentine manufactories have been opened up in the forests. In the southeast is the live oak, much valued in ship building, while the many swamps afford cypress, cedar and palmetto."

"The higher branches are well provided for. As early as 1801 steps

1801 steps for founding a university were taken at Athens. The first commencement took place in 1804. The college proper (Franklin College at Athens) annually admits free of charge 'fifty meritorious young men of limited means' and also such as may be studying for the ministry who need aid. There is also connected with the university a medical college, located at Augusta, and an agricultural college at Dahlonga, with nearly 250 students, whose tuition is free. The State college of agriculture and mechanic arts, also connected with the university, has a special endowment derived from the United States of \$240,000; the whole endowment of the university is \$376,500. The university, exclusive of its establishments at Augusta and Dahlonga, has five departments, 13 professors and 200 students, with a library of 14,000 volumes, and two literary societies. Besides the usual collegiate course, there are a preparatory school and a law school."

were taken to found Franklin College at Athens, and the first commencement was held there in 1804. She admits to her privileges each year, fifty young men free of charge; also as many as may stand in need of aid who are studying for the ministry. Connected with Franklin University there is a medical department at Augusta and an agricultural department at Dahlonga, with about 250 students, whose tuition is free. The United States Government fixed an endowment of \$240,000 on the State Agricultural and Mechanical Arts department also connected with the university, which makes the total endowment fund \$376,500. The university, exclusive of its departments of letters and agriculture, has five departments, 13 professors and 200 students, with a library containing over 1,400 volumes. In connection with the University there is a preparatory course and a law school."

In the two articles on "Homestead" there are numerous instances of similar passages. But two of them will be cited:

From Complainant's Edition:

"In such a case the original claimant will not be permitted to make another entry, as the law allows but one homestead privilege. It is essential that the person making a homestead entry should know that no one else has located upon the land and begun improvements as the foundation of a claim under the pre-emption laws, for such a claim would antedate his own. Having resided upon and cultivated his claim for five years, the settler is allowed two years more, but no longer, in which to make his 'final proof.'"

"The first step in securing a pre-emption right is to go upon the land and commence 'improvements.' When this has been done, if the land is 'offered'—that is, if at some time it has been offered at public sale by proclamation of the President, or otherwise—the applicant, within thirty days from date of his settlement, must file with the district land office a declaratory statement setting forth his claim; and within one year from date of settlement he must appear before the registrar and receiver, and make proof of actual residence on and cultivation

From Defendants' Edition:

"The original claimant is not permitted to make a second entry, as but one homestead privilege is allowed by law. It is important that the applicant making a homestead entry should know that no one else has located, and made improvements upon the land preparatory to a claim under the pre-emption laws, as such a claim, under the land laws, would antedate his own. After the applicant has resided upon and cultivated his claim for five years, he is allowed two years more in which to make 'final proof.'"

"The first step in securing a pre-emption claim is to go upon the land, and begin to make improvements. When this has been done and the land is offered for sale, by proclamation of the President or otherwise, the pre-emptor must file a declaratory statement with the District Land Office setting forth his claim, within thirty days. And within a year from the date of settlement, he must appear before the Registrar and Receiver, and make proof of his actual residence upon, and cultivation of the land. He will then be permitted to obtain

of the tract. He will then be permitted to obtain title to the land, by locating upon it land warrants or scrip, or by paying for it with cash at the rate of \$1.25 per acre, or, if within the limits of a public improvement grant, at the rate of \$2.50 per acre. In case the land has not been offered at public sale, the applicant has three months after settlement within which to file his declaratory statement with the local land officers, and thirty-three months from settlement within which to make final proof and payment for the land. If the land is unsurveyed when the settlement is made, the claimant must file his declaratory statement within three months from the date of the receipt at the district land office of the approved plat of survey of the township embracing the tract."

title to the tract by paying \$1.25 per acre, or, if the land is within the limits of the public improvement grant, \$2.50 per acre. When the land on which the pre-emptor has settled has not been offered for sale, he is given three months in which to file his declaratory statement, and thirty-three months from the time of his settlement, in which to make final proof and pay for the land. In the case where land is unsurveyed, when the settlement is first made, the applicant must file his declaration within three months from the date of the receipt at the District Land Office of the approved plat of the survey of the township, embracing said applicant's claim."

One cannot read these passages without observing, in each pair of them, not merely the numerous cases of identical phraseology, but the common sequences of thought contained in them. In the last two parallel passages, for example, the order of the subjects mentioned is the same, and is as follows: The first step in securing a pre-emption right, offering the land for sale, proclamation by the President, filing declaratory statement, appearing before registrar and receiver, making proof of actual residence, obtaining title to the land, proceedings where land has not been offered for sale, time within which final proof and payment may be made, and proceedings where land is unsurveyed.

Quotations from the remaining articles do not seem necessary. It is sufficient to say that the proofs show such identities and resemblances of plan and language, and such common sequences of thought, between the two articles on each of the seven subjects, that no other opinion can be entertained than that very considerable portions of the defendants' articles were taken from the complainant's articles. That opinion is confirmed by the fact that the defendants have produced the affidavit of the alleged author of each of the seven articles, and that, while each of them admits having written in 1890 one or more articles for Richard S. Peale without reference to or use of the complainant's articles, no one of them states that he wrote in its present form any one of the articles contained in the defendants' edition. It is true that Peale says the articles furnished to him by these authors were printed exactly as they were written. But he stands alone in this statement. The convincing evidence furnished by the articles themselves overcomes his naked statement. Substantial identity, or a striking resemblance between the work complained of and that for which protection is claimed, creates a presumption of unlawful copying, which must be overcome by the defendant. *Drone on Copyright*, pp. 400, 430. And what amounts to substantial identity is a question of fact, to be determined in each case by a comparison of the two works. *Drone on Copyright*, p. 408; *Emerson v. Davies*, 3 Story, 793, Fed. Cas. No. 4,436; *Lawrence v. Dana*, *supra*.

The complainant is therefore entitled to the injunction sought unless there be some merit in the defenses set up at the argument. These defenses will now be considered.

It is urged, in the first place, by the counsel for the defendants, that the act of the defendants in publishing the articles complained of during the pendency of the suit will not result in irreparable injury to the complainant, and therefore that a preliminary injunction ought not to issue. The answer to this objection is that, if the defendants have no right to continue their publications, the injury to the complainant is one for which damages awarded on an accounting or in a suit at law will furnish utterly inadequate redress. This is illustrated in the case of *West Publishing Co. v. Lawyers' Co-operative Publishing Co.*, 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400, where, in a case very like the one now in hand, the court, on final hearing, continued a preliminary injunction, ordered an accounting of profits, and, because of the impossibility of segregating the profits for the specific paragraphs there enjoined, ultimately gave a decree for six cents.

In the second place, it is said that a preliminary injunction ought not to be allowed because the defendants have a large capital invested and 1,500 or 2,000 men employed in their business, and that an injunction would do them irreparable injury. It is true that in cases of this nature the court will sometimes balance inconveniences, and withhold a preliminary injunction where its allowance will cast a burden upon the defendant disproportionate to the relief which its allowance will afford the complainant. But this is not such a case. If the injunction be here allowed, the defendants may continue their business as soon as they shall have substituted for the articles now published by them other articles which do not infringe the complainant's copyrighted articles.

In the third place, it is said that the provisions of the agreement between Stoddart and Scribner made on March 24, 1881, deprive the complainant of the right to maintain this suit. The argument is that Scribner, who, at the time of executing the agreement, was the record owner of certain of the copyrights, held those copyrights in trust for the Blacks, and that he agreed that no suit for infringement of any copyright, past or future, should thereafter be brought by him or by the Blacks. But it will be observed that that agreement, the provisions of which material to this point have already been cited, does not show that Scribner had any authority to represent the Blacks, or that he attempted to do so. He was an importer and purchaser of the *Edinburgh*, now the complainant's, edition; he was a party to the agreement in his individual capacity only; and he agreed that no suit should thereafter be brought by the Blacks "with his consent or co-operation." Stoddart acquired no rights or privileges, under that agreement, from the Blacks. He did acquire thereunder certain rights from Scribner, but there is no proof that any of these rights were ever in any wise transmitted to either of the defendants.

Lastly, it is insisted that a preliminary injunction should not be allowed because of the laches of the complainant and its predecessors in title. To support this defense, reference has been made to the

cases of *Black v. Ehrich et al.* (C. C.) 44 Fed. 793, and *Black v. Henry G. Allen Co.* (C. C.) 56 Fed. 764, from which, as I understand the arguments of the defendants' counsel, the inference is drawn that the Blacks, complainant's predecessors in title, had knowledge of the infringements alleged in the present case, and that their silence since those cases were decided must be construed as acquiescence in the publications now complained of. The argument is based on false premises. *Black v. Ehrich et al.* was decided on a motion for preliminary injunction on January 31, 1891, and the proofs in the present case show that the bill of complaint in that case was filed July 11, 1890; and a supplemental bill on October 30, 1890. The defendants, Ehrich Bros., were selling agents of the edition of the *Encyclopædia Britannica* then published by R. S. Peale & Co., and the complaint was that Ehrich Bros. were engaged in unlawful competition with the Blacks. The case of *Black v. Henry G. Allen & Co.* was decided on final hearing on April 14, 1893, but a reference to the same case in 42 Fed. 618, 9 L. R. A. 433, discloses the fact that the court rendered an opinion on a demurrer to the bill of complaint on June 16, 1890. By the demurrer the Henry G. Allen Company raised the question whether they had not the legal right to sell an American edition of the *Encyclopædia Britannica* which should contain, not only the parts of the Edinburgh edition which were admittedly publici juris and could not be copyrighted in the United States, but also the articles in the Edinburgh edition which had been copyrighted in the United States. The decision was against their contention. It appears, then, that neither *Black v. Ehrich et al.* nor *Black v. Henry G. Allen Co.* had any relation to the articles now complained of. None of these articles was in existence when those suits were commenced. Indeed, the defendants have filed the affidavit of Richard S. Peale himself, in which he declares that it was because of suits instituted against his agents that he secured the preparation of the articles now complained of. And Paul E. Werner, the president of the Werner Company, also swears that the articles now objected to were first published, as he is informed and believes, in 1891. The Blacks and their successors in title to the copyrighted articles may well have been induced by such conduct on the part of Peale to believe that he had utterly abandoned his purpose of including in his edition of the *Encyclopædia* the copyrighted articles of the Edinburgh edition, and that the articles subsequently published by Peale were in truth original articles, and not pirated ones. Neither the Blacks nor their successors in title had cast upon them any obligation to be astute in discovering the piracy. There seemed to be no call for a critical examination of the new articles secured by Peale, and it was not until December, 1902, that Franklin H. Hooper discovered the remarkable similarities between some of the copyrighted articles and the articles on corresponding subjects in the defendants' edition. His discovery led to the employment of other persons to extend the investigation, and finally to the analyses and comparisons contained in the affidavits of eminent authors now submitted to the court. In the circumstances of this case, the defense of laches cannot be successfully invoked. The cases in which laches has been

considered a bar to equitable relief proceed on the assumption that the party to whom it is imputed has knowledge of his rights. *Halstead v. Grinnan*, 152 U. S. 412, 14 Sup. Ct. 641, 38 L. Ed. 495; *Ritchie v. Sayres* (C. C.) 100 Fed. 520. Laches is not, like limitation, a mere matter of time, but, rather, a question of the inequity of granting the relief. *Gallihier v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738; *Old Colony Trust Co. v. Dubuque Light & Traction Co.* (C. C.) 89 Fed. 794.

In this case, there would be inequity in refusing to grant the relief prayed for. The objectionable parts of the defendants' articles are so intermingled with the other parts that it is impossible satisfactorily to separate them. In all such cases the rule is to enjoin the publication of the whole of the literary matter in which the piracy is found. *Farmer v. Elstner* (C. C.) 33 Fed. 494; *West Publishing Co. v. Lawyers' Co-operative Publishing Co.*, *supra*.

A preliminary injunction will be allowed, restraining the defendants, and each of them, and their agents and employes, until the further order of the court, from printing, publishing, selling, or offering for sale any volumes of the defendants' edition of the *Encyclopædia* containing in their present form any of the seven articles now included in that edition on the subjects "Georgia," "Homestead," "Honduras," "British Honduras," "Indian Territory," "Lafayette," and "Louisiana." The restraining order heretofore allowed must be vacated as to the remaining subjects.

EARLE v. ENOS.

(Circuit Court, E. D. Pennsylvania. May 13, 1904.)

No. 59.

1. ACCOMMODATION NOTE—DEFENSES.

The fact that a bank which discounted an accommodation note knew its character does not entitle the maker to set up the want of consideration as a defense thereto.

2. SAME—VARYING BY PAROL.

A parol agreement by a bank, made at the time of the delivery of an accommodation note and its discount by the bank, that it would not look to the maker for payment, but solely to the person for whose accommodation the note was given, and that it would apply thereon collaterals belonging to such person, cannot be shown to defeat an action on the note, its effect being to vary the written contract.

At Law. On motion for judgment for want of a sufficient affidavit of defense.

Asa W. Waters, for plaintiff.

A. S. Ashbridge, Jr., for defendant.

J. B. McPHERSON, District Judge. The affidavit of defense in this case is as follows:

"David G. Enos, being duly sworn according to law, deposeth and saith that he is the defendant in the above-entitled case, and as such has a just, true,

† 1. See Bills and Notes, vol. 7, Cent. Dig. §§ 165, 964.

full, and complete defense to the plaintiff's entire claim as contained in said statement, of the following nature, to wit:

"(1) The deponent admits that he signed the note upon which suit in this case was brought.

"(2) The deponent avers that at the time of the execution and delivery of the said note to the Chestnut Street National Bank, William M. Singerly was the president of the said bank, and was its chief executive officer; and the deponent further avers that he never received any consideration for the said note, and that he signed the said note as an accommodation to T. H. Bechtel, and for the accommodation of the said bank. The said note was delivered to the said William M. Singerly, president of the said bank, in the presence of the deponent, and the deponent then and there stated to the said William M. Singerly that he had not received and would not receive any consideration for the said note, to which the said William M. Singerly replied that he understood that, that it was for the benefit of Mr. Bechtel, and that it would be discounted by the bank and the money paid to the said Mr. Bechtel, and that the bank would not look to the said D. G. Enos for the payment of said note, or hold him liable thereon, but would look to Mr. T. H. Bechtel alone, and his collateral deposited with said bank, for payment thereof. Thereupon the deponent delivered the said note to the said William M. Singerly, and the said note was discounted by the said Chestnut Street National Bank, and the proceeds thereof were credited by the said Chestnut Street National Bank to the account of the said T. H. Bechtel, who was a depositor in said bank, and who had an account in the said bank at the time of its closing of its doors; and, in addition thereto, the deponent avers that the forty dollars paid on account of said note was paid by the said T. H. Bechtel, and not by the deponent.

"(3) The deponent specifically avers that he never received any consideration for this note, and that it was known by the said Chestnut Street National Bank, at the time it was discounted by them, that he had never received any consideration therefor, and the said Chestnut Street National Bank, through William M. Singerly, its president and chief executive officer, agreed to and with the deponent that it, the said bank, would not look to the deponent for the payment of the said note at maturity, or hold defendant liable therefor, but would only hold the said T. H. Bechtel, and his collateral deposited with said bank, liable therefor, and acknowledged that the said note was only delivered to the said bank as an accommodation for the said T. H. Bechtel and said bank; and upon this promise, and only upon this, the said note was delivered to the said bank.

"(4) At the time said note was delivered to said William M. Singerly there was in possession of said bank a certificate for 400 shares of the Black Lick Coal Company, 200 shares of which were pledged as collateral security for the payment of another note of \$2,800 of said Bechtel, and the remainder of said collateral was not specifically pledged for the payment of any specific note, but was collateral security for payment of any indebtedness of said Bechtel to the payment of which the bank chose to apply the same. And it was these 200 shares of stock of Black Lick Coal Company which the said William M. Singerly promised and agreed to apply to the payment of the note in suit at its maturity. At the time the plaintiff took possession of the assets of this bank said 400 shares of said stock came into his possession as receiver, and was subsequently sold by him for the sum of \$10 per share, and he received the sum of four thousand dollars therefor, of which two thousand dollars was received from the sale of the unapplied collateral, which the said William M. Singerly covenanted and agreed with the deponent to apply to the payment of the note in suit. And said promise so to apply said collateral was the inducement upon which said note was secured by said bank. The said note was therefore paid when plaintiff received said two thousand dollars from the sale of said collateral, and should have been delivered to the defendant.

"All of which facts are true, and the deponent expects to be able to prove the same upon the trial of this case."

In my opinion, this affidavit is insufficient to prevent judgment for the plaintiff. It sets up two defenses: First, that the defendant is an accommodation maker, and that the president of the bank knew

that fact from the beginning of the transaction; and, second, that when the note was made and discounted a collateral agreement was entered into, which provided that the note need not be paid according to its terms, but should be taken care of by the bank out of the proceeds of certain securities that had been pledged by the indorser. These defenses have been decided to be ineffectual, both by the courts of Pennsylvania and the courts of the United States. The first defense was considered by the Supreme Court of Pennsylvania in *Lord v. Ocean Bank*, 20 Pa. 384, 59 Am. Dec. 728, and was decided to be insufficient; the court saying:

"But the maker of an accommodation note cannot set up the want of consideration as a defense against it in the hands of a third person, though it be there as collateral security merely. He who chooses to put himself in the front of a negotiable instrument for the benefit of his friend must abide the consequence ([*Walker v. Bank*] 12 Serg. & R. 382), and has no more right to complain, if his friend accommodates himself by pledging it for an old debt, than if he had used it in any other way. This was decided ([*Appleton v. Donaldson*] 3 Pa. 381) in a case strongly resembling the present one. Accommodation paper is a loan of the maker's credit without restriction as to the manner of its use."

To the same effect is *Penn Safe Deposit Co. v. Kennedy*, 175 Pa. 164, 34 Atl. 660, where it is again declared:

"That an accommodation note is a loan of the credit of the maker to the payee, which he may use as freely and with the same effect as to the maker as he could use a note given for a full consideration. It is no defense for the maker of such a note, when sued by the indorsee, to aver the character of the note, or knowledge of its character by the indorsee."

The same rule prevails in the federal courts. In *Israel v. Gale*, 174 U. S. 395, 19 Sup. Ct. 769, 43 L. Ed. 1019, the Supreme Court said:

"As the discount of the note at the Elmira National Bank was not a diversion, but, on the contrary, was a mere fulfillment of the avowed object for which the note was asked, and to consummate which it was delivered, it becomes irrelevant to consider the various circumstances which it is asserted tended to impute knowledge to the bank of the purpose for which the note was made and delivered. If the agreement authorized the discount of the note, it is impossible to conceive that knowledge of the agreement could have caused the discount to be a diversion, and that the mere knowledge that paper has been drawn for accommodation does not prevent one who has taken it for value from recovering thereon is too elementary to require citation of authority."

See, also, note to *Gillespie v. Campbell*, 5 L. R. A. 698.

How far the second defense would be available in the courts of Pennsylvania is more difficult to decide. Parol evidence to vary or contradict a written instrument is admissible in this state in cases of fraud, accident, and mistake, and as these subjects call for the consideration of circumstances that continually vary, it is not always easy to apply with confidence the rule of one decision to another set of facts. But *Phillips v. Meily*, 106 Pa. 536, which has been often cited since with approval, seems to be much like the case in hand. Among the reported facts were these:

"Meily testified, in substance, that about April, 1874, Phillips came to him and told him that he held a note against the Union Forge Company, and wanted to pass it out of his hands for collection; that he had dealt largely with the company; that they had been kind to him, and that he did not wish to

distress them; that they were solvent, but that he wanted his money out of them; that because he was out of business they knew that he did not need his money, and that they would not pay him; and that he had thought of defendant as a proper person in whose hands to place the note, they knowing that he (defendant) was in business, and needed the money, and that they would pay him sooner than they would pay him (the plaintiff); that he then agreed to take note from plaintiff for collection, and asked the plaintiff to indorse it; that it occurred to him then that the plaintiff ought to have something to show for what he had received of him (plaintiff), and suggested to him that he would give him his note, payable April 1, 1875, with interest from maturity of the forge company note, so as to extend the time of payment of the note beyond the maturity of said forge company note, in order to give him time to collect it and pay it over to the plaintiff."

Of this testimony, the Supreme Court said:

"The defendant's testimony amounts to no more than that the note was not to be paid according to its terms, but only upon the contingency that he should be able to collect another note from the Union Forge Company. That such evidence is no defense was decided in *Hill v. Gaw*, 4 Pa. 493; *Anspach v. Bast*, 52 Pa. 356; *Hacker v. National Oil Refining Co.*, 73 Pa. 93; *Heist v. Hart*, Id. 286."

But, whatever the validity of the second defense might be in the courts of Pennsylvania, I think it is clear that the more rigorous rule concerning the admissibility of parol evidence that prevails in the federal courts would not permit the admission of testimony there to establish the facts set up by the affidavit of defense. *United States Bank v. Dunn*, 31 U. S. 51, 8 L. Ed. 316, was closely similar in its facts to the present case. It was a suit against an indorser, who offered evidence to prove that when the note was made and indorsed the officers of the bank declared that he would incur no liability by his indorsement, as the payment was secured by a pledge of stock. Of this evidence the court said:

"The facts stated by the witness Carr are in direct contradiction to the obligations implied from the indorsement of the defendant. By his indorsement he promised to pay the note at maturity, if the drawer should fail to pay it. The only condition on which this promise was made was that a demand should be made of the drawer when the note should become due, and a notice given to the defendant of its dishonor. But the facts stated by the witness would tend to show that no such promise was made. Does not this contradict the instrument, and would not the precedent tend to shake, if not destroy, the credit of commercial paper? On this ground alone the exception would be fatal. But the most decisive objection to the evidence is that the agreement was not made with those persons who have power to bind the bank in such cases. It is not the duty of the cashier and president to make such contracts; nor have they the power to bind the bank, except in the discharge of their ordinary duties."

In *Specht v. Howard*, 83 U. S. 564, 21 L. Ed. 348, the court quoted with approval the following sentence from *Parsons on Bills and Notes*:

"It is a firmly settled principle that parol evidence of an oral agreement, alleged to have been made at the time of the drawing, making, or indorsing of a bill or note, cannot be permitted to vary, qualify, or contradict, or add to or subtract from, the absolute terms of the written contract."

In *Brown v. Spofford*, 95 U. S. 481, 24 L. Ed. 508, after referring to the foregoing cases, and to *Forsyth v. Kimball*, 91 U. S. 291, 23 L. Ed. 352, the court said:

"Parol evidence of an agreement made contemporaneously with a promissory note, which contains an absolute promise to pay at a specified time, is not admissible in order to extend the time for payment, or to provide for the payment out of any particular fund, or in any other way than that specified in the instrument, or to make the payment depend upon condition. Chitty, Contr. (10th Ed.) 99; Abrey v. Crux, Law Rep. 5 C. P. 41; Allen v. Furbish, 4 Gray, 514 [64 Am. Dec. 87]; 2 Pars. Bills and Notes, 501."

There are many other decisions in the federal courts to the same effect, but I think these are sufficient to show that the defense now under consideration could not be heard if the case were on trial in the Circuit Court. An elaborate discussion of the general subject of contemporaneous agreements and their breach as a defense to a promissory note may be found in 43 L. R. A., at page 449.

Judgment may be entered for the plaintiff for want of a sufficient affidavit of defense.

In re GOODHILE.

(District Court, N. D. Iowa, C. D. May 23, 1904.)

No. 472.

1. BANKRUPTCY—PROVABLE CLAIMS—SURRENDER OF PREFERENCE.

Under the provisions of Bankr. Act July 1, 1898, c. 541, § 1, cl. 15, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], that "a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property * * * shall not, at a fair valuation, be sufficient in amount to pay his debts," the fact alone that the indebtedness of a retail merchant to a wholesale house is past due when a payment is made thereon does not give the creditor reasonable cause to believe the debtor to be insolvent, and that it was intended to give a preference, so as to render the payment a voidable preference, which, if made within four months of bankruptcy, is required by section 57g, as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 799 [U. S. Comp. St. Supp. 1903, p. 415], to be surrendered by the creditor before proving his claim.

In Bankruptcy. On petitions for review of decision of referee allowing the claim of Henry Goodhile against the bankrupt's estate, and rejecting that of Wyman, Partridge & Co.

Deacon & Good, for Wyman, Partridge & Co. and other creditors.

Cliggett, Rule & Keeler and Hurd, Lenehan & Kiesel, for Henry Goodhile.

REED, District Judge. Warfield-Pratt-Howell Company and other creditors of the bankrupt filed objections to the claim of Henry Goodhile for \$1,149.55 against the bankrupt's estate, which objections were overruled by the referee, and the claim allowed. Henry Goodhile filed objections to the claim of Wyman, Partridge & Co. for \$384 and interest, which objections were sustained, and the claim rejected. Exceptions were saved by the respective parties, and petitions filed by them for review of the decision of the referee.

The testimony wholly fails to sustain the objections to the claim of Henry Goodhile. It amply supports the findings of the referee, and his order allowing the same is approved.

The objection of Henry Goodhile to the claim of Wyman, Partridge & Co. is based upon the ground that within four months prior to the bankruptcy the bankrupt paid to Wyman, Partridge & Co. certain sums of money on her indebtedness to them, which payments were received by said company with reasonable cause to believe that a preference was intended thereby. The referee finds that the bankrupt did pay Wyman, Partridge & Co. \$100 within such four months; that the bankrupt was then insolvent; that Wyman, Partridge & Co., had reasonable cause to believe that she was; and that a preference was thereby intended; and held that the claim of such company should not be allowed, because it had not surrendered such preference. In his record of such finding, the referee recites:

"In my opinion, at the time such payment was made the petitioner [the bankrupt] was insolvent; that the owners of this claim were in a position, by reason of the same being past due, to know that the bankrupt was in an insolvent condition. I therefore find that such payment was a preference, and that claimants were not entitled to share in the assets of said estate."

It thus appears that the finding of the referee that Wyman, Partridge & Co. "had reason to know that the bankrupt was in an insolvent condition" is based upon the fact that the debt was past due at the time of such payment. The testimony shows that most of the debt owing by the bankrupt to said company was past due at the time of the payment, and that the company was urging her to pay, and that she was promising to pay as fast as she could; but there is no other evidence to show that the company had knowledge or reasonable cause to believe that she was insolvent when such payments were made.

As originally enacted, the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) provides as follows:

"Section 57g (30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]). Claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

"Section 60a (30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]). A person shall be deemed to have given a preference, if being insolvent, he has * * * made a transfer of any of his property and the effect of the enforcement of such transfer will be to enable any one of his creditors to obtain a greater percentage of his debts than any other of such creditors of the same class."

In *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, it was held by the Supreme Court that under these sections a creditor who receives payments from his insolvent debtor within four months prior to the filing of the petition to be adjudged bankrupt is not entitled to prove his claim against the bankrupt's estate, without surrendering such preferences, even though he did not know or have reasonable cause to believe at the time of such payments that his debtor was then insolvent.

By the amendment of February 5, 1903, section 57g (32 Stat. 799, c. 487 [U. S. Comp. St. Supp. 1903, p. 415]) is made to read as follows:

"Sec. 57g. Claims of creditors who have received preferences voidable under section 60b * * * shall not be allowed unless such creditors shall surrender such preferences."

"Section 60b [U. S. Comp. St. Supp. 1903, p. 416]. If a bankrupt shall have given a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was in-

tended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. * * *

Since this amendment, in order to deprive the creditor of the right to prove his claim against the bankrupt's estate, it must appear that he received from the debtor a payment with reasonable cause to believe that a preference was intended thereby. What then is meant by the words "reasonable cause to believe a preference was intended"?

In *Merchants' Bank v. Cook*, 95 U. S. 342, 24 L. Ed. 412, the Supreme Court, in speaking of the meaning of the words "having reasonable cause to believe the party to be insolvent," said:

"When the condition of a debtor's affairs is known to be such that a prudent business man would conclude that he could not meet his obligations as they matured in the ordinary course of business, there is reasonable cause to believe him to be insolvent."

This was under the bankruptcy act of 1867, which defines "insolvency" to be "inability to meet one's obligations as they become due in the ordinary course of business." Under the present bankruptcy law it is provided that:

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property * * * shall not, at a fair valuation, be sufficient in amount to pay his debts."

Under the present law, this decision of the Supreme Court would require that the condition of the debtor's affairs "must be known to be such that prudent business men would conclude that the aggregate of the debtor's property, at a fair valuation, was not sufficient to pay his debts," before there is reasonable cause to believe that the debtor is insolvent, and that a preference would therefore be the result of a payment while in such condition. Has it been shown that Wyman, Partridge & Co. knew of any such condition of this bankrupt's affairs at the time this payment was made? From the testimony it appears that Mrs Goodhile, the bankrupt, was engaged in the mercantile business at Manly, Worth county, Iowa; that Wyman, Partridge & Co. were wholesale dealers doing business at Minneapolis, Minn., with whom and other wholesale houses the bankrupt was dealing. In the winter of 1902-1903 she remitted to Wyman, Partridge & Co., as payment on her account with them, a check and drafts, at the dates and in the amounts as follows: December 2, 1902, check for \$100; January 6, 1903, bank draft for \$100; January —, 1903, bank draft for \$38. The check of December 2d was her individual check on the local bank at Manly, which was sent by mail to Wyman, Partridge & Co., at Minneapolis, the day it was made. This check was paid by the local bank, and afterwards returned to the bankrupt. The draft of January 6th was purchased by her from the bank, and paid for in money, as was also the draft for \$38, and each was sent by mail to the company on the day of its purchase. From the certificate and record of the referee, it appears that it was the payment of December 2, 1902, by the bankrupt's check, which he finds was received by Wyman, Partridge & Co., with reasonable cause "to know that the bankrupt was in an insolvent condition. In such certificate the referee says:

"The evidence shows that the claimant received payment of \$100 within four months prior to the adjudication of the bankrupt; * * * that, at the

time claimant received such payment, the bankrupt was insolvent and claimant's account was past due, and that the check which was given then, and was afterwards cashed, was made payable at a date several days in the future from the time when such check was actually delivered to the claimant. I find said payment was made within four months prior to the adjudication of the bankrupt, and the claimant had reason to know that the bankrupt was in an insolvent condition."

The only testimony upon which such finding is based is that of the bankrupt. After testifying to payments to other creditors, she said:

"I remember paying Wyman, Partridge & Co. on their claim. December 2, 1902, I paid \$100; January 6, 1903, \$100; and in January, \$38. Q. How did you make these payments? A. I gave a check for \$100 December 2. I gave a draft for \$100 January 6th, and draft for \$38 some time in January. I got the drafts at the bank, and sent them by mail. * * * Q. What did you do with the \$100 check you issued December 2, 1902? A. I sent it to them by mail. I think I did not get a receipt for it, but got the check back when it was paid. Q. Whom did you receive that check from? A. Manly Bank. I inclosed it in a letter to Wyman, Partridge & Co., and it was afterwards charged to my account at the bank and returned to me. I had been dealing with them for some time. Q. Was any of their creditmen to see you before these payments were made? A. No; but a short time after—some time in January—the creditman was there. Q. At the time these payments were made, was your account past due? A. Most of it was. They had not drawn on me, but had threatened to do so; and we told them we were doing all we could, and would pay them as soon as we could. Q. On this check to Wyman, Partridge & Co. are these words: 'Pay when dated.' Was that on there when the check was sent in? A. Yes; and the check was sent to them the same day it was dated. Some of the other checks to other parties were dated ahead, but this was sent the day it was dated. The drafts for \$100 and \$38 I bought at the bank, and paid for with money."

This is all of the testimony with regard to the payments to Wyman, Partridge & Co., and of their knowledge of the financial condition of the bankrupt. The check of December 2d is not returned with the testimony, but Mrs. Goodhile testifies that it was not dated ahead. It may be conceded that Mrs. Goodhile was insolvent when this check was made and sent to the company also when the drafts were sent in January; but there is no testimony from which it can be found that Wyman, Partridge & Co. had reasonable cause to believe her to be so at the time either of these payments was received from her. She was then conducting her business in the usual way, so far as the testimony shows, and these payments were made apparently in the ordinary course of business. No agent of the company had called upon her until after the second payment was made. On August 25, 1902, she made a written statement to this company, as a basis for credit, showing her assets to be \$8,125, and her liabilities \$891, and net worth \$7,234, less whatever sum she was owing to this company. It is true that most of the bankrupt's account with Wyman, Partridge & Co. was past due at the time of these payments, and that the company was urging payment, but that is not sufficient to charge it with reasonable cause to believe that she was insolvent. Neither is the fact that the check was dated ahead, if that were true; and, under the testimony submitted, it was not. Such facts would only show that the debtor was unable to meet payments promptly, and that is not insolvency, under the present bankruptcy law. The burden is upon the objecting creditors or the trustee to prove that Wyman, Partridge & Co. had reasonable cause to believe that the bankrupt was

insolvent when these payments were made. This they have failed to do. No doubt, they were desirous of obtaining what was due them, and they may have had suspicions that she was embarrassed or might be insolvent, but that is not enough.

In *Grant v. National Bank*, 97 U. S. 80, 24 L. Ed. 971, the Supreme Court, in speaking of the meaning of the phrase, "have reasonable cause to believe such person is insolvent," says:

"It is not enough that some creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it; and yet such belief as the act requires may be wanting. Obtaining additional security or receiving payment of a debt under such circumstances is not prohibited by law. Receiving payment is put in the same category in the section referred to as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their insolvency were sufficient for the purpose."

In *Stucky v. Masonic Savings Bank*, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640, the same rule is announced, and, in speaking of *Grant v. Bank*, above, it is said:

"That case established the doctrine that a creditor dealing with a debtor whom he may suspect to be in insolvent circumstances, but of which he has not sufficient evidence, may receive payments without violating the bankruptcy law. He may be unwilling to trust him further; he may be anxious about his claim, and desire to secure it; but such belief as the act requires may be wanting. Additional security and receiving payments under such circumstances are not prohibited by law."

There are no facts shown in the present case from which it can be found that Wyman, Partridge & Co., at the time such payments were made, had reasonable cause to believe that Mrs. Goodhile was insolvent, or intended a preference by the payments she made to it. It follows, therefore, that its claim should not have been rejected, and the referee is directed to allow such claim against the bankrupt's estate.

IN RE C. F. BECKWITH & CO.

(District Court, M. D. Pennsylvania. June 7, 1904.)

No. 423.

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—PARTNERSHIP.

To sustain proceedings in involuntary bankruptcy against a person as a partner in a firm, a partnership in fact must be shown, and not a mere holding out by which he may have become liable to creditors.

2. PARTNERSHIP—EVIDENCE TO ESTABLISH.

The existence of a partnership may be deduced from facts and circumstances, and where two or more persons are engaged in a joint business enterprise, to which they contribute either capital, skill, or labor upon an

understanding, tacit or otherwise, that they will share in common the profits accruing therefrom, they are partners in fact and in law, both between themselves and as to creditors, although there is no express agreement to that effect.

3. SAME.

Evidence considered, and *held* to show such relation on the part of a defendant in proceedings in involuntary bankruptcy to the business conducted in the name of his codefendant during a series of years as to establish a partnership between them in such business.

In Bankruptcy. Involuntary proceedings. Hearing on petition, answer, and proofs.

Frank E. Donnelly and A. V. Bower, for petitioners.

W. J. Hand and C. J. Galston, opposed.

ARCHBALD, District Judge. These are involuntary proceedings instituted against the firm of C. F. Beckwith & Co., composed, as it is alleged, of Charles F. Beckwith, of Scranton, and Frank Cazenove Jones, of New York. Beckwith makes no contest, but Jones answers, denying insolvency and the commission of any act of bankruptcy, and particularly denying that he was a partner as charged. A jury trial was demanded as to all these issues, but it has been withdrawn as to the question of partnership, which is submitted to the court for disposition on the proofs.

To maintain the proceedings as to Jones a partnership in fact must be shown, and not a mere holding out, by which he may have become liable to creditors. *Collier on Bankruptcy*, 61; *In re Clark* (D. C.) 111 Fed. 893; *Lott v. Young*, 6 Am. Bankr. R. 436, 109 Fed. 798, 48 C. C. A. 654. Otherwise the proceedings might be good as to some creditors, with respect to whom this was true, and not as to others, as to whom it was not. And we should also have instances where there was no joint estate to administer, nor any assets other than the personal liability of the individuals who had made themselves answerable, a condition which plainly is not contemplated by the bankrupt act. *In re Kenney*, 3 Am. Bankr. R. 353, 97 Fed. 554. But the existence of a partnership may be deduced from facts and circumstances, and does not have to be established by proof of an express agreement, either oral or written. 22 Am. & Eng. Enc. Law (2d Ed.) pp. 39, 40, 65. Where two or more parties are engaged in a joint business enterprise, to which they contribute either capital, skill, or labor, upon an understanding, tacit or otherwise, that they will share in common the profits accruing therefrom, they are partners in fact and in law, both between themselves and as to creditors. 22 Am. & Eng. Enc. Law (2d Ed.) pp. 13, 27; *George on Partnership*, 30; *Karrick v. Hannaman*, 168 U. S. 328, 18 Sup. Ct. 135, 42 L. Ed. 484. It is upon this basis, if at all, that the claim of partnership here must be made out.

The relation between the two parties concerned as respondents in these proceedings was in the beginning the outcome of social friendliness. Mr. Jones had large manufacturing interests, and young Beckwith, on giving up college in 1896, through family acquaintance and influence, secured a place in one of his establishments, to familiarize

himself with the business, and later on was given an agency at Scranton to sell on commission rubber goods and oils. The oils were afterwards cut off on objection from the general agents at Philadelphia, and Beckwith confined himself to buying and selling mine machinery and supplies, including rubber products as they happened to come in. It was not long before he began to need money, and Jones undertook to have notes discounted for him in New York. At first perhaps five hundred to a thousand dollars was raised in this way, but it was gradually increased as Beckwith branched out, until it amounted to several thousand. In the fall of 1898, after consultation with Jones, a party by the name of Derry was taken in by Beckwith, and the firm of C. F. Beckwith & Co., ostensibly composed of Beckwith and Derry, was formed. Derry contributed nothing but his services and ability as salesman, for which he was paid a commission in addition to his salary, the necessary capital to carry on the business being obtained, as before, by notes with Mr. Jones' indorsements, discounted at bank. The advance made in this way while Derry was in the firm reached the aggregate of \$20,000. The year following another party, named Carter, who was expected to contribute both capital and business, was talked of being taken into the concern, and Jones was consulted with regard to it, giving it his approval, and stating that when the arrangements were complete he would have his attorney, Mr. Warner, draw up the partnership papers. The matter fell through, and this was not necessary, but the suggestion contained in the latter observation is significant.

In May, 1901, differences arose between Beckwith and Derry, ending in Derry's withdrawal. Immediately following this Jones was consulted by Beckwith as to whether he should continue to use the firm name of C. F. Beckwith & Co., and Jones advised him to do so, saying that he was still with him, as he had been heretofore. About this time also Beckwith undertook to put through a large transaction in steel rails which required extended capital and credit, and inquiries began to be made in commercial circles as to the standing of the firm. In response to this a call was made on Mr. Jones at his office in New York by J. S. Merrill, a representative of Dun & Co.'s Mercantile Agency, who stated the occasion of his coming, and asked for information as to his connection, if any, with C. F. Beckwith & Co. To this Mr. Jones replied that he was and always had been a special partner with Beckwith; that he had known him from a boy, and helped him since he left college, furnishing him capital, and practically financing his business. He also stated that C. F. Beckwith & Co. had a capital of from \$30,000 to \$50,000, and was able to carry through any deal that they might undertake, and was made up of Beckwith, and himself as a special partner, the intention being to take in also two other practical men, which would not, however, affect his own interest. Mr. Jones denies any such statement, but Merrill was a man of too large experience in such work to either misrepresent or be mistaken, and he is corroborated by the report which he gave of the interview to the mercantile agency which he represented. Neither was this the only time that Jones admitted to being a part-

ner. When Beckwith was negotiating for the purchase from M. J. Dolphin of the Riverside coal washery, he wanted to make part payment in notes, to which Dolphin assented, provided Jones, who had been introduced by Beckwith as his partner, would indorse them. But Jones said that it would make no difference, as he was interested with Beckwith, and would be liable. He also declared that he was a partner to Col. Sickles of New York, and to Mr. Coffin, of the Phoenix National Bank, to whom Mr. Beckwith had gone for the purpose of getting him to negotiate some Western paper. It further appears that Mr. Jones was furnished with a statement from the books every 30 or 60 days showing the condition of the business, and was constantly consulted and kept advised by Beckwith, by letters and personal interviews, as to just what was going on. In the rail deal referred to, he guarantied accounts of the firm to the extent of \$160,000; and, taking the aggregate of his indorsements during the five or six years that he backed the concern, he loaned his credit, all told, to the extent of about \$600,000.

The intimate connection which is thus shown, entirely aside from any statements or representations, is hardly consistent with anything less than a direct financial interest in the business. With all Mr. Jones' friendliness, it is, to say the least, most unusual that he should put up the whole capital required to keep the concern going, in increasingly large amounts, and intervene, as he did, in the conduct of its affairs, not only by advice, but at times by active personal participation, on a purely disinterested basis. And when, in addition to the natural inference to be drawn from these circumstances, we have his word for it—not once, but on several occasions, and to separate parties—that he was a partner, he cannot well complain, if we conclude from all the evidence, that in so stating he spoke the undoubted truth. It is urged, however, that he said no more to Merrill than that he was a special partner, implying a limited liability to the extent of the capital put in. But he did not confine himself to this statement, declaring, as he did, that the firm was made up of Beckwith and himself. Neither is there any suggestion of a compliance with the law by which such special and limited liability is secured. Further than this, there was no such qualification in his declarations to Dolphin, Col. Sickles, or Mr. Coffin, nor in the introduction of him by Beckwith as a partner, which he permitted to be made to others. It is said that in the letters, back and forth, which have been put in evidence, Beckwith always speaks of the business as his own, laying stress on the kindness of Mr. Jones in befriending him, and that those from Mr. Jones are of similar tenor. But this is readily explained, if not natural, and by no means overcomes the other circumstances which have been alluded to. Further than this, if letters are to speak, that from Mr. Jones of February 11, 1899, is significant. Referring to some difficulty which had been expressed in getting orders filled by Voorhees & Co., and the prices which they had charged, he writes: "I will have a full talk with Mr. Voorhees, and if he does not give you these samples, and does not hereafter promptly reply to your enquiries, we will have to go somewhere else." And again,

on the matter of prices: "It is outrageous for them to act in this way, and unless they can pull themselves together, and do business in a proper manner, we will have to leave them, and we will give them this one more chance." The whole of this letter, which is too long to repeat, can be consulted with profit on the subject of the relation between these parties.

But it is urged that the moneys advanced by Jones were always on obligations of the firm, which he merely indorsed by way of accommodation. It is true that they took this form, and were carried on the books as an indebtedness, the firm paying the discount. But they were to be paid, according to the arrangement, out of the business, and with that in view this was the only correct or convenient way to treat them. It is also to be observed that Beckwith, as well as Derry when he was in the firm, worked on a salary drawn from the business, so that it was not as though he contributed his time and services as against Jones' money. And being fully compensated in this way for what he did, Jones, as a matter of equality, was entitled, particularly if it was so agreed, to have the working capital which he secured treated and taken care of as a loan. Except as to risk, this may have given him somewhat the best of the bargain, but it certainly does not dispel the idea of a partnership.

But it is further said that there was no provision for a sharing of profits, which is essential to the partnership relation. In *re Gibbs' Estate*, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276. That there never was a division of profits in fact is true, because of the condition imposed by Jones that the obligations of the firm should be first taken care of. But it cannot be said that there was no provision for it. On the contrary, Mr. Beckwith testifies that he brought the matter up to Mr. Jones, and was put off with the suggestion that it would be time enough to talk of that when the notes had been paid which were outstanding. This did not put aside the possibility; it simply postponed the day. The idea was not rejected as inapplicable to the existing relation, but was merely deferred until certain contingencies had been overcome. Can it be successfully argued that if there had been profits to divide Mr. Jones would not have been entitled to set up and rely upon this remark of Beckwith's as evidence that by mutual understanding he was to have a share? If it be said that the proportion which each was to have was not defined, it may be answered that an equal division, in the absence of a distinct agreement, would be implied. At all events, it is to be observed that the right of Mr. Jones to share in the profits was brought forward and apparently assented to. It was thus recognized that the business was his as well as Beckwith's, which is that with which we are particularly concerned. It is difficult to reproduce the transactions of years, and what has thus been alluded to in outline has to be filled in by natural inference and deduction; but enough is shown, as it seems to me, to establish the essential elements of a partnership, and to warrant the conclusion that it existed between these parties as claimed. The case may not be free from doubt, but the weight of the evidence certainly is that way.

On the issue raised by the petition and answer it is held that a partnership existed between the respondents C. F. Beckwith and Frank Cazenove Jones, trading as C. F. Beckwith & Co., as charged in the petition, and the proceedings are to that extent sustained.

CORNELL STEAMBOAT CO. v. UNITED STATES.

(District Court, S. D. New York. May 21, 1904.)

1. SALVAGE—SUIT AGAINST UNITED STATES—JURISDICTION.

A claim for salvage is founded on an implied contract, and, where it does not exceed \$1,000, a suit thereon may be maintained against the United States in a District Court, under the Tucker act of March 3, 1887, c. 359, §§ 1-7, 24 Stat. 505, 506 [U. S. Comp. St. 1901, pp. 752-755], which provides for suits in either the Court of Claims or a Circuit or District Court on "all claims founded upon * * * any contract, express or implied, with the government of the United States, * * * in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable."

2. SAME—SALVAGE ON DUTIES COLLECTED.

A lighter loaded with imported sugar, on which the duties had been paid, but which was still in the custody of the customs officers, was saved from fire in the port of New York by libelant's tug. *Held*, that the government had an interest in the sugar to the extent of the duty paid thereon, and that libelant was entitled to recover from the United States salvage on such amount at the same rate allowed against the sugar itself.

3. SAME—FINDINGS OF LAW.

In an action against the United States to recover salvage on duties collected by reason of the salving of merchandise while in the custody of the customs officers, the court will not make findings of law defining the powers of the Secretary of the Treasury in respect to refunding the duties under Rev. St. § 2984 [U. S. Comp. St. 1901, p. 1958], had the merchandise been destroyed.

Action to Recover for Salvage Services.

Benedict & Benedict, for petitioner.

Henry L. Burnett, U. S. Atty., and Arthur M. King, Asst. U. S. Atty.

ADAMS, District Judge. This is a petition filed by the Cornell Steamboat Company against the United States for the recovery of salvage on certain duties collected by the Government. The main facts have been, in substance, agreed upon as follows:

"Findings of Fact.

First. The Cornell Steamboat Company is a corporation duly incorporated under the laws of the State of New York, and is resident within the Southern District of New York, and is and was on the 9th day of January, 1901, the owner of the steam tug R. G. Townsend.

Second. On or about the 9th of January, 1901, a certain lot of 1,883 bags of sugar, while on board of a certain lighter called the Bangor, in the waters of the Port of New York, was in danger of being destroyed by fire, and the tug R. G. Townsend, belonging to the petitioner, at great risk and peril, saved the said cargo of sugar from destruction by said fire,

Third. The said sugar had been imported from a foreign country, and was subject to duty under the laws of the United States; and at the time of said fire had not been delivered to the consignees and was still in the possession and under the control of Custom House officers of the United States.

Fourth. The duties on said sugar amounted to \$6,000, and said sum had been paid to the Government of the United States.

Fifth. On the 25th of February, 1901, petitioner filed a libel in the District Court of the United States for the Eastern District of New York against the said cargo of sugar, to recover salvage compensation for the services rendered in saving said sugar. The owner of the sugar thereafter appeared and claimed the sugar, and filed an answer to the libel, and such proceedings were had that on the 20th day of April, 1901, the court made a decree awarding the petitioner salvage for its said services in saving the sugar, and fixing the amount of the award for said salvage services at ten per cent. of the value of the property saved, and by said decree awarded to the petitioner as salvage the sum of Twelve hundred and seventy-four $\frac{3}{100}$ Dollars [108 Fed. 277].

Sixth. In fixing said sum the District Court considered the invoice value of the sugar only, and in no way awarded a percentage of the value of the estimated duties saved to the United States by said salvage services.

Seventh. A copy of said decree is a copy of said decree referred to above.

Elighth. Petitioner has duly filed its petition herein in this District and served a copy thereof on the United States District Attorney for this District, and mailed a copy of the same by registered letter to the Attorney General of the United States, and filed affidavit of such service and mailing with the Clerk of this Court."

The defendants here ask for the following conclusions of law, viz.:

"Second. If the said sugar had been destroyed by fire, the owners thereof would have been entitled under the statute, to make application to the Secretary of the Treasury for a refund of the duties paid upon said sugar, but that the granting of said petition would have been entirely a matter of discretion with the said Secretary of the Treasury, and his decision in the premises would have been final and not subject to review by this or any other Court.

Fourth. If said sugar had been destroyed by fire, the Government would not have lost the right to its duties but could have maintained a suit for their recovery."

The finding of these conclusions would tend to determine the matter in favor of the Government, because it might then rest with the Secretary of the Treasury to determine whether the salvage should be paid or not. Although it may be assumed that the Secretary would act correctly in the case, in such event, there would be no legal right to a judgment.

The Tucker Act, under which this action was brought, provides (chap. 359):

"Be it enacted &c. That the Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon the Constitution of the United States or any law of Congress, * * * or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable.

* * * * *

Sec. 2. That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury.

Sec. 3. * * *

The judgment of said court or the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. * * *

Sec. 7. That it shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts."

Act March 3, 1887, c. 359, 24 Stat. 505, 506, 1 Supp. Rev. St. pp. 559-561 [U. S. Comp. St. 1901, pp. 752-755].

The claim in this action is founded upon an implied contract, based upon the principle that the Government has undertaken to do what it ought to do. The law has recently been discussed in a salvage claim against the Government and it was held that the United States Courts have jurisdiction to determine such a claim. *United States v. Morgan*, 99 Fed. 570, 39 C. C. A. 653.

By reason of the amount involved, that action was in the Circuit Court but the discussion applies here and it is unnecessary to go over the same ground.

On the question of the conclusions sought, the Government refers to *D. M. Ferry & Co. v. United States*, 85 Fed. 550, 29 C. C. A. 345. That was a case where a petition was filed under section 2984 of the Revised Statutes [U. S. Comp. St. 1901, p. 1958], and the Secretary of the Treasury made a ruling relative to duties which had been paid. It was sought to review such ruling but the court held it could not be done. Referring to the case of *Nichols v. United States*, 7 Wall. 122, 19 L. Ed. 125, it was said (page 555, 85 Fed., page 350, 29 C. C. A.):

"To avoid the effect of the *Nichols Case* upon the question before us, it is pointed out that in that case the revenue laws themselves provided a remedy by which the taxpayer might bring the secretary's decision under review in the courts, but that here there is no such provision. This is true, but the *Nichols Case* did not proceed on the ground that there had been an appeal to the courts provided for within the revenue acts themselves; nor was it intimated that a suit in the court of claims would have been permitted had no such appeal to the courts been provided. On the contrary, the plain effect of the decision is that if the intention of congress is manifest to create the secretary of the treasury a tribunal to decide whether a wrong has been committed under the revenue law, and has made no provision for an appeal, because the revenue law provides a complete system within itself, the presumption must be that it was intended to make the decision of the special tribunal thus established final."

It would seem that no conclusion of law should be made here which would apparently affect the jurisdiction of this court to determine the question involved, and I decline to make the Government's proposed conclusions.

I adopt the following conclusions of law, as proposed by the petitioner, viz.:

"Conclusions of Law.

First. At the time of the salvage aforesaid the United States had an interest in said sugar to the amount of Six thousand Dollars.

Second. By reason of said salvage service the said sum of Six thousand Dollars in duties has been saved to the United States.

Third. The petitioner is entitled to recover as salvage herein the same percentage on the sum so saved to the United States as was allowed by the United States District Court for the Eastern District of New York against the sugar itself, to wit, ten per cent.

Fourth. The petitioner is entitled to judgment against the United States for the sum of Six hundred Dollars."

Judgment for petitioner for the sum of \$600.

LIPPINCOTT v. SUPREME COUNCIL A. L. H.

(Circuit Court, E. D. Pennsylvania. May 18, 1904.)

No. 5.

1. BENEFIT LIFE INSURANCE—RENUNCIATION OF CONTRACTS—RIGHT OF MEMBER TO RESCIND.

A life insurance association renounced its contracts with its members, by adopting a by-law, without legal right, by which it attempted to arbitrarily reduce the amount payable on their certificates below the amount therein agreed to be paid, and by levying assessments thereunder on the reduced amount. A member, on receiving notice of the reduction, refused to assent thereto, and declared his intention of enforcing the contract as made. He tendered the assessments at the former rate, but, on their being refused, paid at the reduced rate for more than two years, but always under protest, and he then notified the association of his intention to rescind the contract, and demanded the return of the assessments he had paid before the reduction. *Held*, that while the payments made after the adoption of the by-law were voluntary, and could not be recovered back, they did not bind him as an acquiescence in the action taken, nor did his declaration of his intention to insist on performance constitute an irrevocable election which precluded him from afterwards rescinding the contract and recovering the payments previously made, where the association was not misled or prejudiced by the delay.

At Law. On motion for new trial, and for judgment in favor of defendant notwithstanding the verdict.

Joseph H. Brinton, for plaintiff.

J. F. B. Atkin, Murdock Kendrick, and Frank P. Prichard, for defendant.

J. B. McPHERSON, District Judge. This case presents a question that did not arise in *Supreme Council, etc., v. Black*, 123 Fed. 650, 59 C. C. A. 414, nor in *Daix v. Supreme Council (C. C.)* 127 Fed. 374, recently affirmed by the Court of Appeals for the Third Circuit (130 Fed. 101), namely, the right of a member of the defendant order to rescind his contract after having once elected not to rescind. The facts are undisputed. The plaintiff, upon receiving notice of the attempted reduction of his certificate from \$5,000 to \$2,000, in accordance with the by-law passed in August, 1900, refused to acquiesce, made a vigorous verbal protest at the first meeting of his local council after receiving notice of the change, declared he would never assent to the reduction and would always pay under protest, offered to pay assessments at the old rate, and, when this was refused, paid at the reduced rate, but always insisting that he did not agree

to the change, until February 28, 1903, when he sent the following letter to the council:

"I beg leave to advise you that I shall discontinue to pay the dues and assessments on the \$5,000 certificate issued to me and will ask you to return me the amount paid by me on the same up to October 1, 1900, at which time by the adoption of the resolution you abrogated your contract with me."

Notwithstanding the plaintiff's protest, the decisions make it perfectly clear that his payments under the reduced rate were voluntary payments, in the eye of the law. There was no element of duress either of person or of goods, and without duress a payment cannot be regarded as legally involuntary. It may be unwilling or reluctant, but it is nevertheless voluntary, unless it is preceded by the use of what the law will declare to be unlawful compulsion. The rule is thus stated in *Radich v. Hutchins*, 95 U. S. 213, 24 L. Ed. 409:

"To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary—treating now the redemption of the cotton as made in money, goods being taken as equivalent for a part of the amount—there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the Court of Appeals of Maryland, the doctrine established by the authorities is that 'a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid.' *Mayor and City Council of Baltimore v. Lefferman*, 4 Gill, 425 [45 Am. Dec. 145]; *Brumagin v. Tillinghast*, 18 Cal. 265 [79 Am. Dec. 176]; *Mays v. Cincinnati*, 1 Ohio St. 268."

See, also, *Lonergan v. Buford*, 148 U. S. 581, 13 Sup. Ct. 684, 37 L. Ed. 569; *De la Cuesta v. Ins. Co.*, 136 Pa. 62, 658, 20 Atl. 505, 9 L. R. A. 631; and the note to *Mayor, etc., v. Lefferman*, 45 Am. Dec. 145.

Recognizing this fact, the plaintiff does not ask to recover the assessments that have been paid since October 1, 1900, but abandons this amount to the council; confining his demand to the sum paid before that date, and putting his claim on the ground of rescission, and not in any degree upon the ground of involuntary payment. The unquestioned facts show plainly that the plaintiff, by his words and conduct, declared his intention not to assent to the reduction of his certificate, but to hold to the original agreement. This he had a right to do. The defendant's anticipatory breach could not put an end to the contract. The plaintiff's right therein could not be taken away at the mere pleasure of the defendant, but the breach gave the plaintiff a right to choose whether he would assent to the proposed change in the contract, or would refuse such assent. No doubt, he was bound to exercise this right within a reasonable time; but what would be a reasonable time in any case is not to be determined so much by the lapse of weeks or months, as by considering the circumstances of the parties, and by determining what effect may have been produced upon the defendant by a plaintiff's delay. In *Black's Case*, prompt action was taken by the plaintiff. He made his election within a month. But in *Daix's Case* a delay of two years and four months was held not to be fatal, because there was no evidence that

the defendant had suffered the slightest injury, or that its situation had been in the least degree altered, during the interval. It seems to me that a similar test should, in fairness and justice, be applied to the facts of the present case. There is no allegation that the defendant has been harmed in any manner by what has taken place, or has been misled or deceived to its hurt. On the contrary, it has been benefited by the receipt of assessments for nearly $2\frac{1}{2}$ years which the plaintiff cannot reclaim, and is probably further benefited because it has exchanged a liability for \$5,000 on the original certificate for a liability of \$3,875; this being the amount of assessments paid before October 1, 1900. There is no equity in its contention, but the plaintiff must suffer a total loss upon his certificate if his unwise step, no doubt taken in ignorance of the legal effect of payment under protest, was incapable of being retraced. As it seems to me, however, there is no sufficient ground for holding that an election once made is always, and under all circumstances, irrevocable. Suppose that the plaintiff, after having tendered his assessment at the old rate, and having thereby made manifest his intention to insist upon the original contract, had been better advised an hour or two afterwards, or upon the next day, and had then sent a notice such as was sent in February, 1903. Is it possible that any court would enforce so rigorously the rule requiring him to elect within a reasonable time, that under such circumstances his first choice would be held to be final? Of course, no matter how short the time that may elapse between his first and his second choice, if the defendant's situation should be changed, or if it should be misled by his act so that harm would come to it by a change in his attitude, a different question would be presented. It would then be the defendant's right to object, and its objection would certainly be decisive; but where, as here, it is not even averred that injury would be done, and where it also affirmatively appears that the defendant is benefited by the plaintiff's change of mind, it seems to me that the power to change ought not, in equity and good conscience, to be denied him. There is no reason why the defendant should be regarded with special favor. Its unlawful act created the situation that called upon the plaintiff to decide promptly what he would do, or to delay at his own risk, and a hasty or ill-advised decision under such circumstances ought not to be held irrevocable, unless the defendant's condition is somehow changed meanwhile, so that revocation now would do it harm. Of course, acquiescence in the by-law manifested by a deliberate, even if an angry, payment of the reduced rate, would be a different matter. The plaintiff's payments were not of this kind, however. They were voluntary in the legal sense, because there was no duress, and therefore could not be recovered back, but the continued protest made it clear that there was at least no acquiescence in the action of the supreme council, and that the reduced rate was paid only because the council would accept no more. The defendant was not misled or deceived, and in this respect the case seems to me even stronger than the case of Daix, whose silence was capable of being construed to be acquiescence, whereas the plaintiff's continued protests were at

least notice to the council that his opinion of the by-law remained unchanged.

A new trial is refused, and judgment is directed upon the verdict in favor of the plaintiff. To the refusal to enter judgment for the defendant notwithstanding the verdict, an exception is sealed.

In re BENSON.

(Circuit Court, S. D. New York. May 26, 1904.)

1. CRIMINAL LAW—REMOVAL OF DEFENDANT—INDICTMENT—SUFFICIENCY.

The sufficiency of an indictment against a federal prisoner is to be determined by the court in which it was found, and is not a proper matter of inquiry in proceedings to remove him to the district in which he is triable.

2. SAME—COMMISSION OF OFFENSE—INDICTMENT—PRIMA FACIE EVIDENCE.

In proceedings to remove a federal prisoner for trial to the district where the offense charged was alleged to have been committed, the indictment is prima facie evidence of the commission of the offense.

3. SAME—EVIDENCE.

In proceedings to remove a federal prisoner for trial to the district where the alleged crime was committed, the fact that evidence introduced failed to establish facts sufficient to constitute the offense charged did not impair the credit of the indictment, nor entitle accused to a discharge, since there may have been other and more persuasive evidence before the grand jury than was offered in such proceeding.

4. SAME—VENUE.

Where, in proceedings to remove a federal prisoner to the District of Columbia for trial, certain counts of the indictment alleged offenses committed there, it was immaterial that other counts and the evidence in such proceeding disclosed offenses committed in another state.

5. SAME—REMOVAL TO DISTRICT OF COLUMBIA.

Rev. St. § 1014 [U. S. Comp. St. 1901, p. 716], provides that, where any offender is committed in any district other than where the offense is to be tried, it shall be the duty of the judge of the district where the offender is imprisoned to issue a warrant for his removal to the district where the trial is to be had. Act Cong. Feb. 21, 1871, c. 62, 16 Stat. 426, declares that the Constitution and all laws of the United States not locally inapplicable shall have the same force and effect within the District of Columbia as elsewhere within the United States. *Held*, that though the District of Columbia was not in existence at the time section 1014 was enacted, and the word "district," as used therein, referred to the judicial districts into which the United States was divided, such section by the act of 1871 became applicable to the District of Columbia, and authorized the removal of a federal offender to such district for trial of an offense committed there.

This is a hearing upon writs of habeas corpus and certiorari. Defendant was arrested upon a warrant issued by a United States commissioner, and, after a hearing before that officer, was committed to await the action of the District Judge upon an application to be made by the United States attorney for a warrant of removal to the District of Columbia for trial upon an indictment found by a grand jury of the Supreme Court of the District of Columbia. The charge is for several separate violations of the provisions of section 5451,

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 510.

Rev. St. U. S. [U. S. Comp. St. 1901, p. 3680], which punishes with fine and imprisonment any person who promises, offers, or gives any money or thing of value to any officer of the United States with intent to induce him to do or omit to do any act in violation of his lawful duty.

Frank H. Platt and Boardman, Platt & Soley, for petitioner.

Henry L. Burnett, U. S. Atty., and Ernest E. Baldwin, Asst. U. S. Atty., for the United States.

LACOMBE, Circuit Judge. It is now well settled that the sufficiency of the indictment is to be determined by the court in which it was found, and is not matter of inquiry in removal proceedings. *Greene v. Henkel*, 183 U. S. 249, 22 Sup. Ct. 218, 46 L. Ed. 177; *Beavers v. Henkel*, 24 Sup. Ct. 605, 48 L. Ed. —. This indictment avers that defendant was engaged in fraudulent operations under the land laws; that, under orders of the Secretary of the Interior, an investigation of his alleged frauds was begun; that the investigators were to report to the secretary for the exclusive consideration and use of the proper officers of the department; that one Harlan was an officer of the department to whom such report would come; and that, on a day named, defendant gave a specified sum of money to Harlan, with intent to induce him to reveal to defendant, when the same should come to his hands, the contents of the said report. The principal criticisms of the indictment are that it does not sufficiently aver that the report was one to be kept secret and confidential, nor that it was Harlan's "lawful" duty not to reveal its contents to the individual whose malpractices it described, and that, since the report was not in existence when the officer was bribed, the offense charged could not be committed, because the contingency specified (the making of the report) might never happen. These objections, however, are to be determined, as above suggested, in the court which found the indictment. On any ordinary and natural construction of its language, it sets forth an offense under section 5451, Rev. St. [U. S. Comp. St. 1901, p. 3680].

It has been held in *Beavers v. Henkel*, 24 Sup. Ct. 605, 48 L. Ed. —, that, in proceedings to remove, the indictment itself is prima facie evidence of the commission of the offense charged. In this proceeding no evidence was introduced by defendant controverting any of the averments of the indictment. The government, however, called several witnesses, and undertook to prove the offense independently of the indictment. Defendant insists that their testimony falls short of establishing the necessary facts. It is unnecessary to go into any analysis of this proof. Even if it failed in some particulars, that circumstance does not impair the credit of the indictment. Non constat but what there was other and more persuasive evidence before the grand jury.

It is further contended that as to some of the counts the evidence shows that the offense was committed in California, where the letter inclosing the bribe was mailed, not in Washington, D. C., where it was received. It is unnecessary to discuss this question here, since

concededly the offenses charged in the other counts were committed in Washington.

Finally it is contended that under section 1014, Rev. St. [U. S. Comp. St. 1901, p. 716], there can be no removal to the District of Columbia. That section reads as follows:

"Sec. 1014. For any crime or offense against the United States the offender may * * * by any commissioner of a circuit court to take bail * * * be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense * * * and where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

This was originally (with a slight change, which is concededly of no importance) section 33 of the original judiciary act (Act Sept. 24, 1789, c. 20, 1 Stat. 91). At the time of its original enactment there was no District of Columbia, and the word "district," as used in the section, applied to the appropriate judicial district, viz., to one of the judicial districts into which by that act the United States was divided. Reliance is had upon the opinion of Judge Brown in *Re Dana* (D. C.) 68 Fed. 898. That case, however, went off on the proposition that "libel in the District of Columbia does not belong to the class of offenses contemplated or provided for by section 33 or by section 1014, [since] * * * there has never been any statute, either of the United States or of the state of Maryland, making libel a criminal offense." The learned judge does discuss removals generally, but that part of the opinion is obiter. In the case at bar we have a crime or offense against the United States, and it is to be expected that, even if the language of the original section were not sufficient to include the District of Columbia, Congress has provided in some way against the extraordinary result of its legislation, whereby an individual who might commit murder upon the steps of the Capitol could live in undisturbed security, provided he succeeded in getting beyond the limits of the District of Columbia before he was arrested. The act of February 21, 1871, c. 62 (16 Stat. 426), now section 93 of the Revised Statutes of the District of Columbia, has apparently provided for such a case as this. It reads:

"Sec. 93. The Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the District of Columbia as elsewhere within the United States."

This places the District of Columbia, so far as practicable, on an equality of privilege with the various states and judicial districts of the rest of the country. One of the privileges of a judicial district is to have persons who within its borders offend against the laws of the United States returned from any other district to itself for trial before the appropriate federal court sitting therein. That privilege is made practically available by section 1014, and by the act of 1871 the provisions of that section "have the same force and effect within the District of Columbia as elsewhere in the United States."

The writ is dismissed, and defendant remanded to await the action of the District Judge.

THE JOSEPH PEENE.

(District Court, S. D. New York. May 24, 1904.)

1. TOWAGE IN HUDSON RIVER—FLOATING ICE—NEGLIGENCE OF TUG.

A tug started from Jersey City up the Hudson to Yonkers, in the night, with libellant's canal boat and another tow belonging to the owner of the tug. Encountering floating ice, the master of the canal boat requested to be left, but the tug proceeded with her to Yonkers, where she was cast loose, and permitted to drift up the river with the flood tide for half a mile, while the other tow was being taken care of. She was then brought back against the tide, and through the ice. They stopped at a wharf on the way, and the master again requested to be left there, but the tug proceeded to the wharf where she was to be delivered, where it was found that her planks were cut through by the ice, so that she soon filled. Held, that the tug failed to exercise the degree of reasonable diligence and care imposed on her by the circumstances, and especially after having continued the voyage against the master's protest, and was liable for the injury.

In Admiralty. Suit against tug for injury of tow.

Alexander & Ash, for libellants.

Carpenter, Park & Symmers, for claimant.

ADAMS, District Judge. This action was brought by Christian Heidt, et al., owners of the canal boat A. C. McLaughlin, to recover the damages sustained by reason of injuries received by that boat, while in charge of the tug Joseph Peene, on the 10th day of January, 1903. The boat was destined for the wharf of the Federal Sugar Refining Company at Yonkers and it is claimed that she was injured through the negligence of the tug, in the following, among other particulars:

"1. * * * * *

2. In that said tug towed said boat 'A. C. McLaughlin' at night time through the ice, and refused to suspend said towing, when requested until daylight, and until said boat could be towed without danger of injury by contact with the ice.

3. In towing said boat through the ice, after warned and requested by her master not to do so.

4. In abandoning said boat and letting her go adrift in the ice, on the occasions hereinbefore mentioned.

* * * * *

6. In abandoning said boat in the ice after getting her to the dock of the Sugar Refining Company as before mentioned, and failing to render assistance by promptly pumping her out and otherwise, as she was in duty bound, to prevent additional injury to boat and cargo."

The answer denies any negligence and alleges that the tug exercised:

"Great care and prudence in said towage service, and that the leak and resulting damage to said boat was in no wise caused through any fault or want of care on the part of the said steam tug 'Joseph Peene' or those in charge of her."

The canal boat was loaded with empty barrels, destined for the sugar refinery at said wharf, and was taken in tow at the foot of Morgan Street, Jersey City, at about 1 o'clock A. M., together with another boat, belonging to the tug owner, bound for Yonkers, which

was considerably larger than the McLaughlin. The McLaughlin was at first taken on the tug's starboard side, but on the trip up, in the vicinity of Manhattanville, when ice was encountered, the master of the boat asked that she be left at Edgewater. Instead of complying with this request, the pilot of the tug dropped the boat astern, and, the tide being flood, the vicinity of Yonkers was reached without perceptible, if any, injury to her. There, however, the libellants' boat was left to drift up the river for about half an hour, while the other boat was delivered, and by the time the tug was ready to take hold of the McLaughlin again, she was about half a mile above her destination, which necessitated towing in the ice, against the tide, mostly exposing her starboard side. For this service, the tug took the boat behind on two short lines. On the way to her destination, the tug stopped with the boat at Peene's Wharf to rearrange the towing lines and the master of the boat then requested that she be left there but the tug master concluded to go on with her. When they arrived in the vicinity of the Federal Wharf, the tug dropped the boat, while she broke up the ice, by doing which the tug succeeded in getting the boat up to the wharf, where she could lie diagonally and be made fast. There had been only about 5 inches of water in the boat before the last towing was attempted; over two feet were found between 5 and 6 o'clock; about an hour afterwards between 4 and 5 feet; then she filled. It was subsequently found that planks, 2 inches in thickness, principally on the starboard side, were cut through by the ice, at the water line; others were gouged out but not cut through.

The general relations of a tug and tow have been recently defined by the Circuit Court of Appeals for this circuit, as follows (128 Fed. 684, 685):

"The tug was neither a common carrier nor an insurer of the boat or her cargo. She was not required to exercise the highest degree of skill, but reasonable diligence and care only. She was bound to know the channel and whether she could complete the voyage with safety, so far as safety depended upon known facts, or facts easily capable of ascertainment. The agreement of the canal-boat to be towed at her own risk did not exempt the tug from liability for damages occasioned by her own negligence. That liability does not arise out of the towage contract, but is imposed by law. The master of the tug was the pilot of the voyage and responsible for the navigation of both vessels. It was his duty to exercise ordinary diligence to see that the tow was properly made up, that the hawsers were of the proper length, strong and securely fastened. On the other hand, the master of a boat offering her for towage represents her as sufficiently staunch and strong to withstand the ordinary perils to be encountered on the voyage. If she be unseaworthy by reason of weakness, decay or leaks and such defects are not obvious to the master of the tug he will be absolved from responsibility where such unseaworthiness causes the damage complained of. The tug undertakes only for that degree of skill, care and prudence necessary for the management of a seaworthy boat. *The Margaret*, 94 U. S. 494, 24 L. Ed. 146; *The Quickstep*, 9 Wall. 670, 19 L. Ed. 767; *The Lady Pike*, 21 Wall. 1, 22 L. Ed. 499; *The William Murtaugh* (D. C.) 3 Fed. 404; *The Syracuse*, 6 Blatchf. 2, Fed. Cas. No. 13,717; *The Florence* (D. C.) 88 Fed. 302." *The Edmund L. Levy*, 128 Fed. 683.

My attention has not been called to any ice case in point. *The Packer* (C. C.) 28 Fed. 156, has been cited by the claimant. There the tug was held not liable because, although the tow was injured, the

tug was doing the best it could under the circumstances and the tow concurred in the risk.

Here, the towage was conducted at an unusual hour and the master of the tow, after encountering the ice, protested against being taken further on account of it. It is doubtful if any serious injury was received by the boat from being taken through the ice up as far as Yonkers. It probably occurred while she was being towed back through the ice. It is in such respect that negligence on the tug's part is apparent. Having undertaken against the master's protest to continue the voyage, thereafter it became incumbent upon the tug to take every reasonable precaution to secure the safety of the tow. She should, for example, have proceeded at once to the Federal Wharf, instead of leaving the boat to drift, while the barge belonging to the tug owner was taken care of, and there was subsequent negligence in not leaving the boat at Peene's Wharf. The tug failed to exercise the degree of reasonable diligence and care, which the circumstances required of her. The evidence fully sustains the 2nd, 3rd, 4th and 6th charges of fault.

Decree for the libellants, with an order of reference.

STEPHENSON v. SUPREME COUNCIL A. L. H.

(Circuit Court, E. D. Pennsylvania. May 18, 1904.)

No. 37.

1. NATURE OF ACTION—LEGAL OR EQUITABLE—AVOIDING SETTLEMENT FOR FRAUD.

Where the beneficiary in a life insurance certificate after the death of the insured was induced by false statements made by representatives of the association to settle her claim and receipt the certificate, her remedy, in a federal court, at least, is in equity, and not at law, where evidence to avoid the settlement and receipt for fraud is not admissible.

At Law. On motion for new trial.

See 127 Fed. 379.

F. Earle Von Leer, for plaintiff.

J. F. B. Atkin, Murdock Kendrick, and Frank P. Prichard, for defendant.

J. B. McPHERSON, District Judge. I am clearly of the opinion that the plaintiff has misconceived her remedy, and should have sued in equity, and not at law. Her husband was a member of the Legion of Honor, and held a certificate calling for the payment out of the benefit fund of "a sum not exceeding \$5,000 in accordance with, and under the provisions of, the by-laws governing said fund." In August, 1900, the supreme council passed a by-law reducing the amount payable on such certificates to \$2,000, and on October 1st this by-law was put into effect. The plaintiff's husband died in March, 1901, and in September following the plaintiff, who was the beneficiary named in the certificate, met two officials of the Legion, was informed by them that the amount to be paid was only \$1,900, and that her

husband had understood about the reduction, accepted the money, signed a receipt upon the certificate for that sum, and delivered the instrument for cancellation. This suit is brought to recover the difference between the amount thus received and the face of the certificate; the ground of recovery being that the by-law has been declared unlawful by the Court of Appeals of this circuit, and that the settlement was invalid, because the plaintiff was deceived by a statement that her husband had agreed to the reduction, while the fact was that he had always paid the assessments at the reduced rate under protest. At the trial the certificate was produced by the defendant under compulsion of a subpoena, and the plaintiff attempted to offer it in evidence against the defendant's objection, which went not only to the paper itself, but to the whole of the evidence that sought to invalidate the receipt. I admitted it provisionally, reserving the further consideration of the objection until the matter could be more fully argued. The argument has now been had, and the result has been, as I have already stated, to satisfy my mind that the plaintiff should have proceeded by bill in equity to attack directly the receipt and the cancellation of the certificate. Even in the courts of Pennsylvania, where equitable defenses are freely permitted in actions at law, the remedy by bill has been decided to be the proper proceeding under such circumstances as are now presented. *Blair v. Supreme Council*, etc. (a case recently decided, and not yet officially reported) 57 Atl. 564, was almost identical in its facts, and offered the Supreme Court of the state an opportunity to say that, although an action at law might perhaps be sustained, nevertheless such an action would not be an adequate remedy, while a bill in equity would afford complete and appropriate relief. As is well known, the distinction between law and equity is much more carefully preserved in the federal courts, and the power of a court of law to hear evidence of the character offered by the plaintiff has been expressly denied by the Supreme Court of the United States. In *George v. Tate*, 102 U. S. 570, 26 L. Ed. 232, where, in an action upon a bond, it was set up as a defense that the obligors had been induced to sign the instrument by fraudulent representations concerning a suit in attachment, the court said:

"Proof of fraudulent representations by Myers & Green, beyond the recitals in the bond, to induce its execution by the plaintiff in error, was properly rejected.

"It is well settled that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give. *Hartshorn et al. v. Day*, 19 How. 211, 15 L. Ed. 605; *Osterhout v. Shoemaker and others*, 3 Hill, 513; *Belden v. Davies*, 2 Hall, 433; *Franchot v. Leach*, 5 Cow. 506. The remedy is by a direct proceeding to avoid the instrument. *Irving v. Humphrey*, 1 Hopk. 284."

This is a decisive authority upon the question, and requires me to set aside the verdict and grant a new trial. It is unnecessary, therefore, to consider the further question whether the plaintiff can attack the receipt without offering to return the money already paid. In

an action of tort, where it was charged that a settlement had been obtained by fraud, it has been held that an offer to return the money paid must be proved before the settlement can be avoided (*Hill v. Railway Co.*, 113 Fed. 914, 51 C. C. A. 544); but the rule may not apply where the money paid is conceded to be due in any event.

A new trial is granted. The plaintiff may suffer a voluntary nonsuit, or discontinue on payment of costs, without prejudice in either case to her right to sue in equity.

ENCYCLOPÆDIA BRITANNICA CO. v. AMERICAN NEWSPAPER ASS'N et al.

(Circuit Court, D. New Jersey. June 28, 1904.)

1. COPYRIGHT—VIOLATION OF INJUNCTION AGAINST INFRINGEMENT—CONTEMPT PROCEEDINGS.

One defendant company was publisher of an encyclopædia, and the other was engaged in soliciting orders for the same, which were filled by it with books obtained from the publisher. A temporary order was granted against both defendants, restraining them from selling or delivering sets containing certain articles alleged to infringe complainant's copyright, and no more of such volumes were thereafter shipped by the publisher. The second company had agencies in different cities, each in charge of a manager, whose duty it was to report each order taken to the company, without whose approval no delivery was authorized to be made thereon. At once on service of the order all managers were notified not to make further deliveries of the volumes involved, but that they might continue to take orders, which would be filled as to such volumes after the court's order should be vacated or the infringing matter eliminated by the publisher. Within the week following service of the order, certain persons employed for the purpose by complainant obtained from such defendant delivery of four sets or parts of sets containing articles within the prohibition, each in a different city, two through a misunderstanding of the manager as to the volumes affected, and two from subordinate employes, having no knowledge of the order, in the absence of the manager, and in each case in violation of the rules of the defendant, and without waiting for the usual instructions, because of urgent demand for immediate delivery. *Held*, that such facts did not warrant an adjudication that either defendant was guilty of contempt, in the absence of any evidence tending to show that the violation of the order was intentional.

In Equity. On rule to show cause why defendants should not be punished for contempt.

Frederic R. Kellogg and John M. Dickinson, for complainant.
John G. Johnson and Rollin M. Morgan, for defendants.

LANNING, District Judge. On June 2, 1904, upon application of the complainant, a rule was allowed requiring the defendants, the American Newspaper Association and the Werner Company, to show cause why a preliminary injunction should not be issued against them. With the rule went an ad interim order restraining the defendants from offering for sale or selling any sets of the Encyclopædia Britannica, heretofore published and sold by the defendants, containing certain

articles on "Galveston," "Georgia," and 17 other subjects, like or substantially like other articles on the same subjects copyrighted under the laws of the United States and published in the complainant's edition of the Encyclopædia Britannica. The affidavits used on the hearing show that, after the restraining order was served on the defendant corporations, four sets of the enjoined volumes were sold and delivered to four persons, one in Philadelphia, one in Pittsburgh, one in Washington, and one in Chicago. The question now to be considered is whether either of the defendant corporations has violated the restraining order and contemned the authority of this court.

The Werner Company has its factory in Akron, Ohio. Paul E. Werner, the president and general manager of the company, first learned of the existence of the restraining order at 2 o'clock in the afternoon of June 3d, in the city of New York. He immediately telegraphed to the factory at Akron to make no shipments of the enjoined books until further instructions from him. The telegram was received by the assistant superintendent about 7 o'clock in the evening of June 3d, and he immediately communicated its contents to the employé having sole charge of the shipping department. It appears, further, that, by the Werner Company's method of conducting its business, no one is authorized to deliver any volume or volumes of the Encyclopædia except upon a written order from Otto G. Schultz to the person in whose charge such volume or volumes may be, and that Schultz gave no order to any person whomsoever for any of the enjoined volumes after June 3d. These statements are sworn to by Paul E. Werner, the president, Edward P. Werner, the assistant superintendent, Otto G. Schultz, the order clerk, and Herman Werner, the shipping clerk. Other statements are sworn to by them, none of which are controverted, which make it clear that the persons who sold and delivered the inhibited volumes did not represent the Werner Company, and that none of these volumes were sold or delivered with the consent or knowledge of any of the officers or employés of the Werner Company.

The business of the American Newspaper Association is, amongst other things, the securing of orders for the Encyclopædia Britannica published by the Werner Company. It has offices in 11 of the principal cities of the United States. Each of these offices is in charge of a manager who hires salesmen to solicit subscription contracts for the Encyclopædia. Every contract received is turned over to the proper manager, who forwards it to the central office of the Newspaper Association in New York City. From this office instructions are forwarded to the managers, and no manager or other person has authority to deliver books upon any contract until after instructions concerning such contract are received. The restraining order was served on the association on June 3d, and on the same day it sent a letter to each of its 11 managers, advising them of the issue of a "temporary injunction," and saying:

"If the case cannot be brought up for decision in court immediately, The Werner Company will simply hold back the six or seven volumes in which the copyrighted articles appear, when making shipments to subscribers, and will prepare entirely new articles to take the place of these few pages, and the

volumes referred to will be shipped later. It is not necessary for the managers to send notice to all the agents or say anything to the agents about it unless the agents mention it to the managers. The agents can go right ahead and take orders just the same as before, and The Werner Company will explain to the subscriber when shipment is made that the other volumes will follow in a short time. This should not in any way interfere with the book."

This letter has been severely criticised by the counsel for the complainant. But it violates neither the letter nor the spirit of the restraining order. Nothing was prohibited by that order except the sale and delivery of volumes containing the articles which the complainant insisted were infringements of its copyrighted articles. The letter shows conclusively that those volumes were to be withheld from sale and delivery until a decision favorable to the defendants should be had, or until new articles should be substituted for the alleged infringing ones. The proofs do not show whether the managers keep on hand a supply of the sets of defendants' Encyclopædia. It is quite probable they do. But even so, they had no authority to deliver any sets except upon instructions from the New York office to do so. At the time the restraining order was served, this rule of business concerning the delivery of books had never been departed from. I am satisfied that neither the officers of the American Newspaper Association, nor its agents at the central office in New York, had any reason to suspect that it would be departed from after such service.

The suggestion of complainant's counsel that it was the duty of the association, immediately upon receiving notice of the restraining order, to telegraph its managers and agents in other cities not to deliver the books in question, is answered by these facts: James L. Armstrong, the manager of the Philadelphia office, understanding that the injunction applied only to the last 6 volumes of the set of 31 volumes, caused the first 25 volumes of the set to be delivered to Walter G. Mulliner on June 6th. In Washington, on June 9th, a full set of 31 volumes was delivered to Lewis T. Hooper by a lady clerk in the Washington office, who had no knowledge of the restraining order, and who made the delivery during the absence of the manager of that office in Richmond, Va. On June 7th the bookkeeper at the Chicago office, having no knowledge of the restraining order, and while the manager of that office was absent on account of the sickness of his father, delivered a full set of 31 volumes to Olinus Olson. And on June 10th William H. Pittenger, the manager at the Pittsburgh office, understanding that the restraining order applied only to the last five or six volumes of the set, delivered the remaining volumes of the set to Thomas M. Reed. Each of the four persons making these deliveries swears that no authority for such deliveries existed, and that they were made, without waiting for the usual orders or instructions from New York, only because of urgent demands for immediate delivery. They each further swear that they have never delivered any other sets or parts of sets to any persons whomsoever without the customary authority. The complainant admits that it employed Mulliner and Olson to purchase the books that were delivered to them. The books obtained by Hooper and Reed were doubtless purchased by like authority. In each of these four sales the circumstances were unusual, and were made so by the com-

plainant alone. Such sales were unprecedented in the business of the American Newspaper Association, and as soon as its officers learned of the sales they telegraphed instructions to all their managers not to deliver any sets of the Encyclopædia except on explicit orders from the New York office.

The facts do not warrant an adjudication that either of the defendant corporations is guilty of contempt, and the rule to show cause will be dismissed, with costs.

MUNFORD RUBBER TIRE CO. v. CONSOLIDATED RUBBER TIRE CO.
et al.

(Circuit Court, S. D. New York. May 12, 1904.)

1. REMOVAL OF CAUSES—REMOVAL BY ONE OF SEVERAL DEFENDANTS.

An action brought in a state court against a number of defendants, all of whom are citizens of other states, is removable by any one of the defendants, although it involves but a single controversy.

On Motion to Remand to State Court.

Wallach & Cook, for the motion.

Mr. Humes and C. W. Stapleton, opposed.

COXE, Circuit Judge. The plaintiff is a citizen of Georgia; the defendants are citizens of other states, none of them being a citizen of Georgia. We have then a controversy wholly between citizens of different states. I am unable to distinguish this case from *Ins. Co. v. Champlin* (C. C.) 21 Fed. 85. Subsequently followed in this circuit in *Garner v. Bank* (C. C.) 66 Fed. 369, and *Trust Co. v. Mackay*, 70 Fed. 801.

The motion to remand is denied.

¶ 1. Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 244; *Mason v. Dullaghan*, 27 C. C. A. 298.
See Removal of Causes, vol. 42, Cent. Dig. § 90.

SCOTT et al. v. MINERAL DEVELOPMENT CO.

(Circuit Court of Appeals, Sixth Circuit. May 12, 1904.)

No. 1,248.

1. ADVERSE POSSESSION—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

The Kentucky statute of limitations relating to actions for the recovery of land has been liberally construed and applied by the Court of Appeals of the state in respect to the adverse possession of settlers which will ripen into a title thereunder, on account of the confusion created by the loose practice of the state in issuing patents for conflicting grants, and its decisions, having become a rule of property in the state, will be followed by the federal courts.

2. SAME—WHAT CONSTITUTES—KENTUCKY STATUTES.

Under the statute of limitations of Kentucky (Ky. St. 1903, § 2505), which requires an action for the recovery of land to be brought within 15 years after the right to institute it accrues, and the champerty statute (Id. § 210), which provides that "all sales or conveyances * * * of any lands * * * of which any other person at the time of such sale, contract or conveyance has adverse possession shall be null and void," the elements constituting adverse possession are the same.

3. SAME—EXTENT OF POSSESSION.

An entry into possession of any part of a tract of land, under a deed containing specific metes and bounds and purporting to convey the same, gives constructive possession of the whole tract, if not in any adverse possession; and a continuation of such possession, although actually of only a part, but under claim of title to the whole, for the statutory period, will give the occupant title to the whole by adverse possession, at least against one out of possession who claims title to the entire tract through a single conveyance and source of title.

4. SAME—SEPARATE TRACTS CONVEYED BY SINGLE DEED.

A title founded on adverse possession under a deed which purports to convey the title is wholly independent of prior conveyances or of the grantor's actual title, and it is therefore immaterial whether his title to the whole was obtained from a single source or through separate conveyances of different parts of the tract.

5. SAME—NOTICE OF EXTENT—RECORD OF DEED.

The record of a deed under which the grantee has entered into possession is notice to the world of the extent of his possession.

6. SAME—KENTUCKY CHAMPERTY STATUTE.

One holding two adjoining tracts of land under separate patents took possession of one and made improvements thereon, and thereafter sold and conveyed all the land as a single tract to defendants, who leased the entire tract, and the tenant went into possession of the improved portion. *Held*, that defendants' possession through their tenant extended to all the land covered by their deed and lease, and that a subsequent conveyance to plaintiff by an adverse claimant was void as to the entire tract, under the Kentucky champerty statute (Ky. St. 1903, § 210), which provides that all conveyances of lands of which any other person at the time has adverse possession shall be void.

In Error to the Circuit Court of the United States for the Eastern District of Kentucky.

¶ 1. State laws as rules of decision in federal courts, see notes to *Griffin v. Overman Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

Wm. B. Dixon and J. F. Bullitt, for plaintiffs in error.
S. B. Dishman, D. D. Fields, and T. L. Edelen, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This is an action of ejectment brought by the Mineral Development Company to recover the possession of certain parcels of land in Letcher county, Ky. The defendants John S. and Mary D. Wentz claim to own the lands, and Scott and Raleigh were their tenants in possession of some of them. The plaintiff founds its claim of title upon a patent made by the state February 28, 1874, to William H. Nickels for a tract consisting of 34,800 acres of land in said county on a survey made by him in 1873. The tract so patented was on February 3, 1882, conveyed by Nickels to Joseph B. Altemus and William D. Jones, who, on December 7, 1883, conveyed the same to Altemus, Benson, and McGeorge upon a trust expressed in a contemporaneous instrument for certain named beneficiaries. In consequence of the resignation and death of trustees and the transfer of interests of the beneficiaries, the trustees and the beneficiaries on July 15, 1901, conveyed the tract to the plaintiff in this suit, a corporation organized under the laws of Virginia, and in exchange therefor the corporation issued its stock to the beneficiaries in the proportion of their respective interests and in an amount agreed upon. Claiming that these defendants were in possession of, and unlawfully withholding the possession of, parcels of the Nickels grant above mentioned, the plaintiff, on January 20, 1902, brought this suit.

The defendants pleaded to the jurisdiction that the conveyance to the plaintiff by the trustees, who had theretofore held title to the lands conveyed, was fraudulently made for the purpose of enabling the plaintiff to bring suit therefor in the United States court, which the trustees could not have done; it being further alleged that the cestuis que trust, by virtue of their stockholding interest, had resumed their relation to the property conveyed. They also filed an answer to the petition claiming title in John S. and Mary D. Wentz, and, further, that the defendants, and those under whom they claimed title, had been in adverse possession of the lands for more than 15 years prior to the commencement of suit, and also that the conveyance to the plaintiff of the lands was made while they were adversely held by the defendants or their grantors, and was therefore void for champerty. We take no notice of some preliminary pleadings, as they are not now material. Under the Practice Code of Kentucky the objection to the jurisdiction might properly have been incorporated in the answer. We so held in *Roberts v. Langenbach*, 119 Fed. 349, 56 C. C. A. 253. But, as the case was tried by a jury upon all the issues, the same consequences have resulted as if all the defenses had been joined in an answer. The jury, under the direction of the court, found that the plea to the jurisdiction was not sustained; that is to say, such is the effect of their verdict, although no separate verdict was taken on that issue, as should have been done in regular order. But in the result it is immaterial now that such practice was not pursued, and no question is raised upon it. We think

the court did not err in instructing the jury that the defense presented by the plea was not sustained. In support of it nothing was shown except the bare facts of the conveyance of the land to the plaintiff and the conditions of the transfer above recited. On those facts alone there would be no fair ground for the conclusion that the parties colluded to falsely create the appearance of jurisdictional facts, or that the legal effect of the transaction was such as to defeat the jurisdiction. But the trustees, who were called as witnesses, testified that the exigencies of the business to which the trust had relation suggested the transfer as a proper and advisable proceeding. We do not think that the facts are so nearly similar to those in the case of *Lehigh Mining & Manufacturing Co. v. Kelly*, 160 U. S. 328, 16 Sup. Ct. 307, 40 L. Ed. 444, to which reference is made, as to require a different conclusion from that which we have indicated.

The other issues concern the merits. Under the peremptory instruction of the court the jury rendered a verdict awarding some of the lands in controversy to the plaintiff and some to the defendants. The correctness of this instruction is the matter we have to determine. The defendants complain that by error of the court they have been deprived of several parcels of the land to which they had valid title by adverse possession, or that in respect to one or more the plaintiff was precluded by the statute of the state concerning champerty. The foundation of the defense arising upon adverse possession is the Kentucky statute of limitations, which provides that "an action for the recovery of real property can only be brought within 15 years after the right to institute it first accrued to the plaintiff, or to the person through whom he claims." Ky. St. 1903, § 2505. The right accrues when another person takes adverse possession of the owner's lands. Of course, if the adverse possession is not maintained for the period mentioned, the statute is inoperative, for it imports that there must be a continuous right of action during that period. Inasmuch as the Kentucky statute against champerty is involved in the controversy and will be referred to in the discussion of the effect of adverse possession, it is here quoted, as follows:

"All sales or conveyances, including those made under execution, of any lands, or the pretended right or title to the same, of which any other person, at the time of such sale, contract or conveyance, has adverse possession, shall be null and void." Ky. St. 1903, § 210.

It would seem that the adverse possession here intended is the same as that which, if continued for the requisite period, would give title under the operation of the statute of limitations above quoted. During the years 1900, 1901, and 1902 the plaintiffs in error John S. and Mary D. Wentz, defendants below, purchased and received conveyances of several contiguous parcels of land lying within the boundaries of the Nickels patent. One—and much the larger—tract, lying in the north-eastern and eastern part of the entire tract purchased by them, was conveyed to them October 13, 1900, by J. J. Lewis by deed of that date. On December 10, 1900, they acquired by deed from D. M. Collier another parcel adjoining that purchased from Lewis, and lying in the northwestern part of their whole tract. On January 2, 1902, they purchased of Hiram Raleigh and received his deed for another parcel ad-

joining that purchased of Lewis, and lying on the south side of the western portion thereof. Meantime, on December 20, 1901, they had purchased from A. J. Crager a parcel lying next west of the Raleigh parcel, and took his deed therefor. These Raleigh and Crager lands occupied the southwestern part of their entire tract. At the time Nickels obtained his patent for the 34,800-acre tract several prior patents had been granted by the state for different parcels of the tract patented to him, and to which his patent therefor conveyed no title. When Lewis acquired his title to the western portion of the land deeded by him to John S. and Mary D. Wentz, which was in 1883, a considerable part thereof was, and for a long time had been, settled upon and cultivated by his grantors and those under whom they claimed title. One of the patents above mentioned, older than that to Nickels, covered a strip or parcel which, in one side of it, included a part of the settlements just mentioned. On getting his deed in 1883 Lewis extended the occupation and improvement of the land deeded to him on the parcel covered by the old patent, and also on the land not covered by it, but covered by the Nickels patent, and lying on that side of the old patent beyond which the older settlements extended. Evidence was adduced at the trial tending to show that Lewis, claiming title to the extent of the boundaries of his deed, had continued and extended the actual occupancy of the land within the limits of the old patent, and on that side of it where the old improvements had been made, from 1883 until 1900, when he deeded to the Wentzes, and that they continued the occupancy until the commencement of this suit. Neither Lewis nor the Wentzes had occupied or improved any portion of the land lying on the other side of that covered by the old patent above mentioned.

The court below was of opinion that, while the adverse possession shown of the land lying on that side of the older patent on which the actual occupancy and improvements were made entitled the defendants to maintain their defense as to all the lands on that side and within the boundaries of the deed to Lewis, yet, as that portion was cut off from the other part of the land covered by that deed by the intervening older patent which prevented the Nickels patent from attaching to the land covered by said older patent, such occupancy on one side of the old patent would not extend the possession to that part of the land included in the deed to Lewis over and beyond the older patent. The court did not say so in terms, but that is the plain inference from its instructions to the jury, which were to find a verdict for the defendants for the land on the one side of the old patent and for the defendants on the other.

In this, we think, there was error. It is apparent from the decisions of the highest court of Kentucky that, on account of the mischiefs which had ensued from the loose and indiscriminate practice which had prevailed of patenting lands in that state without taking the necessary precautions to ascertain whether they had been patented before, and the chaotic condition of land titles which had resulted therefrom, that court has given a liberal interpretation of the statutes above mentioned in respect of the adverse possession therein intended in favor of actual settlers with a view to quieting titles. The decisions of that court in respect to this subject have become rules of property, and the statutes

as expounded and applied by the court furnish the governing law for the federal courts. *Elder v. McClaskey*, 70 Fed. 529, 17 C. C. A. 251. It is the settled law not only in Kentucky, but elsewhere, that an entry into possession of a tract of land under a deed containing specific metes and bounds and purporting to convey the same gives a constructive possession of the whole tract, if not in any adverse possession. *Ellcott v. Pearl*, 10 Pet. 412, 9 L. Ed. 475. And it is equally well settled that such an entry upon some part of the land purporting to be conveyed followed by a continuous adverse possession, though it may be actually of such part only, under claim of title to the whole tract, will, if prolonged for the period prescribed by the statute of limitations, give to the occupant a title superior to that of the original owner. The Kentucky Court of Appeals holds that, in order to prevent the application of this rule, the adverse possession of another must be that of one holding title, and that the limitation is not made in favor of strangers to the title. *Bush v. Coomer*, 69 S. W. 793, 24 Ky. Law Rep. 702. In the present case it is not claimed that any one in the chain of the plaintiff's title was ever in actual possession of any part of the land covered by the Nickels patent. That qualification of the rule may therefore be eliminated; and it must follow that the entry of Lewis upon the land described in his deed under claim of the title which it purported to convey gave him possession of the whole tract covered thereby, unless there was some obstacle arising from the previous condition of the title to the land or some part of it. But how could any such obstacle arise? The claim is against all the world. The deed and the entry thereunder are the foundation of the title accruing to the claimant if he maintains his possession under his claim for the requisite period. It is immaterial for this purpose what the title of his grantor was, or from how many persons, or in what parts or interests, it was acquired by the grantor, or, indeed, whether he ever acquired any title to any part of the land. It is all one to the grantee to whom the deed assumes to convey the title. His reliance is on what his deed purports to convey to him, and his position is against everybody else, including his own grantor, unless some special fact is shown which qualifies the purpose of the grantee in taking and maintaining the possession.

In *Elder v. McClaskey*, supra, a deed under which possession had been taken and held purporting to convey the entire estate, though it did not in fact, for the grantor had only a part interest therein; and it was contended that the adverse possession was qualified thereby. But Judge Taft, who delivered the opinion of the court, said:

"It is immaterial that the fee-simple deeds under which the entries were made actually vested only the title to a life estate, or an undivided interest. The extent of the interest purporting to be conveyed characterizes the entry and subsequent possession, and shows beyond doubt that they were made under a claim to the whole, and with intent to oust all others asserting an interest. This is well-settled by federal and state authorities."

And a number of cases are cited in confirmation of his statement. That in such cases the grantee is not affected by anything behind his own deed is confirmed by the rule that he holds adversely to his grantor. It was so held in *Elder v. McClaskey* and cases there cited. *Clymer's Lessee v. Dawkins*, 3 How. 690, 11 L. Ed. 778; *Croxall v. Sher-*

rer, 5 Wall. 287, 18 L. Ed. 572; *Merryman v. Bourne*, 9 Wall. 600, 19 L. Ed. 683; *Bybee v. Oregon & Cal. R. R. Co.*, 139 U. S. 681, 11 Sup. Ct. 641, 35 L. Ed. 305.

In *Watkins v. Holman*, 16 Pet. 25, 54, 10 L. Ed. 873, Mr. Justice McLean, after stating the rule as elsewhere held, said:

"In Kentucky it is well established that a purchaser, who has obtained a conveyance, holds adversely to the vendor, and may controvert his title. *Voorhies v. White's Heirs*, 2 A. K. Marsh. 27; *Winlock v. Hardy*, 4 Litt. 274. And this is the settled doctrine on the subject."

In *Merryman v. Bourne*, 9 Wall. 592, 19 L. Ed. 683, Mr. Justice Swayne, referring to those who had been in adverse possession, and the principle by which a lessee is estopped, said:

"How many such parties were in possession, what portion of the premises their possession embraced, and whether their possession under Fulton was as vendees, lessees, or otherwise, does not appear. If they were grantees in fee, the principle relied upon has no application. It is one of the incidents of subinfeudation, and was brought into the common law from the feudal system. It does not reach the relation of vendor and such a vendee. The latter holds adversely to all the world, and has the same right to deny the title of his vendor as the title of any other party."

These cases prove how absolutely independent of previous titles is that which is built up by an adverse entry, followed by continual possession under color of title by a deed which purports to convey it. Of course, we are not now speaking of those cases where the deed received and the entry made are affected by a trust or some duty owing to the grantor by reason of some fiduciary relation. If this be so, it is difficult to see how the entry of Lewis into the land covered by his deed under a claim of right to the whole tract and his maintenance of the possession so taken for more than 15 years could be affected by showing how or by whom the different parcels were previously held. The suggestion is that the Nickels patent while it professed to be for the whole tract of 34,800 acres, was, in effect, a conveyance only of what was left after satisfying previous patents located in the midst of it; that, therefore, the land covered by the old patent within the bounds of the deed to Lewis was not in fact the land of those claiming under the Nickels patent, but that of a stranger; and that possession taken of that was not notice to them of the assertion of a claim of right to any part of their land. But the fact is that Nickels himself and those deriving title from him were always claiming the whole tract covered by his patent, and it was so, by the terms of the deed, conveyed to the plaintiff in July, 1901; and it would seem there is scant ground for the complaint that the predecessors of the plaintiff were not affected with notice by reason of the fact that on the reduction of their claim to its valid limits they are obliged to yield to an older patent this parcel inside the Lewis tract. Such a proposition as this would seem to be wholly inconsistent with the elementary principles applicable to the subject. But we will decide no more than is necessary to the present purpose. Actual possession was taken by Lewis not only within the limits of the old patent, but also of parts of the Nickels tract within the bounds of that patent. The owners of that title were thereby warned that Lewis was claiming some of their land, and they were thereby put upon inquiry as

to what his claim was. The most reliable and certain sources of information were Lewis himself or the record of his deed, either of which would have disclosed the extent of the claim under which he had entered and was maintaining adverse possession. That deed had been on record in the county registry 17 years when this suit was commenced. In *Clymer's Lessee v. Dawkins*, 3 How. 674, 11 L. Ed. 778, it was held that partition proceedings of land held in common, on file or of record in the office of the clerk of the county court, was of a sufficiently public character to charge the other tenant in common with notice, though he was not a party thereto. Such inquiry, made by the plaintiff's grantor, would have shown to them that his deed covered not only their land on that side of the old patent on which his actual occupation was taken, but also the parcel covered by the old patent, but claimed by them, and their land beyond, and that his possession was adverse to all concerned, whether themselves, the owners of the older patent, or anybody else. They were bound to know that the effect of an entry so taken would not be altered by the fact that the land covered by the deed under which the entry was made had been owned or claimed in severalty by different individuals. The deed to Lewis, which covered the land in question, was of a single tract, and not of parcels. His claim was not one thing in one place and of another sort in another place, but it was one claim over the whole tract; and his entry was by construction of law coextensive therewith, and had identical effect in all parts of the land covered by the deed. The claimant is not, without clear proof, supposed to have investigated the titles to the several parts of his purchase, and regulated his conduct and purpose by reference thereto, intending perhaps an adversary position as to some and a subordinate one as to others, for that would be an extraordinary case.

In *Ellicott v. Pearl*, 10 Pet. 412, 9 L. Ed. 475—a case involving the title to land in Kentucky—the possession relied upon by the defendant was one taken by him under a deed of 7,000 acres, which included two contiguous tracts covered by separate patents of 2,000 and 1,000 acres, respectively. He took actual possession of one of them; that is to say, he settled upon and occupied a part of it. It was contended that such settlement and occupation of that tract was not an adverse entry and possession of the other tract. Mr. Justice Story, in his opinion, pointed out that the deed to Pearl was of the whole tract of 7,000 acres by metes and bounds, and that "the law construes the entry to be coextensive with the grant to the party upon the ground that it is his clear intention to assert such possession"; and then, in reference to the contention of the plaintiff above stated, said:

"If the possession intended was that of Pearl, as both tracts were within his tract of 7,000 acres, it is clear that his possession would extend over both tracts upon the principles already stated."

The plaintiff, in his request for instruction, had also contended that a possession of the other included tract by a settlement thereon under the title of Pearl would not be an adverse possession of the first. After disposing of this contention, the learned justice further said:

"In truth, the instruction asked seems to have proceeded upon a ground perfectly untenable in itself, and that is that as to third persons, who are in under title or color of title, their possession is to be bounded and limited by

the nature and extent and origin of the distinct titles of their adversary, and not by that under which they themselves have entered and taken possession."

It is proper to observe in this connection that the petition of the plaintiff avers that the defendants are in possession of this land in dispute, and proof of the averment was necessary to its recovery. As their possession was but the continuation of that of Lewis, it is clear that the plaintiff must rely upon the proposition which it now disputes that the entry and possession of Lewis extended over the parcel in dispute.

The decisions of the Court of Appeals of Kentucky give full recognition to these principles as the foundations of the law of that state upon this subject. They are too numerous to be separately discussed. Several of the earlier cases are referred to in *Ellicott v. Pearl*, supra, and shown to be in accord with the principles there announced; to which we add: *Calk v. Lynn's Heirs*, 1 A. K. Marsh. 346; *Taylor v. Cox*, 2 B. Mon. 430; *Smith v. Frame*, 3 A. K. Marsh. 231; *Campbell v. Thomas*, 9 B. Mon. 82; *Beeler v. Coy*, Id. 312; *McLawrin v. Salmons*, 11 B. Mon. 96, 52 Am. Dec. 563; *West v. McKinney*, 92 Ky. 638, 18 S. W. 633; *Bush v. Coomer*, 69 S. W. 793, 24 Ky. Law Rep. 702; *Altemus' Assignee v. Potter*, 69 S. W. 1083, 24 Ky. Law Rep. 795; *Kirby v. Scott*, 73 S. W. 749, 24 Ky. Law Rep. 2175. Some of these cases are cited by both sides in support of opposite contentions. But it is apparent that there has been little deviation in respect to the principles which dominate the question we are now considering, however they may have been applied in particular cases.

A case upon which much reliance is placed by counsel for plaintiff is that of *Smith v. Frame*, 3 A. K. Marsh. 231. It appears that Smith held a deed for two tracts of land of 400 acres each, adjoining each other, and for each of which his grantor had taken separate patents of different dates. A senior patent underlaid the patent for one of these tracts throughout nearly its whole extent. Frame held under a deed which included a strip off one side of both the Smith tracts, one part of which strip extended over the senior patent above mentioned. On this extension Frame made entry and improvements, and had lived there for more than 20 years. But he never actually entered with intent to take possession upon that part of the land deeded to him which was part of the other tract of Smith, and the question was whether his possession on the 400-acre tract which was underlaid by the senior patent should be extended to that part of the land in the other 400-acre tract covered by his deed, but upon which he had made no entry. The court held that it should not. The reason assigned was that the entry and possession of Frame was only upon land of which Smith had no title, but which belonged to the owner of the senior patent, and not at all upon Smith's other tract, which he did own. It does not appear whether Smith had ever asserted title to the land underlaid by the senior patent, or made any such entry or held any such occupation as would constructively extend his possession over both tracts. But whether he did or not, the essential difference between that case and this remains that there was no actual possession taken of any portion of the land of which Smith had title, while here the possession of Lewis included land of which the plaintiff or its grantors did have title, and that is the same title upon which it now seeks to recover.

Another case which is cited for the plaintiff to support the ruling of the Circuit Court is that of *West v. McKinney*, 92 Ky. 638, 18 S. W. 633. The heirs of McKinney brought an action to obtain possession of a piece of land lying within the boundaries of a large survey consisting of 18,000 acres. He had never obtained any patent, but had entered upon and maintained possession of a small part thereof. Much of the 18,000 acres had been sold in parcels scattered through the survey, and were owned and occupied by the owners in such manner as to leave the unused parts dissevered from one another. West had entered upon one of these parts, and held possession under claim of right to the extent of the boundaries of that part. The plaintiffs relied upon the entry by their ancestor and his occupation of a part of his survey as extending over every one of the dissevered parcels including that of West, and the lower court so held. But the Court of Appeals reversed the judgment, and in stating the grounds of its decision said, "No patent or deed that would bring to the plaintiffs a constructive possession being exhibited, an actual possession must be shown," and it was held that, as there had been no such possession, there had been no ouster by the defendant, and nothing to prevent his occupation from extending to the limits of his boundaries. But here, as has already been stated, Lewis entered under a deed, and he had not conveyed the intervening parcel, but held and occupied it himself. If he had no deed, and the intervening parcel had been owned and occupied by others, a very different case would be presented. These are the most relevant Kentucky cases of those which are relied on by the plaintiff. We think they are not in conflict with the principles which should govern our decision.

Counsel for plaintiff (in the court below) place much reliance upon the case of *Carter v. Ruddy*, 166 U. S. 493, 17 Sup. Ct. 640, 41 L. Ed. 1090, as supporting their contention that, where the land adversely held consists of several parcels, the possession of one will not be extended to the others. But an examination of that case shows that it is not inconsistent with the rule as we have stated it, but is in accord with it. The deed under which the adverse possession was claimed to have been held described the land as a block consisting of 24 lots of certain described dimensions and locality, and there was evidence that these lots had been marked out on the ground, and that the plaintiff, who was grantee, had occupied some of them, but not the lot in controversy. The court had charged the jury that, if the plaintiff held the land as one tract or parcel, his possession of one or more lots would give him possession of the entire tract, but if it was cut up into separate lots, and so marked upon the ground, and was held and treated as distinct tracts, possession of all of them must be shown. The jury having found the latter to be the case, the court, approving the instructions, affirmed the judgment.

It is of little or no consequence that parts of the Lewis tract were known and called by particular names, or that they had at some time been possessed by different persons. They were none the less one tract when deeded to Lewis.

In dealing with this portion of the Lewis tract in controversy, if we understand the facts correctly, what we have said with respect to the consequences of the adverse possession of Lewis is sufficient to dispose

of that part of the controversy, and we shall not consider the other ground of defense.

With respect to that part of the tract conveyed to the defendants Wentz by D. M. Collier and wife on December 10, 1900, which is involved on this writ of error, the facts are that the conveyance was of the whole tract by metes and bounds, and not in parcels. The deed was recorded in the clerk's office on the 29th of the same month. On February 1, 1901, the grantees in that deed made a lease of the whole tract covered by that deed to Winfield Scott for the term of one year, and at the expiration of that lease they, on January 1, 1902, gave him another lease of the same premises for the year 1902. This Collier tract, prior to his deed to the defendants Wentz, had been held by Collier claiming under two patents, one for the northern part and the other for the southern part. These patents were junior to the Nickels patent. He had occupied the southern part for more than 15 years, and this was awarded to the defendants by the verdict and judgment of the lower court upon the effect of Collier's adverse possession. But it does not appear that Collier actually occupied the northern part, which is the parcel here in controversy. On getting his lease of February, 1901, Scott, claiming to the extent of the boundary of his lease, entered thereon, and continued the actual possession of Collier on the southern part. We shall not consider the effect of Collier's adverse possession of the southern part upon the title to the northern part. And the question is whether the grant of Collier to the defendants Wentz of the entire tract followed by the entry and actual occupation by their lessee, Scott, upon the southern part, worked a disseisin of the whole tract, so that they were in adverse possession of the whole thereof at the date of the deed to the plaintiff in July, 1901. If they were, the deed was void as to this land under the champerty act. If, as has been repeatedly held, the defendants Wentz, grantees of Collier, had no concern with the manner in which Collier had acquired his paper title, or the validity thereof, it was immaterial whether he held the tract he assumed to convey under one patent or under several. The Nickels patent, under which the plaintiff claims, covered the whole tract. So did the deed from Collier. If Collier had never had any color of title, nor any possession, the entry of the defendants and taking adverse possession of part would be an ouster of the land covered by their deed. For the present purpose the previous possession by Collier of the southern part is wholly immaterial. This part of the controversy is completely governed by the rule affirmed in *Ellicott v. Pearl*, to which we have referred in dealing with the Lewis tract.

Then, as to the Raleigh tract, it appears that it was deeded by Raleigh to the defendants Wentz January 2, 1902, which was later than the deed of the Nickels title to the plaintiff. The plaintiff's deed was therefore not void by reason of any adversary possession of those defendants. But it is claimed that the parcels of this tract which are now in question were at the date of the plaintiff's deed in the possession of Raleigh, and that the deed was for that reason void. In determining the nature and effect of the adverse possession of Raleigh, we have not the same conditions as we had in respect to the Lewis and Collier tracts—that is to say, not in all the parcels claimed by the defendants in that

tract—for Raleigh did not acquire all the lands included in his deed to the defendants by the same grant as Lewis had done when he took his deed, or the Wentzes when they took their deed from Collier, but in different parcels. But as to one of these parcels, which was covered by a patent to him for 75 acres in 1885, upon which he had made entry and occupied in part continuously since, the court held that, because there was an older patent covering the other part, or an intervening portion of it, Raleigh's possession did not extend beyond the part covered by his patent which was not covered by the older patent. But Raleigh's patent was upon a definite survey. There was no adversary possession, and his entry and possession were under claim of title to all that his patent covered. We think his entry and possession extended over the whole, upon the principles hereinbefore stated, and certainly so as against the plaintiff, who did not connect itself with that earlier patent, which was also earlier than its own.

It also appears that Raleigh had taken out another patent in 1891 for a 50-acre tract, a portion of that conveyed by him to the defendants Wentz. There was no adverse possession of this for a sufficient period to gain title. Whether there was any adverse possession which would render void the deed to the plaintiff for champerty is not clear. If there was, the plaintiff could not recover it for lack of title. If there was not, we see no reason why they should not recover. Their petition avers that the defendants were in possession. But this might be so in 1902, and not in 1901, when plaintiff took its deed. As there must be a new trial, it will be sufficient to indicate, as we have, the principles by which the right to recover this parcel will be governed.

The judgment must be reversed, with costs, and a new trial awarded.

BOARD OF TRADE OF CITY OF CHICAGO v. L. A. KINSEY CO. et al.*

(Circuit Court of Appeals, Seventh Circuit. April 12, 1904.)

No. 1,032.

1. SALES FOR FUTURE DELIVERY—EVIDENCE OF INVALIDITY—SETTLEMENT BEFORE TIME FOR PERFORMANCE.

The fact that contracts for the sale and purchase of commodities for future delivery, made on the exchange of the Chicago Board of Trade, lawful in form, are settled daily by the payment of differences, or by canceling out and substituting other contracts by what are known as the "direct" or the "ring" methods of settlement, does not render such contracts illegal as gambling transactions, for, being lawful in form, they are lawful in fact, unless it was the intention and understanding of both parties that there should be no delivery; and lawful contracts may lawfully be canceled and settled in advance of the time for performance.

2. EXCHANGES—RIGHT OF PROPERTY IN QUOTATIONS.

Even if it were true that a very large percentage of the contracts for the sale of commodities for future delivery, made on an exchange, were

* Rehearing denied May 27, 1904.

¶ 2. Quotations of prices and transactions on exchanges, see note to Sullivan v. Postal Tel. Cable Co., 61 C. C. A. 2.

gambling transactions, such fact does not deprive the board of trade conducting the exchange of its property right in the price quotations based on its sales, which are the same for the lawful as for the unlawful transactions.

3. SAME.

The right of property in market quotations based on the transactions of an exchange, and the right to be protected in such property, are not affected by the fact that such quotations may be used for unlawful as well as for lawful purposes.

4. SAME—RIGHT TO EQUITABLE PROTECTION.

That a board of trade permits gambling on its exchange, in violation of law, does not affect its right to go into a court of equity for the protection of its property right in the market quotations based on the transactions of its exchange, which, as news, are entirely independent of the exchange transactions, since the court cannot deny relief on the ground of the general immorality, or illegal acts, of a complainant, not affecting the particular right asserted in the suit.

Appeal from the Circuit Court of the United States for the District of Indiana.

For opinion below, see 125 Fed. 72.

On final hearing, appellant's bill to enjoin appellees from purloining its continuous quotations was dismissed for want of equity.

Appellees discuss the questions whether the quotations are property, and whether, if so, appellant lost its proprietary right by its method of giving them out; but that part of the case is ruled in this court by the decisions in *Illinois Commission Co. v. Cleveland Electr. Co.*, 119 Fed. 301, 56 C. C. A. 205, and *Sullivan v. Postal Electr. Cable Co.*, 123 Fed. 411.

There is, however, one further matter that requires presentation and decision. It pertains to the defense that appellant has no standing in a court of equity for either or both of two reasons: That the quotations are contraband, and may be seized by any one with impunity; that appellant, even if the quotations themselves are not contraband, comes into court with unclean hands, in this: that it seeks to exclude all others from using property (the quotations) which might be put to good uses, in order that it may aid its members in maintaining the gambling in grains and provisions which it permits to be carried on in its exchange hall.

Respecting the facts of this defense, the master found as follows:

"The transactions conducted in the 'pits' of the complainant association, while they are of the same general character, are divisible into two classes, which are described by the members of the Board of Trade as 'hedging' transactions and 'speculating' transactions, respectively. Of the members of the complainant association who are engaged in business in the exchange hall, the number conducting speculative transactions is between one-third and one-half of the total, and practically all of such members conduct a hedging business.

"The principals who are engaged in hedging transactions are, generally speaking, either grain merchants, millers, or manufacturers of grain products. The method of such principals is this: When they have bought grain in the country, or in city warehouses, which they propose to hold for future sales to domestic or foreign purchasers, they at once sell in the pits of the complainant association an equal amount of grain; or, on the other hand, if they have sold to domestic or foreign purchasers grain or grain products for future delivery, they at once buy in the pits of the complainant association an equal amount of grain for future delivery at times corresponding with the times of their selling contracts. And thus, when they have contracts of purchase, they have contracts of sale, for future delivery in the pits, practically even with their purchases; and, if they have contracts of sale with domestic or foreign purchasers, they have contracts of purchase, for future delivery in the pits, practically even with such contracts of sale. The object of such hedging is to insure against loss by fluctuation in the market in the commodity which the principal is carrying, or which he has sold in advance of purchase

and manufacture upon a time contract. A hedge must always be against a cash commodity.

"A speculative transaction is not based upon a cash commodity primarily. In effect, it is based upon the confidence which on the one hand the seller of a commodity for future delivery has in his personal opinion that the price of the commodity sold will by the time of delivery have so declined that he can purchase the commodity for less than his selling price, and thus make a profit, and which on the other hand the buyer has in his personal opinion that the price of the commodity bought will so advance by the time of delivery that the commodity bought will be worth more at the time of delivery than it was at the time of purchase, and that he will thus have a profit. It is possible, under the rules, usages, and practice of the complainant association, for the seller and the buyer, respectively, if either changes his opinion, to buy or sell in the 'pits' the commodity which he has previously sold or bought, as the case may be, for the same time of delivery. While this procedure is in form the same as hedging, it is not designated as 'hedging,' but is styled 'spreading.' It is also possible, under the rules, usages, and practices of the complainant association, for a member of the complainant association to make such counter contract of purchase or sale during the same day that he has under an original contract of sale or purchase, and thus, within the day or within a few days, to have his advantage of profit or to adjust his disadvantage of loss. Such a course of business is designated 'scalping.'

"The evidence does not contain sufficient data upon which to predicate an estimate of the aggregate volume of business conducted in said pits daily, monthly, or yearly. It does appear, however, that the volume of such business is enormous; one firm conducted transactions in wheat daily aggregating 1,500,000 to 2,000,000 bushels, and in corn 1,000,000 bushels daily; another firm's transactions in wheat daily amounted to 6,000,000 bushels; a third firm's transactions in wheat daily amounted to 4,000,000 bushels; a fourth firm's transactions amounted to 1,000,000 bushels daily; a fifth firm's transactions in all grain amounted to 1,800,000 bushels daily; and a sixth firm's transactions in all grain amounted to 2,000,000 bushels daily. While it is true that the business of these six firms in the pits is much larger than the business of any other six firms conducting transactions in the pits, and that it would not be proper to say that the average business is a proper average of each of the persons conducting transactions in the pits, it is nevertheless true that it is fairly deducible from the evidence that the aggregate business transactions in grain was largely in excess of the total wheat and corn production of the entire United States during either of the years 1900 and 1901, and was many times over the entire receipts in Chicago of grain during each of said two years of 1900 and 1901, and, of such receipts in Chicago, less than 20 per cent. inspected up to grades of grain which could be delivered upon time contracts made by said sales and purchases in the pits. It is also true that a decrease in the total grain productions of the United States does not cause a proportionate decrease in the volume of business done in the 'pits' of the complainant association, but, on the contrary, such business is larger during a year in which there is a shortage in the grain crop.

"Under the rules, usages, and practice of the complainant association, all time contracts made in the 'pits' are carried until it is possible to close them as between members of the complainant association by either one of three methods of settlement, namely, the method called 'direct settlement,' the method called 'rings' or 'ringing out,' and the method of delivery by delivering warehouse receipts physically or 'by notice.'

"Most time contracts made in the 'pits' are adjusted as between members of the complainant association, before the specified time of delivery arrives, by either the first or the second of the above-named methods. Direct settlements are effected by offsetting similar contracts at the close of the business hours of each day in the following manner: As soon as is practicable after the close of business in the 'pits,' each broker (individual, firm, or corporation) conducting business in the 'pits' takes from the day's transactions on his books the contracts similar as to amount and time of delivery to counter contracts made with other members of the complainant association, and ascertains therefrom the difference of the aggregate prices of such similar contracts, and, if

the difference be in his favor, the amount of such difference is charged to the other party in such counter contracts, and, if the difference is against him, such difference is credited to the other party to such counter contract. The following is a simple illustration: If, during the day, broker A. has sold to broker B. 5,000 bushels of December wheat at 75 cents per bushel, and broker B. has sold to broker A. 5,000 bushels of December wheat at 76 cents per bushel, after offsetting the contracts at 75 cents per bushel, there is a difference in B.'s favor of one cent on each bushel, or \$50. This offsetting difference in cash is placed as a debit or credit, as the case may be, upon the clearing house sheet, hereinafter described, of the respective brokers, parties to said counter or offsetting contracts.

"The 'ring' method of settlement is as follows: Each broker (person, firm, or corporation) conducting business in the 'pits' has an employé who is called a 'settlement clerk,' who keeps a record of all his employer's transactions in the 'pits.' The complainant association furnishes a room wherein all of such settlement clerks meet at stated hours each day and compare their respective books, called 'settlement books,' which are required by the complainant association to be kept by each broker. Upon comparing their respective books, said settlement clerks ascertain what, if any, outstanding time contracts may be offset by some other corresponding time contract made by the parties with other members of the association, and which of such contracts are, by consent of the parties thereto, permitted to be offset, and thereupon, under the rules of the complainant association, are deemed to have been settled, provided the requirements of sections 6, 7, 8, and 9 of rule 22 of the complainant association are met, as therein provided, with reference to the clearing-house sheet and other details of settlement therein specified. * * *

"Theoretically, and in bare outline, an illustration of the 'ringing out' method is as follows: Broker A. sells to broker B. 5,000 bushels May wheat, broker B. sells to broker C. the same amount, broker C. sells to broker D. the same amount, and broker D. sells to broker A. the same amount; by consent of brokers A., B., C., and D., all of these time contracts are deemed discharged, and by novation there is substituted a contract wherein broker A., the initial seller in the series of discharged contracts, sells to broker D., the last buyer in the series of discharged contracts. The clearing-house sheets of the complainant association in evidence in this suit show that the actual process of 'ringing out' time contracts by elimination and substitution is much more complicated than the outline illustration, but that illustration exhibits the principle of the process. Among the daily transactions in complainant's 'pits' there are 'hedging' contracts, 'spreads,' and 'scalping' contracts, and all of these forms of time contracts are adjusted by both the 'direct' method and the 'ring' method of settlement. Upon the question what part of all the transactions in the pits are adjusted by the 'direct' method and the 'ring' method of settlement, the evidence is not very satisfactory. It tends to show, however, and I accordingly so find, that at least three-fourths of the total transactions in the pits are adjusted by the 'direct' and 'ring' method of settlement.

"In the event that said time contracts cannot be settled by either the 'direct' method or the 'ring' method, they are and must be closed by a third method, namely, delivery under the rules and usages of the complainant association. Said rules are as follows:

"Rule 21—Section 1. All deliveries upon contracts for grain or flax seed unless otherwise expressly provided, shall be made by tender of regular warehouse receipts." * * *

"The rules of the complainant association do not permit any persons other than members of said association to make 'time' contracts upon the floor of the exchange hall, and all 'time' contracts made in the pits are contracts between the members of the complainant association, who are in said transactions respectively sellers and buyers. The rules of the complainant association permit members of said association, as between themselves and nonmembers, to act as brokers in 'time' contracts made in the pits. In case a member of the complainant association, in making a 'time' contract in the pits, acts as a broker for an undisclosed principal, if such contract is settled by either the 'direct' method or the 'ring' method, such settlement does not discharge it, so

far as such undisclosed principal is concerned, as between him and his broker, but the latter is required under complainant's rules to substitute a duplicate 'time' contract with the two elements of identity, namely, like amount of grain or other commodity, and like date of delivery, but not like price. If such substituted contract is not a duplicate, but differs from the original in price, the broker becomes principal as to difference in the prices between the original and the substituted contract, and, if it is impossible for such broker to substitute either a duplicate or a similar time contract, the broker becomes principal as to the entire time contract, instead of the original principal with whom he as broker, in behalf of his own undisclosed principal, entered into said original contract.

"The system of 'hedging' in the pits has a commercial influence which is favorable both to the interest of the producer and the consumer, in that the large cash grain houses, which conduct transactions in complainant's exchange hall, by reason of the risk to them from market fluctuations being decreased through 'hedging,' are able to take and do take a smaller margin of profit, and thus they pay to the producer a higher price and sell to the consumer at a lower price. The person taking the side of such hedging contract opposite of that to such grain house is the person who assumes the risk.

"The 'direct' method of settlement and the 'ring' method of settlement is not only an advantage to the members of the complainant association, in that it relieves them from the responsibility of carrying their contracts with other members of the complainant association, but they have, added to this advantage, the benefit of the margins deposited with them by the undisclosed principals for whom they act as brokers. * * *

"Section 8 of rule 4 of the complainant association is as follows:

"Sec. 8. Any member of the association who shall be interested or associated in business with, or who shall act as the representative of, or who shall knowingly execute any order or orders for the account of any organization, firm or individual engaged in the business of dealing in differences on the fluctuations in the market price of any commodity—without a bona fide purchase and sale of property for an actual delivery—shall be deemed guilty of unmercantile conduct, which renders him unworthy to be a member of the association; and upon complaint to and conviction thereof by the board of directors, he shall be expelled from membership in the association.' * * *

"The complainant association has prescribed no method or means which shall be employed by members of said association for the purpose of ascertaining the intent of their respective customers with respect to the delivery or nondelivery of the commodity covered by any time contract.

"Every member of the complainant association acting in the pits as a broker for a nonmember customer requires from such customer a deposit as security in each transaction conducted by him, and this fact is within the knowledge of the directors and executive officers of the complainant association. The rules of the complainant association authorize the members of said association who act as brokers to charge broker's commissions in amounts fixed by such rules. One of such commission charges is expressed in part as follows:

"For the purchase or sale and for the purchase and sale of property for future delivery, whether the contract for purchase or for sale be first made as follows: * * *

"Using a member of the complainant association as his broker, a nonmember thereof may become a party to a time contract as buyer or seller, and at any time before the date of required delivery he may become a party to another contract in which he takes the opposite side to that held by him in the first mentioned contract. Such counter or reverse time contract may be authorized in the same order which authorizes the first contract, by including in said order a so-called 'stop-loss' order. When such contracts are made they may be settled, and are often so settled, as between the member of the complainant association who acted as broker and his nonmember customer, by the payment of the difference between the contract prices. The fact that such is the custom is a fact well known to the directors and executive officers of the complainant association.

"The rules of the complainant association provide for settlements of time contracts made in the pits when the seller does not deliver the property on

the last day of the month of the stipulated delivery—the rules and usages of the complainant association fix such last day of the month as final day of delivery—by allowing the purchasers the privilege of electing: First, to consider the contract forfeited; second, to purchase the property on the market for account of the seller at 1:15 o'clock of the next business day; or, third, by requiring a settlement with the seller at the average market price of the property sold on the last day of the month of delivery."

The master drew conclusions favorable to appellant, and recommended a decree in accordance with the prayer of the bill.

The court, reviewing the matter on exceptions, sustained the master's findings of fact, except that the percentage of transactions in which no actual deliveries were made was nearer 95 than 75; but disagreed with the master's conclusions (125 Fed. 72), and dismissed the bill for want of equity.

Henry S. Robbins, for appellant.

Jacob J. Kern, Charles D. Fullen, John A. Brown, E. D. Crumpacker, Peter Crumpacker, E. D. Smith, and Bernard Koolly, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge, after stating the facts as above, delivered the opinion of the court:

1. We deem it unnecessary to determine from the evidence whether the percentage of trades in which actual deliveries were made was 5 or 25. The finding of the one figure or the other would not prove what proportion of the remaining no-delivery transactions were gambling. Of these, an indeterminate number were "hedging contracts." If we felt called upon by the necessities of this decision to give a definite opinion of hedging, the record might well lead us to find that hedging is a manufacturer's or merchant's insurance against price fluctuation of materials, and no more damnatory than insurances of property and life, which in one sense are wagers that the property will not be destroyed during the term, and that the life will not fail in less than the expectancy in the actuaries' tables. The remainder of the no-delivery transactions were "speculative." But speculation is not unlawful. One may buy any sort of property to hold for a rise, one may contract to buy or sell property not in possession or in existence at the time, and lawful contracts may lawfully be canceled and settled in advance of the time of performance. If a contract, lawful in form, is entered into, it is lawful in fact even though one of the parties never intended to perform his part of it; that is, the intent that the lawful form shall cover a sham must be mutual to make it a sham. We think the court's conclusion that, because in 95 per cent. of the trades no deliveries were in fact made, it was intended that in those cases deliveries should not be made, and that the parties in 19 instances out of 20 were using the forms of lawful contracts to cover mere wagers on the future prices of commodities, is not warranted by the facts in the record. The "direct" and "ring" methods of settlement between members might cancel out nine-tenths of the bids back and forth between the members as agents, and yet every contract may have been perfectly legal and enforceable between the principals, and every principal satisfied by receiving a "substitute" contract. If a seller intended not to deliver, but to settle on differences if prices rose, the buyer who entered into the contract in good faith, and who desired to receive the property, could not force the seller to deliver.

In every such case there would be no delivery, but the buyer would have a valid cause of action. Undoubtedly gambling was going on in the exchange hall, but it was contrary to appellant's by-laws. Appellant was chartered by Illinois for a lawful and useful purpose, and the association adopted and promulgated suitable by-laws and rules. We think the record fails to show that the dominant feature of the members' dealings was unlawful, much less that appellant, as a creature of the state, was violating its charter, or was particeps criminis in what gambling the members carried on.

We do not, however, attach very much importance to the preponderating character of the transactions in the exchange hall, because, in our opinion:

2. The real subject-matter of the suit is the property right in the news, in the reports of prices. Even if it were true that 95 per cent. of the dealings in the exchange hall were wagers, the prices are the same for the transactions that are not wagers, and the quotations sent out show the figures at which honest dealers may secure contracts. Millers, grain buyers, elevator companies, govern their dealings by the market prices made in appellant's exchange hall. The news therefore serves, or, at least, is capable of serving, a useful purpose. So it seems to us immaterial what proportion of the transactions are wagers, since the prices made in the transactions are the prices that farmers and shippers can get, and since the news of the prices and the dissemination thereof are valuable to the community. News may be an object of lawful ownership though nine-tenths of the things reported be unlawful.

3. Nor should the property in this case (the news, the continuous quotation of prices) be adjudged contraband because it is susceptible of bad uses as well as good. Gamblers in Indiana may settle their bets on prices according to appellant's quotations, and this quite irrespective of the fact, if it were the fact, that 95 per cent. of the transactions in appellant's exchange hall were lawful; just as Indiana grain dealers may make and settle their honest contracts on the basis of appellant's quotations, regardless of the fact, if it were the fact, that 95 per cent. of transactions reported were gambling. It seems to us, therefore, that the news, as news, is not without the pale of protection, and that the moral quality is chargeable solely to the user.

4. The property concerned in this suit not being contraband, should appellant be denied the writ of injunction, even if it were true that appellant permits gambling in its exchange hall? We think not. Suppose this noncontraband news were collected and disseminated by the Associated Press. If that company were complainant and "clean-handed," its right to an injunction, the case being proper in other respects, would not be doubted. But if complainant were a gambler or a thief, what then? We think our answer has been sufficiently stated in *Fuller v. Berger*, 120 Fed. 274, 56 C. C. A. 588:

"Equity is not concerned with the general morals of a complainant; the taint that is regarded must affect the particular right asserted in his suit.

* * * If the defendant can do no more than show that the complainant

has committed some legal or moral offense which affects the defendant only as it does the public at large, the court must grant the equitable remedy and leave the punishment of the offender to other forums."

In this case the appellees, citizens of Indiana, have never had any dealings with appellant respecting the quotations; they have not been misled or deceived by appellant in any way; and they certainly are no more concerned with or affected by appellant's violations of the common law or of the penal laws of Illinois than the general public.

In reaching our conclusion, we have given respectful consideration to the cases of *Board of Trade v. O'Dell Commission Co.* (C. C.) 115 Fed. 574; *Board of Trade v. Donovan Commission Co.* (C. C.) 121 Fed. 1012; *Board of Trade v. Ellis* (C. C.) 122 Fed. 319; *Christie Grain & Stock Co. v. Board of Trade* (C. C. A.) 125 Fed. 161—and regret that we are unable to concur therein. We have been aided by the opinion of Judge Hook at circuit (116 Fed. 944) in support of his decree in the Christie Case, which was reversed in 125 Fed. 161.

The decree herein is reversed, with the direction to enter a decree in appellant's favor in conformity to the prayer of the bill.

WALTER BAKER & CO., Limited, v. SLACK.

(Circuit Court of Appeals, Seventh Circuit. April 12, 1904.)

No. 955.

1. UNFAIR COMPETITION—DECEPTION OF CUSTOMERS BY RETAIL DEALER—
BAKER'S COCOA.

Complainant, Walter Baker & Co., Limited, and its predecessors in business, have since 1780 been engaged in the manufacture of cocoa and chocolate, which have become well known in the trade under the general name of "Baker's Cocoa" and "Baker's Chocolate." In 1897 one W. H. Baker, who had then recently commenced the manufacture of similar products, which were sold in unfair competition with complainant's, was enjoined from using the word "Baker" in connection with his products, except when accompanied with the statement in prominent letters, "W. H. Baker is distinct from the old chocolate manufactory of Walter Baker & Company," and such requirement has since been observed. Defendant, a retail grocer, advertised to sell "Baker's" cocoa and chocolate, and when customers called for either by that name they were given the W. H. Baker product. After suit brought, by his direction such customers were told: "We have two Bakers. Which do you want, W. H. or Walter Baker?" He testified that 9 out of 10 would not know the difference, and would ask for the best, in which case they were given the W. H. Baker product. *Held*, that there was a clear design to deceive customers, the profit being greater on the product sold, and that complainant was entitled to an injunction restraining defendant from advertising any product but complainant's under the name of "Baker," or furnishing it in response to requests for "Baker's" goods, or in any manner using such name in connection with other goods without clearly designating by whom such goods were made.

¶ 1. Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

2. SAME—DAMAGES.

Where a defendant has deliberately engaged in unfair trade, complainant is entitled to recover damages and profits from the time the violation of his rights commenced.

3. SAME—PROFITS—EXPENSES OF SALE.

In determining the profits made by a defendant from the sale of an article in a suit for unfair competition, the expenses of making the sales must be deducted from the gross profits.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

One Dr. James Baker, in the year 1780, established at Dorchester, Mass., a manufactory for chocolate and other products of cocoa. He was succeeded in business by his son, and later by his grandson, Walter Baker. In the year 1836 the latter adopted the name of Walter Baker & Co., and under that name the business was continued by him and his successors until 1895, when they organized a corporation under the laws of the commonwealth of Massachusetts under the name of Walter Baker & Co., Limited, and took over the business. This company was in turn succeeded in March, 1898, by another of the same name, created under a special act of the Legislature of that commonwealth, which latter company, the appellant here, acquired the business, property, and rights of its predecessor, and continued the business, its present factory being situated upon the same site in Dorchester on which the business was founded by Dr. Baker in 1780. The cocoa manufactured by the appellant is put up in half-pound tin cans about $4\frac{1}{2}$ inches high and about $3\frac{3}{4}$ by $2\frac{1}{4}$ inches in breadth. Around the tin is a label printed in blue, yellow, and brown. On one side is the picture of a girl carrying a tray, and styled "La Belle Chocolatiere." The conspicuous words on the label are "Walter Baker & Company, Ltd.," printed in blue, and "Breakfast Cocoa," the word "Breakfast" being in yellow and "Cocoa" in white, blue, and brown. On one side the conspicuous words are "Baker's Breakfast Cocoa," the first and last words being in blue and the word "Breakfast" in brown. The chocolate manufactured by appellant is made in half-pound cakes, about six inches in length, three inches in width, and three-quarters of an inch in thickness, with beveled edges, done up in a blue wrapper, with a yellow label pasted upon it on which are the words "Baker's Chocolate," with a description of the goods, and directions for using, in fine print. Upon the reverse side is pasted a picture of the girl above described. These articles have been so made and labeled and placed upon the market for from 30 to 60 years, and are known to the trade as "Baker's Cocoa" or "Baker's Breakfast Cocoa" and "Baker's Chocolate." The name "Baker" has thus become associated in the minds of dealers and consumers, and the public generally, with the product of the appellant's factory, and its products are universally known and bought and sold as "Baker's Cocoa" and "Baker's Chocolate" respectively. During all this time the appellant and its predecessors have extensively advertised their products, and they have become widely known. Until 1893 they were the only manufacturers of cocoa and chocolate by the name "Baker." In the year 1894 one William Henry Baker, of Winchester, Va., began to put upon the market chocolate, powdered cocoa, and other products of the cocoa bean, so put up and labeled as to cause his goods to be called, sold, and accepted as Baker's, and as the goods of the appellant and its predecessors. Thereupon the appellant filed its bill in the United States Circuit Court for the Western District of Virginia against Baker, and also filed a bill against his agent, Sanders, in the United States Circuit Court for the Southern District of New York, to enjoin the palming off of William Henry Baker's goods as the goods of the appellant, and the use of the name "Baker" in connection therewith. In the first suit, in September, 1896, the court by its interlocutory decree enjoined the defendant from imitating the labels, boxes, wrappers, letterheads, or advertisements of the complainant therein, from using the words "& Company" or the word "Company" in connection with the name "W. H. Baker," but declined to enjoin the defendant therein from using the name "W. H. Baker" in connection with the manufacture. Subsequently, on the 20th of July, 1897, the court modified its

decree, so that it enjoined the defendant from using the name "Baker" alone, but required the insertion of the full name "W. H. Baker," and also required to be placed upon each package, in type as prominent as the title, the words, "W. H. Baker is distinct from the old chocolate manufactory of Walter Baker & Company." *Walter Baker & Company, Ltd., v. Baker* (C. C.) 77 Fed. 181. In the suit in the Southern District of New York a like injunction was granted, and enlarged by the United States Circuit Court of Appeals. *Walter Baker & Co. v. Sanders*, 80 Fed. 889, 26 C. C. A. 220. The effect of these decisions is to require a differentiation of the packages of the two manufacturers, and to require William Henry Baker to place in prominent type on the face of the packages the announcement that "W. H. Baker is distinct from the old chocolate manufacturer, Walter Baker & Company." Thereafter William Henry Baker, so far as the record discloses, complied with these decrees, continuing the business and using the labels and names as sanctioned by the decrees. His chocolate is put up in half-pound cakes, wrapped in blue, and bearing a lighter blue label, and his cocoa in half-pound and one-fifth pound tins, all displaying prominently the name "W. H. Baker," with the announcement required by the decrees and above stated.

The appellee, Slack, is a retail grocer in Chicago. For a long time he had handled and dealt extensively in the products of the appellant, selling them, and them only, in response to requests for "Baker's Chocolate" and "Baker's Cocoa," and advertising them by those names. In December, 1898, he commenced to deal in the products of William Henry Baker, purchasing chocolate and cocoa in packages labeled as authorized and required by the courts in the suits above stated. Early in the year 1900 he began advertising William Henry Baker's products in the Chicago papers as "Baker's Premium Best Cooking Chocolate" and "Baker's Best Cocoa," and this continued up to the time of the institution of this suit. After July 1, 1900, the appellee advertised "W. H. Baker's Premium Chocolate," but the advertisement contained no information discriminating between the two kinds. There is evidence to show that his customers asking for "Baker's Cocoa" or "Baker's Chocolate" were supplied with articles of William Henry Baker's manufacture, the profit on which was a few cents a pound more than on the sale of the product of the appellant; but in case Walter Baker's chocolate or cocoa was asked for, customers received that; and that after this suit his salesmen were instructed to say that the chocolate of W. H. Baker was not made by Walter Baker & Co., and that, when "Baker's Chocolate" and "Baker's Cocoa" was asked for, the salesmen would ask what brand, saying, "We have two Bakers. Which do you want, W. H. or Walter Baker?" But 9 out of 10 would not know the difference, saying, "Which is best? Give me the best." And the salesmen would then give them W. H. Baker's.

This bill was filed July 23, 1900, to enjoin the alleged unfair trade. The prayer of the bill as amended was for a decree as follows: "That a writ of injunction, temporary until hearing and perpetual thereafter, may issue out of and under the seal of this court against the said Charles H. Slack, restraining him, his agents and employes, from advertising, selling, or causing to be sold any cocoa or chocolate other than that made by your orator as or under the names 'Baker's Cocoa' or 'Baker's Chocolate,' or in response to requests for 'Baker's Cocoa' or 'Baker's Chocolate,' and also from using the word 'Baker,' 'Bakers,' or 'Baker's' alone on packages, boxes, labels, show cards, or in advertisements, or orally, or in any manner in connection with powdered cocoa or chocolate other than that made by your orator; and from using as aforesaid the word 'Baker,' 'Bakers,' or 'Baker's' (whether the same be or be not coupled with other names or initials) in such a collocation with the words 'cocoa' or 'chocolate' (whether the same be or be not coupled with some further descriptive word or words) as to indicate that such cocoa or chocolate is a variety of 'Baker's Cocoa' or 'Baker's Chocolate,' but the defendant may indicate thereon in appropriate language by or for whom the cocoa or chocolate in question is made or prepared; and nothing herein shall prohibit defendant from selling the cocoa and chocolate of William Henry Baker, of Winchester, Va., wrapped and labeled in the manner prescribed by the United States Circuit Court for the Western District of Virginia in the suit referred to in the bill of complaint."

On April 3, 1901, the court entered an interlocutory decree enjoining the defendant as follows: "That the defendant, Charles H. Slack, his agents, servants, and employ  s, be, and they hereby are, perpetually enjoined from selling, or causing to be sold, any cocoa or chocolate other than that made by Walter Baker & Co., Limited, in response to requests for 'Baker's Cocoa' or 'Baker's Chocolate,' unless prior to such sale the purchaser is actually notified that the cocoa or chocolate about to be furnished is not manufactured by the old chocolate manufactory of Walter Baker & Co., and that a writ of injunction issue to that effect;" but refused to enter any decree with respect to the advertising by the defendant. The complainant below excepted to the action of the court in refusing to award a perpetual injunction in accordance with the prayer of the amended bill. The matter was referred by the decree to a master to ascertain the profits which the defendant had made since May 1, 1900, and, to the action of the court in limiting the accounting to a period since that date, the complainant below also excepted. The master reported the gross profits to be \$128.48, and deducted therefrom the average cost of operating the general business of the defendant, 24.27 per cent. of the gross sales, being \$113.11, leaving as a net profit to the defendant on the sale of the infringing goods \$15.37. Upon that report the final decree was entered on the 13th day of June, 1902, enjoining the defendant as in the interlocutory decree stated, overruling the exceptions to the master's report, confirming the same, and awarding judgment for \$15.33 profits and for the costs of the action, from which decree, upon due assignment of errors, this appeal is taken.

Frank F. Reed and W. L. Putnam, for appellant.

A. B. Melville, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The appellee sold the product of William Henry Baker in the exact form of package and style of label sanctioned by the decrees of the courts referred to in the statement of facts. He had purchased from William Henry Baker the product in the form and style which those courts had authorized Baker to make and sell. To that extent the appellee, we are disposed to hold, was justified. It must not, however, be overlooked that the word "Baker," as applied to chocolate and cocoa manufactured by the appellant, had in the course of years come to represent to purchasers the product of Walter Baker & Co., and was so generally known to the trade. The appellee had largely dealt in those products, and was well informed of those facts, prior to the time when he undertook the sale of the product of William Henry Baker's manufacture. It must also not be overlooked that William Henry Baker instituted his business and applied the name of "Baker" to his products fraudulently, with the expectation of profiting by the trade-name of "Baker," and in the hope of diverting to himself some part of the trade which legitimately belonged to Walter Baker & Co., Limited. We must therefore deal with the conduct of the appellee in the marketing of this product of William Henry Baker in the light of these circumstances. He had the right, as we assume, to sell that product, but honesty and good faith required that he should not palm it off as the product of Walter Baker & Co.; that he should not represent it as "Baker's Chocolate" or "Baker's Cocoa," for that meant to the purchaser that it was the product of Walter Baker & Co., Limited. We need not be diligent to assemble the many instances

which the record discloses of wrongful imposition upon purchasers of the one product for the other, since the appellee himself furnishes the key to his conduct. It is satisfactorily shown that for a long time prior to this suit purchasers inquiring for "Baker's Chocolate" would be supplied with W. H. Baker's product, and this because "we made a little more on that." Upon the commencement or threatening of the present suit, he instructed his salesmen to say to purchasers demanding "Baker's Cocoa" or "Baker's Chocolate," "We have two Bakers. Which do you want, W. H. or Walter Baker?" He also said that 9 out of 10 purchasers would not know the difference, saying, "Which is best? Give me the best." And the salesman would then furnish the W. H. Baker product. Without enlarging upon this conduct, we think it evidences a deliberate design and intention to deceive. The purchaser was entitled to that which he demanded, to that which had been approved to his taste by experience, or which he had been recommended to purchase. In the market there were no "two Bakers'" products. There was but one, and that was the product of Walter Baker & Co., Limited. The courts had enjoined William Henry Baker from using the word "Baker" alone, and had required to be prominently placed upon each package the statement that "W. H. Baker is distinct from the old chocolate manufactory of Walter Baker & Company." No such statement or representation was by the appellee directed to be made to the inquirer for "Baker's Chocolate" or "Baker's Cocoa." Instead, there is manifested a clear design to mislead and confuse the proposing purchaser with the statement that there were two "Baker" products in the market. The courts sanctioned the use by William Henry Baker of his name "Baker" upon the packages, with the explanation stated, to avoid, as far as possible, confusion of goods; but they did not sanction the use of the name "Baker" in connection with the term "chocolate" or "cocoa." We have no difficulty, therefore, in finding that the appellee, with full knowledge of the situation, sought to palm off the spurious goods as the genuine. The court below was evidently of that opinion, but by its decree enjoined the appellee from selling "any cocoa or chocolate other than that made by Walter Baker & Co., Limited, in response to requests for 'Baker's Cocoa' or 'Baker's Chocolate,' unless prior to such sale the purchaser is actually notified that the cocoa or chocolate about to be furnished is not manufactured by the old chocolate manufacturer, Walter Baker & Co." This, as we conceive, gave the appellee leave to sell the spurious article as "Baker's Cocoa" or "Baker's Chocolate," if it was accompanied by the statement that it was not manufactured by the old chocolate manufacturer, Walter Baker & Co. We may safely take it for granted that not one in a thousand knowing of or desiring to purchase "Baker's Cocoa" or "Baker's Chocolate" know of Walter Baker & Co., Limited. The name "Baker" is identified with the product, and known, in connection with the product of the appellant, as a badge and guaranty of excellence. To sanction the sale of the spurious article as "Baker's Chocolate" or "Baker's Cocoa," even if accompanied with the statement that it was manufactured

by William Henry Baker and not by the old manufacturer, Walter Baker & Co., Limited, would not inform the purchaser that it was a different article, or other than the article known to the trade and to the world as "Baker's Chocolate" and "Baker's Cocoa," and the identity of the name is the more subtle in the deception. The purchaser was entitled to that for which he had asked. We do not mean to say that it is not within the province of the seller to represent to the proposing purchaser that another article which he has is superior in excellence to that which is called for, and to induce him by proper argument or statement to purchase that other, but he must not represent such other to be the product which the purchaser had called for. In this respect we think the decree below failed to give adequate relief, and that the prayer in the amended bill in this respect correctly states the relief to which the appellant is entitled, and safeguards the right of the appellee to sell William Henry Baker's products in a proper manner.

Prior to this suit the appellee advertised the product of William Henry Baker as "Baker's Chocolate" and "Baker's Cocoa." This was done because the name "W. H. Baker" was a new name, and the advertisement in the original name would draw the custom of persons acquainted with the product of the appellant. This was seeking to use the reputation and the good will of the appellant in the sale of the spurious product, and was an efficient means to that end. This was as much a fraud as an actual oral representation to a proposing purchaser, and should have been enjoined. *Singer v. Wilson*, L. R. App. Cases, 389; *Jay v. Adler*, 6 R. P. C., 136, 139; *Mitchell v. Williams*, 106 Fed. 168, 45 C. C. A. 265.

The remaining questions arise upon the directions of the decree with respect to an accounting, and the report of the master thereon, confirmed by the court.

First. The court adjudged that the complainant should recover of the defendant profits which the defendant had made, and the damages which the complainant had suffered, through the defendant's violation of complainant's right, as decreed, since May 1, 1900. The complainant below excepted to so much of that decree as limited the accounting of profits and damages by that date. This date was an arbitrary date, and no reason is suggested in the record for its selection. The evidence discloses that from December, 1898, there had been repeated infringements of the complainant's right, and, necessarily, resulting damage. The complainant was entitled to full compensation for the injury sustained. We perceive no reason why it should be debarred of recovery for the time prior to May 1, 1900. In that respect the decree was faulty.

Second. The proofs adduced to the master had reference only to the profits accruing to the defendant from the illegal sale. The question of the true measure of damages in cases of this sort is an interesting one. The injured party is entitled to full compensation for the injury, but how shall that be measured? Manifestly, the profits which the infringer has made would not in all cases be compensation to the injured. The latter's loss in part inheres in the failure to acquire a just and deserved gain; also in the injury to

the reputation of his product by reason of the substitution of the spurious article. The latter element is difficult, if not impossible, of accurate admeasurement. It can only be approximately compensated by an allowance in the nature of punitive damages, resting largely in discretion. But as to the actual loss, is it not more reasonable to say that the loss sustained is the profit which the injured party would have made if the genuine goods had been supplied, and not the profit which the party inflicting the injury actually made by the unlawful sale? That is to say, ought not the injured party to recover the difference between the cost to him of the manufacture of his article and the price at which he is able to dispose of it in the market, together with such sum as the court in its discretion should think the genuine article had lost in its reputation by substitution of the spurious article? Should not regard be had to complainant's loss, rather than to defendant's profits? *Hall v. Stern* (C. C.) 20 Fed. 788. It has been supposed that the measure of damages in these cases is analogous to the measure of damages allowed for infringement of a patent, but Judge Sawyer suggests that the analogy will not hold. *Benkert v. Feder* (C. C.) 34 Fed. 534. We are, however, spared the necessity of resolving this interesting question, since the complainant below failed to take any exception to the decree in this regard, and contented himself before the master with proving the profits which the infringer had made; and the only question presented for decision is whether the master, whose report was confirmed by the court below, was right in deducting from the gross profits made by the defendant by the sale of the spurious goods a proportionate percentage for the expense of operating the general business of the defendant. In *The Tremolo Patent*, 23 Wall. 518, 23 L. Ed. 97, decided in 1874, the court held, with respect to an infringement of the patent right, that, in the ascertainment of profits made from sales of an organ with a patented attachment, it was proper to prove the general expenses of the business in effecting sales of organs generally, and to deduct a ratable proportion from the profits made from the patented attachment. In *Société Anonyme v. Western Distilling Co.* (decided in 1891 [C. C.]) 46 Fed. 921, Judge Thayer, delivering an oral opinion, stated that the expenses of business to be allowed must be expenses necessarily incurred in the unlawful venture, which would not have been incurred but for engaging in such venture. He says that "when an unlawful business is carried on in connection with the defendant's regular business, and the same agencies are employed in doing that which is lawful and that which is unlawful, no rule of law of which I am aware requires any deduction for expenses in estimating the profits of the unlawful business." He makes no reference to the decision in the *Tremolo Patent*, although in that case there was, as in the case before Judge Thayer, a like invasion of a right. See, also, *N. K. Fairbank Co. v. Windsor* (C. C.) 118 Fed. 96. Considering that the action for damages for the invasion of such right sounds in tort and not in contract, there is much force in Judge Thayer's reasoning. It does not seem quite just that the wrongdoer should be permitted to escape without pecuniary loss to himself, and yet

we must remember that here the appellant has chosen to prove, as the basis of recovery, merely the profits which the wrongdoer has made, and in estimating those profits we feel concluded by the ruling of the ultimate tribunal, that, to ascertain the net profits accruing to the wrongdoer, as in ascertaining profits in any other case, the expense of making the sale should be deducted from the gross proceeds of the sale, upon the same principle that the cost of the spurious article is deducted from the gross receipts of its sale.

The failure to receive adequate compensation for the injury done in such case proceeds from the act of the party in seeking recovery for the profits made by the wrongdoer, rather than the loss sustained by the injured party.

The decree will be reversed, and the case remanded with a direction to the court below to render an interlocutory decree pursuant to the prayer of the amended bill, and to ascertain, according to law, the loss, injury, and damage sustained by the complainant, and to decree accordingly

THE WILDCROFT.

(Circuit Court of Appeals, Third Circuit. May 23, 1904.)

No. 21.

1. SHIPPING—DAMAGE TO CARGO—EVIDENCE AS TO CAUSE.

A ship may sustain the burden of proof resting on her to show that cargo damage was due to a cause for which she is not liable by circumstantial evidence as to the manner in which the water causing the damage entered the hold, and in the absence of direct evidence the court is justified in adopting her theory in that respect, where the facts and circumstances shown are consistent with such theory and not consistent with any other.

2. SAME—EXEMPTION UNDER HARTER ACT—PRESUMPTION OF SEAWORTHINESS.

The casting of the burden of proof on one party or the other in a given case does not destroy the presumptions in favor of a party which exist under the general law of evidence. So a shipowner, claiming exemption from liability for cargo damage under section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), has the burden of proving the seaworthiness of the vessel; but, in the absence of evidence to the contrary, such burden is met *prima facie* by the presumption that he performed his duty in making her seaworthy at the commencement of the voyage.

3. SAME—FAULT IN MANAGEMENT OF VESSEL.

Where a ship was at the commencement of a voyage in all respects seaworthy, and properly manned, equipped, and supplied, damage to a sugar cargo from fresh water which escaped into the hold where the sugar was stowed while the cargo was being discharged, by reason of a valve having been improperly left open while water from the river was being pumped into the engine tank, was due to a fault in the management of the vessel, for which she is exempted from liability by section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]).

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

See 124 Fed. 631, 126 Fed. 229.

¶ 2. Statutory exemption of shipowners from liability, see note to *Nord-Deutscher Lloyd v. Insurance Co. of North America*, 49 C. C. A. 11.

H. L. Cheyney, for appellant.

J. Parker Kirlin, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from a final decree in admiralty, by the District Court of the United States for the Eastern District of Pennsylvania, dismissing the libel of the appellant.

The suit was brought by appellant, to recover damages alleged to have been sustained with respect to a shipment of sugar on the steamship "Wildcroft," from Cuba to Philadelphia. The libelant was consignee of the sugar. The libel recites that the cargo of sugar was delivered to the steamship in good order and condition, to be carried to the port of Philadelphia, and there delivered in the same good order and condition, and that upon the arrival of the steamship at Philadelphia, a large portion of said cargo was greatly damaged by contact with water. The libel charges that said damage was due to the unseaworthiness of said vessel at the commencement of said voyage.

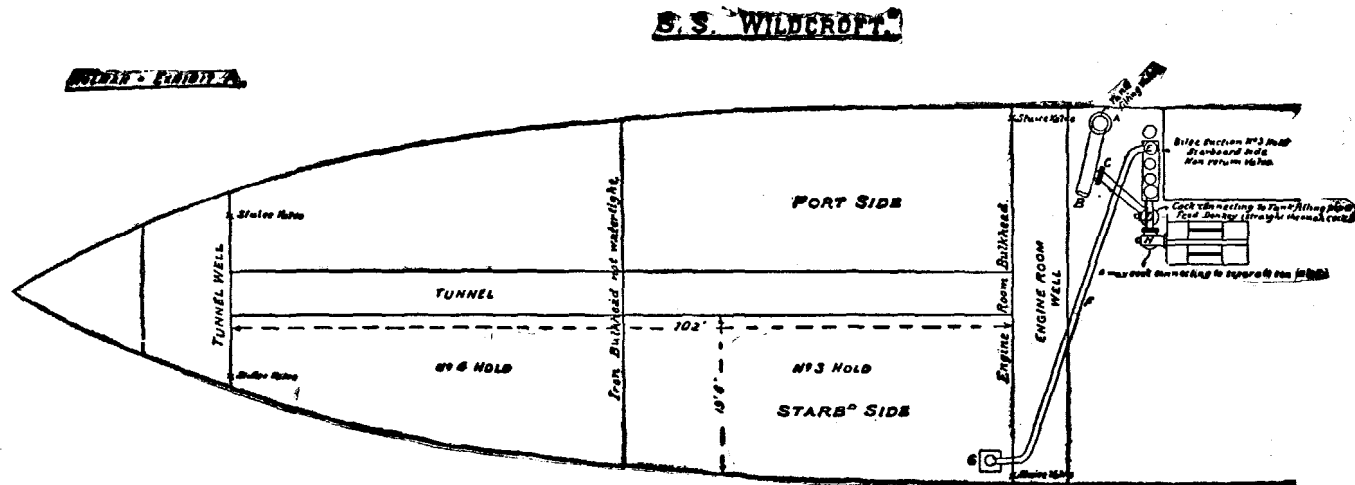
The defense here relied upon is, that the goods were carried forward under bills of lading that contained this clause: "All accident, loss and damage whatsoever from machinery, boilers and steam navigation, or from perils of the seas and rivers, or from any act, neglect or default whatsoever of the pilot, master or mariners, being excepted;" that the vessel was in every way seaworthy at the commencement of the voyage, and that the damage to the cargo was caused by perils of the sea and navigation, within the exceptions in the bills of lading. The alternative defense is urged, that if the damage was caused or contributed to by any faults of those in charge of the vessel, the vessel was protected from responsibility therefor, by the terms of the act of Congress, approved February 13, 1893, called the "Harter Act." Act Feb. 13, 1893, c. 105, § 1, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946].

We take the following statement of the case from the opinion of the learned judge of the court below:

In April, 1901, the Wildcroft, having discharged a cargo of coal in Havana, proceeded to Cardenas and Matanzas, where she loaded sugar in bags, consigned to the libelant. The sugar in controversy was stowed in No. 3 and No. 4 holds, and some of it was found, while being discharged, to have been damaged by water. It does not appear precisely how much of the cargo was damaged. Apparently the bulk of it was sound. But, at the top of No. 3 hatch, on the starboard side, the sugar was wet all across the hatchway to a depth of about 8 feet. Under the starboard ventilator of the same hold, a burrow, caused by water, extended down about 8 feet. Under this there was a layer of sound cargo down to a point about 3 feet from the bottom. On the bottom of No. 4 hold also, as well as of No. 3, there was a layer of damaged cargo about 3 feet thick. There was no damage elsewhere in No. 4. In each hold the damage at the bottom was on the starboard side of the tunnel. The damage at the top of No. 3 hold was caused by salt water that found its way into the hold on April 19th in the manner hereafter stated. The damage at the bottom of the holds, however, was caused by fresh water, the marks on the bulkheads showing that both holds had been flooded to a height of 2 to 4 feet. In order to determine how water, either salt or fresh, may have found its way into these holds, it is desirable to refer to the construction of the vessel in some respects, and also to the circumstances of the voyage. The Wildcroft has four holds, two on the fore side of the engine room tank, and two on the after side.

No. 3 and No. 4 holds are on the after side of the engine room, and are separated from each other by a grain-tight bulkhead. A water-tight bulkhead separates No. 3 hold from the engine room, and a water-tight bulkhead also separates No. 4 hold from the peak tank aft. The flooring under No. 3 and No. 4 holds is not water-tight, but is better than grain-tight. The average depth of the bilges below the flooring is 2 feet 6 inches. As the bulkhead between No. 3 and No. 4 holds is pierced by limber holes, these two compartments are practically one, so far as the passage of water is concerned. The vessel has five tanks: No. 1 is under No. 1 hold, No. 2 under No. 2 hold, No. 3 under the engine room, No. 4 under No. 3 hold, No. 5 under No. 4 hold, and the after peak tank is aft of No. 5. All these tanks, excepting the after peak tank, are built on the double cellular principle. No. 1 and the after peak tank were empty during all the voyage from Baltimore to Havana, and thence to Cardenas, Matanzas and Philadelphia. Nos. 2, 3, 4 and 5 tanks were filled with water for ballast at Havana after the discharge of the cargo, but when the vessel arrived at Cardenas they were pumped dry, and remained dry during the rest of the voyage to Philadelphia.

After the discharge of cargo at Havana, the sluices, holds and bilges on the ship were overhauled and cleaned. At Cardenas part of the cargo was loaded, the rest being taken on board at Matanzas. After leaving this port, each hatch was protected with a wooden cover and with three tarpaulins that were securely battened down with iron bars and wedges. On leaving Matanzas, the vessel drew about 21 feet 6 inches fore and aft, and was then in every respect seaworthy, and properly manned, equipped and supplied. The hatches were not taken off until after the vessel reached Philadelphia. During the voyage the weather was exceptionally severe, culminating on April 19th in heavy gales, tropical rain and high seas, the result being that the vessel rolled and pitched heavily, and shipped large quantities of water on deck. About 3 p. m. on that day a heavy sea tore away the three tarpaulins that covered No. 3 hatch and the starboard ventilator cover at the forward part of the hatch. New tarpaulins were lashed temporarily over the hatch as securely as the violent weather would permit, and a spare cover was put over the ventilator, but the weather did not moderate sufficiently until 6 or 7 o'clock the next morning to permit the crew to fix the tarpaulins permanently over the hatch, and thus to make it again as secure as when the vessel left Matanzas. During this interval, the vessel shipped heavy seas, the downpour of rain continued, and a considerable quantity both of sea water and of rain water entered No. 3 hatch through the joints of the hatch and down the ventilator hole. Not much water reached the bottom of either hold at this time. Both holds were sounded night and morning during all the voyage, and no more than the usual amount of water was found, 2 to 4 inches. The vessel arrived at Philadelphia on April 22d, and was taken to the libellant's wharf to discharge her cargo. Before the discharge was begun, the sugar directly under the hatch of No. 3 was found to be damaged by water. All the bags across the hatchway were wet. Under the ventilator whose cover had been washed off there was a burrow about 8 feet deep between the bags where the water had run down. The discharge began on April 23d and was continued without further incident until April 29th. At 7 a. m. of that day, in accordance with the standing orders that soundings should be taken night and morning, the pumps connecting with No. 3 and No. 4 holds were started and were worked for 15 minutes, but nothing was pumped out. About 3 p. m., however, the stevedore that was discharging the vessel, reported to the chief officer and the chief engineer, that there was water in hold No. 4. Soundings were taken immediately, and between 5 and 6 feet of water were found. There was no water in the engine room bilge, however, and the sluices in the tunnel connecting with No. 3 hold and the after wells of the engine room were then opened, and the water and molasses were pumped out, both holds being dry by midnight. The chief engineer tasted the liquid in the bottom of the hold, and found it to be molasses and fresh water. In order to determine whether any of this water had come into the ship through a leak in the hull, or in any of the ballast tanks, the vessel was thoroughly examined by Lloyd's surveyors in Philadelphia immediately after the cargo had been discharged, and before repairs of any kind had been made. No leak or injury to the hull or tanks was found, and the surveyors thereupon gave the vessel a certificate of seaworthiness.



The fresh water in the holds is accounted for as follows: On the morning of April 29th, No. 3 engine-room tank was filled with fresh water from the Delaware river for ship's purposes. It began to flow into the tank at 10 o'clock and the flow was uninterrupted for three hours. A drawing showing the arrangement of pipes, connections and valves involved in this explanation, is annexed to the claimant's testimony. This drawing was prepared by a consulting engineer, who examined the vessel in London in June, 1901, before any repair, alteration or change in arrangement had been made in any of the pipes, cocks or valves in use on April 29th, when the damage was done. No. 3 tank, just referred to, is under the engine room. It is filled by opening a valve, A, in the ship's side, which admits water from the river into the tank—filling pipe AB. This pipe is connected, on its continuation below the point B, with valves in the tank-distribution box. From this box another pipe leads to the tank top. (Neither the tank distribution box nor the pipe connecting it with the engine-room tank are shown on the plan, as they have no connection with, or relevancy to the present controversy.) There is no direct connection between this tank and No. 3 and No. 4 holds. There is, however, a pipe connection, C, governed by a cock at D, that leads from the tank-filling pipe to the service-donkey, and this in turn is connected with another distribution chest, from which a pipe is led to No. 3 hold for the purpose of pumping out the bilges of that hold. This pipe is indicated by the letters EFG. At the head of this suction pipe in the distribution chest is a non-return valve, E. This valve and the seat on which it rests are made of gun metal. The valve apparently works on a hinge, so that it opens when suction is applied to it from the top by the pumps, but when the suction ceases, the valve falls back on its seat and prevents anything from entering the pipe which it covers. If, therefore, any foreign substance, such as a small piece of wood, had been drawn up the pipe FG when the pumps had been worked last on the limbers of No. 3 hold, and had become caught in the valve E, so that the valve had been wedged open, and if at the same time the cock D in the donkey service or branch pipe were open, it is apparent that water flowing from the river into the tank-filling pipe AB, leading to the engine room, would also flow through CD to the distribution chest, and down the valve E and the suction pipe FG leading to the limbers in No. 3 hold, and thence into No. 4 hold; for, as already stated, No. 3 and No. 4 are practically one hold so far as water communication is concerned. If these cocks and valves, D and E, or either of them, had been properly closed during the process of filling the engine-room tank, it would not have been possible for any water to find its way into No. 3 and No. 4 holds.

I think, therefore, that the damage to the sugar was caused by the water that went down No. 3 hold during the storms on the voyage, and by the water that flowed into the hold through the pipe line on April 29th, in the manner just described. Indeed, it is impossible that the damage could have occurred in any other way, unless some of the water that entered through No. 3 hatch on April 19th passed down the sides of the ship into the holds, and I do not think the testimony justified such a finding.

The findings of fact contained in the foregoing opinion, are not only accepted as *prima facie* conclusive, but, as the result of a careful examination of the testimony sent up in the record, are approved, as being founded upon the weight of the evidence. The only question in the case is, as counsel for appellant say, whether the claimant has shown such facts as to the cause of damage, as to entitle the ship to exemption under the "Harter Act."

We do not intend, nor is it necessary, to recite the evidence at length, upon which these findings are based. It suffices to say, that it clearly appears that the ship was water-tight when the cargo was loaded and when she sailed from Cuba, and that no water reached the bottoms of either No. 3 or No. 4 hold during the voyage. As we have seen, no claim was made for damage to the top of the sugar,

occasioned by the salt water that found its way through the hatches of No. 3 hold during a gale, which washed away the tarpaulins covering those hatches. This damage was clearly due to a peril of the sea. The testimony is, that both of these holds were sounded night and morning during the entire voyage, by the carpenter, and the soundings disclosed merely the usual amount of water in the bilges,—from two to four inches. All of the testimony in this respect is uncontradicted, and no facts are shown from which any other conclusion can be drawn, than that the water which came into the bottom of these holds, to the depth of several feet, doing the damage in question, came in after the early morning of the 29th of April, and before the close of that day, while the cargo was being discharged at the wharf in Philadelphia. It is not disputed that the water was fresh water, such as was the water in the Delaware river, in which she was lying. In connection with these facts, it was shown by the testimony that the sea-cock for filling the engine room tank was open at ten o'clock that morning, and kept open for a period of three hours, and that if two certain cocks, fully described in the evidence and pointed out by the learned judge of the court below, were left open by accident or design, there would be a free flow of water from the open sea-cock into the bilges of hold No. 3. Directly after the filling of the tank and the closing of the sea-cock, water to a considerable depth was reported in holds No. 3 and No. 4. This sea-cock had not been open from the time the cargo was put on board in Cuba until, as just stated, on the morning of the 29th of April, at Philadelphia. We think the court below was fully justified in its finding, that the damage here in question was due to "the water that flowed into the hold through the pipe line on April 29th, in the manner just described," and that "it is impossible that the damage could have occurred in any other way."

It is true, that the evidence upon which the court makes this finding, is in part circumstantial. We see no reason, however, why circumstantial evidence should be excluded from the consideration of the court, in its determination of the issue before it. Its probative force in this case could not be disregarded. It is certainly very strong, if not absolutely conclusive, and when considered in connection with other testimony in the case, fully warranted the learned judge in the conclusion at which he arrived. The gravamen of complainant's contention seems to be, that the court were not justified in relying upon such testimony. He objects that the claimant has not proved "a single fact as to the cause of damage, but he had a theory which the court accepted as a fact." But if all the facts in a case are consistent with one theory, explaining the ultimate fact sought to be proved, and are inconsistent with every other theory attempting such explanation, we have the very foundation upon which all circumstantial evidence rests, by which the most important issues involving life or property may be and are every day determined. And so the learned judge of the court below says:

"I adopt the theory propounded by the ship to account for the presence of the water; indeed, I cannot conceive of any other theory that is consistent with the facts, while this agrees with them all and is in conflict with none."

If the circumstances were such, that the liability of the ship depended upon the establishment of the fact that the damage in question was done by water that came through the open sea-cock on the morning of April 29th, and by the accidental or negligent opening of the two cocks, E and D, reached hold No. 3, can there be any doubt as to the sufficiency of this evidence for that purpose? We think not, and so also, we have no doubt as to its sufficiency, where the exemption of the ship from liability depends upon the same evidence.

Each of the bills of lading under which the cargo was received and carried, contains the following clause:

"It is mutually agreed that this shipment is subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved the 13th day of February, 1893."

The third section of the act thus referred to, and known as the "Harter Act," is, in part, as follows:

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for the damage or loss resulting from faults or errors in navigation or in management of said vessel."

We have no doubt that the court below was right in its conclusion, that the damage thus occasioned resulted from faults or errors in navigation or in the management of the ship. Whatever may be said as to faults in navigation, there can be no question, that the flowing of the fresh water into the hold, where the sugar was stowed, from the open sea-cock, on the morning of the 29th of April, was through the fault of the "management" of the ship, by the officers in charge. At that time, the steamship was in no sense under the control or management of her owners, or those representing them, other than the officers and crew. We agree with the general proposition laid down in several cases, that, for the purposes of the exemption of this act, the "management" of the ship extends from the loading and sailing of the ship to the delivery of the cargo. However this may be, as a general proposition, we are clearly of opinion that the fault, to which the damage was due in this case, was one solely in the "management" of the ship. The condition upon which this exemption from liability can be invoked under the third section of the "Harter Act," is that the owner of the vessel shall have exercised "due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied." In *International Navigation Co. v. Farr & Bailey Mfg. Co.*, 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830, Mr. Chief Justice Fuller, delivering the opinion of the court, said:

"We repeat, that even if the loss occur through the fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions."

See, also, *The Southwark*, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65.

The casting of the burden of proof on one party or the other in a given case, does not destroy the presumptions in favor of a party,

which exist under the general law of evidence. Presumptions are a sort of proof and a substitute in certain stages of a case for affirmative testimony. A disputable presumption may operate as a prima facie case upon a particular point. Thayer's Prelim. Treatise on Evidence, p. 365. A presumption operating as a prima facie case, stands as proved until the prima facies is destroyed by controverting evidence. In the case before us, there is a presumption, that the owner of the steamship performed his duty, in making her seaworthy, and properly manning, equipping and supplying her for the voyage she was about to make. This presumption will support the burden of proof imposed, until it is overthrown or controverted by some evidence. The Chief Justice, who delivered the opinion of the Supreme Court in *Int. Nav. Co. v. Farr, etc.*, supra, used this language in the case of *The Chattahoochee*, 173 U. S. 540, 550, 19 Sup. Ct. 491, 495, 43 L. Ed. 801:

"By the third section of that act" (the "Harter Act") "the owner of a seaworthy vessel (and, in the absence of proof to the contrary, a vessel will be presumed to be seaworthy) is no longer responsible to the cargo for damage or loss resulting from faults or errors in navigation or management."

We think there is no conflict between the two statements made by the learned Chief Justice. The burden of proving seaworthiness rests upon one who wishes to avail himself of the exemption of the third section of the act, and the presumption of fact alluded to, where not controverted, sustains that burden, or, in case of controversy, may help to sustain it.

In this case, libelant produced no controverting testimony; nothing to show any unseaworthiness, general or special. Claimant did, however, in support of the presumption, prove general seaworthiness, and by direct and circumstantial evidence, show that the sea-cock and valves, through the accidental or negligent opening of which it has been found that the damage occurred, were in good order and condition at the commencement of the voyage, and up to the time of the flooding of the hold on the 29th of April. This is testified to distinctly and affirmatively by both the captain and chief engineer, from their personal knowledge and inspection, and there is no controverting testimony produced by the libelant.

The libelant contends that, because this testimony of the captain and chief engineer were to the effect that of their "personal knowledge and inspection, the tank filling pipe, the cocks on it and on the connections between it and the distribution chest, both during the voyage and while the vessel was discharging cargo in Philadelphia, were in thorough working order and condition," it does not follow that the cocks, D and E, were closed at the time of sailing. But it is in evidence, that the water could not have found its way to hold 3, if the valve, D, had been closed, even if the valve, E, had been held open by something accidentally under it. Now valve D was located in the engine room, and was easily accessible, and, according to the testimony, it was worked every morning and evening, in pumping out the bilges of the lower hold, when it was necessarily opened. If at any time after said pumping, it was left open, this was clearly a fault in the "management" of the ship during the voyage. So also, if

valve E, which was testified to have been inspected and found in good condition and working order at the commencement of the voyage, was held open by the accident of some foreign substance being sucked under it, this accidental happening was in the "management" of the ship, and could not have been provided against by those whose duty it was to look after its seaworthiness and general condition before the commencement of the voyage. *The Silvia*, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241; *The Mexican Prince* (D. C.) 82 Fed. 488.

Accepting, therefore, the findings of fact made by the court below, as well founded, we conclude that the damage to the cargo consigned to the libellant was due to a fault in the "management" of the vessel, within the meaning of the exemption in the third section of the act of Congress of February 13, 1893, and that the vessel was shown to have been seaworthy at the time of the loading of the cargo, both generally and in respect to the particular matters involved in causing the damage complained of.

The decree of the court below is affirmed.

MURRAY v. PANNACI et al.

(Circuit Court of Appeals, Third Circuit. May 31, 1904.)

No. 48.

1. TRESPASS—DAMAGES—FAILURE TO PROVE EXTENT OF INJURY.

In an action of trespass for removing sand from the beach in front of and upon plaintiff's lot, where there was no evidence to show the quantity taken nor from which the jury could determine the extent of the damage to plaintiff's lot, the court correctly charged that nominal damages only were recoverable.

2. SAME—EXEMPLARY DAMAGES.

To justify the imposition of exemplary damages for a trespass, there must be evidence that the injury was inflicted maliciously or wantonly, or, at least, with wrongful motive; and defendants, who removed sand from the beach in front of plaintiff's lot in the belief that it was their legal right, and ceased at once on plaintiff's making objection, cannot properly be subjected to punitive damages.

3. SAME—DAMAGES RECOVERABLE.

In an action of trespass for removing sand from the beach in front of plaintiff's lot, plaintiff is not entitled to recover as damages the expense incurred in a chancery suit, instituted against defendant to determine the rights of ocean lot owners, which is still pending on appeal.

In Error to the Circuit Court of the United States for the District of New Jersey.

A. Gordon Murray and John T. Bird, for plaintiff in error.
Edmund Wilson, for defendants in error.

Before ACHESON and GRAY, Circuit Judges.

ACHESON, Circuit Judge. Hattie G. Murray, the plaintiff, and Veronica Pannaci, one of the defendants, respectively owned a lot

of ground—the two lots being contiguous to each other—at Seabright, N. J., each lot having a frontage on the Atlantic Ocean. The title to each lot extended only to high-water mark originally, but afterwards Mrs. Pannaci acquired title to land in front of her lot from the State Riparian Commissioners. The plaintiff acquired no such riparian addition. In the early part of October, 1901, by procurement of Veronica Pannaci or her husband, Hurley, the third defendant, began carting sand from the beach in front of the Pannaci lot. Prior to the 17th or 18th of October some sand was taken by the defendants from the beach in front of the plaintiff's lot, but none after the last-mentioned date. In digging and carting sand from the ocean beach the defendants were acting under legal advice, but in supposing that they had a right to take sand from the beach in front of the plaintiff's lot they misunderstood the advice of counsel. Upon the plaintiff's protest they at once desisted from taking any more sand from the beach in front of her lot. There was evidence to show that some sand was taken from the plaintiff's lot by the defendants, and also that sand was washed or fell from the beach in front of the plaintiff's lot into an excavation made by the defendants on the Pannaci lot. The trial judge instructed the jury that, while there was proof that the defendants had trespassed upon the land of the plaintiff, there was no evidence showing the extent of the damage the plaintiff had thereby sustained, and that under the evidence the jury could allow nominal damages only. The judge applied to the case the familiar rule, settled by many decisions, that although a legal injury to a plaintiff is proven, yet if the extent of the injury is not shown, nor evidence given from which it can be inferred, nominal damages only can be recovered. *Lance v. Apgar*, 60 N. J. Law, 447, 448, 38 Atl. 695; *Leeds v. Metropolitan Gas Light Co.*, 90 N. Y. 26, 29; *Smith v. Loag*, 132 Pa. 301, 19 Atl. 137; *Watts v. Weston*, 62 Fed. 136, 10 C. C. A. 302. Was the court right in applying the above-stated principle to this case upon the facts shown?

We fail to discover any evidence in this record by which the jury could determine the quantity of sand taken from the plaintiff's side of the dividing line between the two lots of ground, either above the high-water mark—the limit of the plaintiff's title—or below the high-water mark, where she had no proprietorship in the soil. The quantity of sand taken was left wholly uncertain by the plaintiff's proofs, as also was the amount of sand displaced by gravity or wave action. Nor did any witness state, or attempt to estimate, the amount of damage done to the plaintiff's land by the defendants' acts complained of. The judge in his charge correctly said that "the plaintiff in this case has not shown what the value of her property was before and after the alleged taking away of sand from her own or the neighboring lot." Indeed, there was a total lack of evidence as to any decrease in the value of the plaintiff's land. As to the alleged damage to the plaintiff's bulkhead, the evidence was vague and uncertain. What part of the expenditure alleged to be needed for repairs to the bulkhead was due to the defendants' acts was not shown. Upon a careful examination of the evidence, we think that the trial judge was quite justifiable in charging the jury that there was an ab-

sence of testimony showing the amount of damage sustained by the plaintiff.

It is, however, urged that the conduct of the defendants, or some of them, was such as to justify the jury in awarding exemplary or punitive damages. But this record, we think, does not disclose such misconduct or circumstances as warranted the allowance of damages of an exemplary or punitive nature. The defendants took no sand from the beach in front of the plaintiff's lot after her objection. They ceased such taking as soon as they discovered that they had misunderstood the legal advice of counsel. Their excavation of the beach in front of the Pannaci lot they evidently regarded as a lawful exercise of the riparian rights of Mrs. Pannaci. If they were wrong in this, it seems to have been an honest mistake. In trespass, to justify the imposition of exemplary or punitive damages, something more must be shown than the doing of an unlawful or injurious act. There must be evidence that the injury was inflicted maliciously or wantonly, or with circumstances of contumely and indignity, or, at least, with wrongful motive. *Day v. Woodworth*, 13 How. 363, 371, 14 L. Ed. 181; *Phila., etc., R. R. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73; *Milwaukee, etc., R. R. Co. v. Arms*, 91 U. S. 489, 493, 23 L. Ed. 374; *Fohrmann v. Consolidated Traction Co.*, 63 N. J. Law, 391, 43 Atl. 892. None of these things, we think, could be justly imputed to the defendants here under the evidence.

We think no error was committed in excluding the offer of the record in the chancery litigation in the courts of New Jersey in the suit brought by Hattie G. Murray against Veronica Pannaci. In the first place, the whole of the record, it would seem, was not offered. Then, again, that litigation was still pending in the Court of Errors and Appeals of New Jersey. It involved the unsettled question of the rights of ocean lot owners in and to the beach in front of their lots. We are wholly unable to see that in the present action the plaintiff was entitled to recover any expenses incurred by her in the chancery litigation. Especially was any such claim inadmissible here in view of the fact that at the time of this trial the New Jersey chancery suit was still undetermined.

We are not able to see that the court erred in excluding the Cooper map of 1885. The preliminary proofs entitling that map to admission were insufficient. Moreover, we cannot see that any injury was done to the plaintiff by the exclusion of the map.

Upon the whole we discover no error in this record, and the judgment of the Circuit Court is affirmed.

In re DAUCHY.

(Circuit Court of Appeals, Second Circuit. April 20, 1904.)

No. 126.

1. BANKRUPTCY—DISCHARGE—CONCEALMENT OF PROPERTY.

Where a bankrupt conveyed real estate by an absolute deed, more than two years prior to the bankruptcy, in order to constitute a fraudulent concealment by failing to schedule the same, which will defeat the right to a discharge, objecting creditors must show that the bankrupt still retains a secret interest in the property. It is not sufficient that it may have been conveyed in fraud of creditors, but it must still be in fact the property of the bankrupt's estate.

Appeal from the District Court of the United States for the Northern District of New York.

This is an appeal from an order of the District Court for the Northern District of New York, overruling specifications of objecting creditors and confirming the report of the referee recommending that a discharge be granted to the bankrupt. The objecting creditors appeal. The cause below is reported in 122 Fed. 688, 10 Am. Bankr. Rep. 527, where the facts are fully stated.

Walter S. Logan, William T. Read, and Russell G. Lucas, for appellants.

John L. Hill and Thomas O'Connor, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. But little need be added to the elaborate discussion of the facts and the law to be found in the opinion of the District Court. We agree with the conclusion there reached.

The questions presented were, first, whether the bankrupt, since the adjudication, June 24, 1901, knowingly and fraudulently concealed from her trustee real property located at Lansingburgh, N. Y., and Nantucket, Mass., belonging to her estate in bankruptcy; and, second, whether she knowingly and fraudulently made a false oath when she swore to the correctness of her schedules, which omitted this property.

The principal accusation of fraud is based upon the conveyance by the bankrupt of the Nantucket property to her father and by him to her son over two years prior to the adjudication in bankruptcy. At the time the petition was filed and the schedules verified the legal title to this property was not in the bankrupt and had not been for two years and seven months. The transfer to her son, conceding it to be fraudulent as to then existing creditors, has not been made by the act a sufficient ground for refusing a discharge. About this there is no disagreement.

In order to establish a fraudulent concealment it must appear that the property concealed belongs to the bankrupt's estate. It must be shown that the transfer was merely a temporary expedient to place the property beyond the reach of the trustee, the title to be resumed

by the bankrupt as soon as prudence will permit. In other words, it must be proved that a secret trust exists in her favor and that her son is under agreement, expressed or implied, to reconvey the property to her when the danger of attack by the creditors has passed.

Were we permitted to indulge in speculation and guesswork and to substitute suspicion for proof it would not be difficult to sustain the creditors' contention, but the burden is upon them to establish by clear and convincing evidence that the bankrupt has been guilty of the offenses alleged. In this they have failed. The referee and the District Court concur in finding that there is insufficient proof to show that the bankrupt retained an interest in the property conveyed and we are constrained to reach a similar conclusion. The law as originally passed, and since the amendments of 1903, does not prevent a discharge in cases of this character. If the law be inadequate or defective in this regard the remedy is with Congress and not with the courts.

The case of *Hudson v. Mercantile Nat. Bank*, 119 Fed. 346, 56 C. C. A. 250, is clearly distinguishable from the case at bar. The essential ingredients of a fraudulent concealment, which are wanting in the present case, were there clearly established. The court found that the property standing in the name of the son was in fact the property of the bankrupt, the son being the mere naked trustee of the title. The bankrupt occupied the land during the 15 years prior to the bankruptcy and during that period was in full enjoyment of the rents and profits, never accounting to his son. The latter resided in Mexico, paid no attention to the property, exercised no visible acts of ownership since his father's occupancy began and, at no time, demanded an accounting. The facts are so plainly dissimilar that the case cannot be regarded as a precedent.

The order appealed from is affirmed with costs.

FISHERIES CO. v. LENNEN et al.

(Circuit Court of Appeals, Second Circuit. April 21, 1904.)

No. 169.

1. CIRCUIT COURTS OF APPEALS—JURISDICTION—QUESTION OF JURISDICTION OF LOWER COURT.

Under Act March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547], creating the Circuit Courts of Appeals, section 6 (26 Stat. 828 [U. S. Comp. St. 1901, p. 549]), an appeal to such court does not bring before it for review the question of the jurisdiction of the Circuit or District Court from which the appeal is taken, which is reviewable only by the Supreme Court, under section 5.

2. CONTRACTS—LEGALITY—AGREEMENTS IN RESTRAINT OF TRADE.

A contract by which sellers of property agreed, as a condition of the sale, that they would not become engaged or interested in the business

¶ 1. Review by Circuit Court of Appeals of jurisdiction of Circuit Courts, see note to *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 48 C. C. A. 351.

of catching or manufacturing the products from certain classes of fish along the Atlantic seaboard, in competition with the business of the purchaser, for the term of 20 years, is not void as in restraint of trade and contrary to public policy.

3. SAME—AGREEMENT CONSTRUED.

A covenant by sellers of fisheries plants, together with their good will, not to enter into business competing with the purchaser along the Atlantic seaboard for a term of 20 years, *held* to be personal in its nature, and to preclude them from establishing a competing business on Chesapeake Bay.

Appeal from the Circuit Court of the United States for the District of Connecticut.

For opinion below, see 116 Fed. 217.

This cause comes here on appeal from a decree of the United States Circuit Court for the district of Connecticut enjoining defendants from carrying on menhaden fisheries along the Atlantic Coast.

H. A. Hull and C. E. Perkins, for appellants.

L. E. Warren, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The opinion of the court below contains a finding of all the facts material to the disposition of this appeal. We shall therefore confine ourselves to a discussion of the assignments of error.

The first assignment is based upon the contention that the Circuit Court had no jurisdiction because the matter in demand does not exceed \$2,000. Under the construction adopted in this circuit of the sixth section of the Evarts act (Act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549]), the question of the jurisdiction of the court below is not before us for review. *United States v. Lee Yen Tai*, 113 Fed. 465, 51 C. C. A. 299.

The second assignment of error presents the question whether the contract in suit was void as against public policy. This question was raised by demurrer in the court below, and the demurrer was overruled on the authority of *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315, and *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007. There was no error in said ruling.

The third assignment of error raises the only real question in the case. Prior to the transactions herein the respondents were engaged in the fishery trade, and had plants at Sag Harbor, Long Island, and at Lewes, Del. They entered into a contract with one Church, or his assigns, for the sale of their plant for \$60,000, agreeing therein that they, upon the completion of said sale, would enter into a contract with said purchaser or his assigns "that the vendors shall not become interested in or connected with any business, other than that to be conducted by the purchaser or his assigns, either in catching menhaden, herring, or other fish used in the manufacture of oil or scrap, or in manufacturing such or any fish into oil or guano, upon, along,

or off any portion of the Atlantic seaboard, for a period of twenty years." Thereafter, Church having assigned said contract of sale to the American Fisheries Company, respondents duly executed a covenant with said company in accordance with said agreement, said covenant to be binding for a period of 20 years.

The respondents contended that there was a contemporaneous oral agreement, by which employment was guarantied to respondents. The court below, having heard the witnesses in open court, upon conflicting evidence has found that Church made no such promise, and we are bound by said finding. There is no evidence of any such promise on the part of the American Fisheries Company.

The respondents afterwards organized a corporation in Virginia, of which they and the members of their respective families are practically the sole stockholders and managing officers, established a plant at Harborton, on Chesapeake Bay, about 70 miles from the Atlantic Ocean, and began fishing within the bay and outside in the ocean. The defense raised by the assignment of error is that the language, "upon, along, or off any portion of the Atlantic seaboard," does not include the waters of Chesapeake Bay. The term "Atlantic seaboard," in its ordinary interpretation, would seem to be broad enough to include such indentations in the coast as Delaware, New York, or Massachusetts Bay, and, at least, such a location on Chesapeake Bay as the one occupied by defendants. But if there might otherwise be any ambiguity in said language or uncertainty as to its interpretation, it is removed by the acts and the written agreement of the respondents. They sold their entire plant for \$20,000 in excess of its appraisal value exclusive of the good will; they refrained from entering into the fishery business until the American Fisheries Company became financially embarrassed; and when they covenanted against fishing off the Atlantic seaboard they expressly stated that this territorial covenant was personal in its nature so far as concerned future competition on their part by the language: "It being the intention of this agreement to bind ourselves, and each of us, firmly by these presents, not to enter into or to become, directly or indirectly, interested in the business of catching or manufacturing any fish when caught, into oil or guano, during the period of twenty years above mentioned."

The decree is affirmed, with costs.

McKEE v. CHAUTAUQUA ASSEMBLY et al.**(Circuit Court of Appeals, Second Circuit. April 20, 1904.)****No. 142.****1. CORPORATIONS—POWERS OF DIRECTORS—RIGHTS OF STOCKHOLDERS.**

As to all matters of management and control within the scope of the powers delegated to the trustees or directors of a corporation by its charter, the affairs of the corporation are committed to their judgment and discretion, and the courts cannot sit in review of their errors at suit of the stockholders.

2. SAME—AMENDMENT OF CHARTER—RESERVED POWER OF LEGISLATURE.

Under power reserved to a Legislature to amend, annul, or repeal the charter of a corporation, it may make any alteration or amendment which will not defeat or substantially impair the object of the grant or any rights vested under it.

3. SAME.

While a reservation to the Legislature, in the charter of a corporation, of the power to annul or repeal such charter, cannot be used to take away property of the corporation, the action of the Legislature in consolidating a corporation with others organized for different purposes, and requiring it to assume their liabilities, is not invalid under such rule, but is within the reserved power, where, by the charters of such other corporations, they have always been under the sole management and control of its own board of trustees; the consolidation in such case being only a legislative recognition of the existing relations between them.

4. SAME.

The alteration or amendment of the charter of a corporation by the Legislature, within power reserved by the grant, does not require submission to the stockholders for their acceptance.

Appeal from the Circuit Court of the United States for the Western District of New York.

For opinion below, see 124 Fed. 808.

S. Schoyer, Jr., for appellant.

John G. Milburn, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. The decree appealed from sustained a demurrer to the bill of complaint, and dismissed the bill. The action was brought by the complainant, as a member of Chautauqua Assembly, a corporation formed under the provisions of chapter 319, p. 447, of the Laws of New York of 1848, authorizing the organization of corporations for benevolent, charitable, scientific, and missionary purposes. Among other things, the bill prays relief as follows:

"That the merger and consolidation with said Chautauqua Assembly of the Chautauqua University and of the Chautauqua School of Theology, together with the assumption of all debts and liabilities of each of the said merged institutions by said Chautauqua Assembly, be declared null and void, and the said Chautauqua Assembly be enjoined and restrained from assuming any of the debts and liabilities of either of the same, or of making the work of the same, or of either, an integral part of said Chautauqua Assembly."

It appears by the bill that the objects of Chautauqua Assembly, as stated in its articles of association, were "to hold stated public meetings from year to year, at Fairpoint in the County of Chautauqua, State of New York, for the promotion of Sunday School interests, and any other moral and religious purposes not inconsistent therewith"; that since its organization it has acquired some 186 acres of land; that its membership consists of about 600 persons, including all persons having a lease of one or more of the lots upon such lands; and that the complainant, as one of such members, has erected upon his lot a cottage for a summer residence, and is entitled to all the rights and privileges which appertain to membership. The bill further sets forth that sundry grievances on the part of the members resulted in the appointment of a committee of three of their number to lay their complaints before the board of trustees; that a conference resulted between that committee and a committee of the board of trustees; and that, pending the adjustment of such differences, the board of trustees secured the passage by the Legislature of New York on March 21, 1902, of an act intended to defeat the claims of complaining members. Laws 1902, p. 496, c. 196. The act thus mentioned is entitled "An act to change the name, define the corporate objects and purposes, regulate the powers and government of the corporation Chautauqua Assembly, and to consolidate with said Chautauqua Assembly the Chautauqua University and the Chautauqua School of Theology." It changes the name of the corporation from "Chautauqua Assembly" to "Chautauqua Institution," and, among other provisions, contains the following:

"Sec. 2. The purpose and object of said corporation shall be to promote the intellectual, social, physical, moral and religious welfare of the people. To this end it may hold meetings and provide for recreation, instruction, health and comfort on its grounds at Chautauqua; conduct schools and classes; maintain libraries, museums, reading and study clubs and other agencies for home education; publish books and serials, and do such other things as are needful or proper to further its general purposes.

"Sec. 3. All debts and liabilities and all papers, records and other property (including the right to receive any gift, devise or bequest now or hereafter made) of Chautauqua University, a corporation chartered by chapter one hundred and forty-eight of the Laws of eighteen hundred and eighty-three, and of the Chautauqua School of Theology, a corporation chartered by chapter sixty-three of the Laws of eighteen hundred and eighty-one, both of which corporations are by chapters three hundred and eighty-seven and three hundred and eighty-eight, Laws of eighteen hundred and eighty-five, now under the sole control of the same trustees as said corporation Chautauqua Assembly, are hereby transferred to the corporation Chautauqua Institution, and the existence of the said Chautauqua University and the Chautauqua School of Theology as separate institutions is hereby terminated and their work is made an integral part of the work of Chautauqua Institution."

"Sec. 5. The government and control of said corporation shall be vested as heretofore in twenty-four trustees. The persons now acting as trustees shall be trustees for the terms for which they are respectively chosen * * * and until their successors are elected; those whose terms have expired shall be trustees until their successors are elected. The trustees shall be divided into Class A, consisting of twenty trustees who shall be elected by the trustees, and Class B, consisting of four trustees who shall be elected by the members of the corporation. The term of office shall be four years. Five of Class A and one of Class B shall be elected each year after 1902."

"Sec. 9. The trustees may by vote of two-thirds of their entire number alter or repeal the by-laws or enact new ones. * * * The sole power to enact, alter or repeal the by-laws shall be in the trustees. * * *"

The bill alleges that the board of trustees assumed authority to accept the provisions of the act of 1902, and, although the act has never been accepted by the members of the corporation, the trustees have proceeded, under color of said act, to use the amended name of "Chautauqua Institution," and have taken over and assumed the debts and liabilities of Chautauqua University and of the Chautauqua School of Theology, and have been and are carrying on the business of the said institutions as a part of the corporate business of said Chautauqua Institution, without any authority or assent from the members of Chautauqua Assembly, although the purposes and objects of each are entirely dissimilar from those of Chautauqua Assembly and from each other; that the purposes and objects of the Chautauqua School of Theology, as prescribed in the law of its organization, include the instruction of its patrons in historical and philosophical learning, and the departments which are usually taught in seminaries devoted to the training of candidates for the clerical profession, and also to provide an archæological library and museum, and a collection of books, manuscripts, charts, etc.; that the leading objects of Chautauqua University, as prescribed in the law of its organization, are to promote liberal and practical education, especially among the masses of the people, to teach the sciences, arts, languages, and literature, and give instructions embracing all departments of culture which the board of trustees may deem useful and proper, with power to grant diplomas and confer the usual university degrees; that, in carrying out the purposes of these two corporations, large expenses are incurrable for the services of instructors, teachers, lecturers, printing, etc.; that the assembly is without capital to prosecute the business of its department of theology or its university; that since the merger and consolidation of the corporations the Chautauqua Assembly has incurred large expenses for the support and maintenance of the business comprehended within the purposes of the other two corporations; that the continued support and maintenance thereof will be productive of great losses, and will threaten the continued existence of the corporation, and deprive the members of the benefits, privileges, and advantages resulting from membership therein, and will result in a serious depreciation of the property of lot-holding members of the corporation.

It is unnecessary to recapitulate the various averments of the bill which set forth the grievances complained of in the previous management of the corporation, or the prayers for relief founded upon them, and we have not referred to them in detail, because, unless the act of 1902 is unconstitutional, that act precludes the complainant from obtaining any relief in respect to those transactions. It is proper to say, however, that the averments in respect to the actions of the trustees in purchasing the capital stock of the "Chautauqua Press," in incurring indebtedness, and in creating a mortgage upon the property of the corporation, fail to show that the trustees trans-

cended their powers. The control and management of its affairs and funds were lodged by law with the trustees. They were expressly authorized to mortgage the property of the corporation upon obtaining the concurring vote of two-thirds of their members. Laws N. Y. 1895, p. 336, c. 559, § 13. The purchase of the stock of the Chautauqua Press was authorized. Laws N. Y. 1899, p. 326, c. 172. It is to be presumed, in the absence of any averment that two-thirds of the trustees did not concur, that the mortgage was properly created. In exercising the delegated power of managing its concerns for the common benefit of all the members of the corporation, the trustees were subject to the control of the membership, through its power to supersede them at recurring elections; and, if the trustees improvidently managed its affairs by incurring debts or otherwise, the remedy of the members was thus to supersede them. As to all matters of management and control within the scope of their powers, the affairs of the corporation were committed to their judgment and discretion, and the courts cannot sit in review of their errors.

Neither do we deem it necessary to discuss the contentions for the complainant that the act of 1902 contravenes the prohibitions of sections 16 and 18 of article 3 of the state Constitution, as it is entirely clear that these contentions are without merit. The real questions are whether the act is constitutional upon other considerations, and whether, if constitutional in part, some of its provisions are not nugatory without the consent of the corporation.

The power of the Legislature to amend, annul, or repeal the charter or articles of association of the corporation was originally reserved by section 10, c. 319, p. 449, of the Laws of 1848, and was preserved when that chapter was remodeled by chapter 563, p. 1065, of the Laws of 1890. That power confers exceedingly wide discretion upon the Legislature, but it is not without limits. Diverse views as to its scope have been entertained by the tribunals of different jurisdictions, some of which treat it as authorizing much less radical changes than do others; but the authorities which should be regarded as controlling upon this court are the decisions of the highest courts of New York and of the Supreme Court of the United States. The decisions of these tribunals are practically in accord, and sanction the doctrine that the reserved power authorizes the Legislature to make any alteration or amendment of a charter which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the Legislature may deem necessary to promote the original purpose contemplated by its charter or articles of association, or to protect the rights of the public. In *The Mayor v. Twenty-Third Street Railroad Co.*, 113 N. Y. 317, 21 N. E. 60, the Court of Appeals used this language:

"It is difficult to put precise limits upon the power of the Legislature thus reserved over corporations created by it under its authority. Under its reserved power it cannot deprive a corporation of its property, or interfere with or annul its contracts with third persons; but it may take away its franchise to be a corporation, and may regulate the exercise of its corporate powers. * * * It may enlarge or limit its powers, and it may increase or limit its burdens. It is sometimes said that the alteration under such reserve power must, however, be reasonable, and it must always be legislative in its char-

acter, and consistent with the scope and object of the corporation as it was originally constituted."

The Supreme Court of the United States in *Schurz v. Cook*, 148 U. S. 411, 13 Sup. Ct. 645, 37 L. Ed. 498, quoted from this decision, and added:

"This construction of the statutes of the state by its highest court is of controlling authority."

In *Looker v. Maynard*, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79, the Supreme Court used this language:

"The effect of such a provision, whether contained in an original act of incorporation, or in a constitutional or general law subject to which a charter is accepted, is, at the least, to reserve to the Legislature the power to make any alteration or amendment of a charter subject to it which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the Legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the administration of its affairs."

Further citations of authority are unnecessary, and the validity of the act of 1902 is to be tested by the general principles announced in these decisions.

The changes introduced by section 2 (Laws 1902, p. 496, c. 196) are consistent with the original object of the corporation, and merely enumerate more specifically the "other moral and religious purposes," which by the articles of association were declared to be within the contemplation of the incorporators. The changes made by sections 5 and 9 in the mode of the selection of the trustees, in their tenure of office, and by investing in them exclusively the power of enacting by-laws, were clearly within the competency of the Legislature. Changes fully as radical as these in the mode of constituting the government of a corporation were upheld as within the reserved power of the Legislature in *Miller v. The State*, 15 Wall. 478, 21 L. Ed. 98, and *Close v. Glenwood Cemetery*, 107 U. S. 466, 2 Sup. Ct. 267, 27 L. Ed. 408. The changes of more doubtful validity are those made by section 3. The provisions of this section not only merge the corporation with two others, and thus embark it in new enterprises, but they compel it to assume the debts and liabilities of the corporations. Thus apparently these provisions appropriate the funds of the corporation, and divert them from its own treasury, to the extent necessary to pay the outstanding liabilities and carry on the operations of the other two corporations. If it were really the effect of these provisions to compel the corporation to embark its money improperly in one or more unrelated and independent concerns, the legislation would seem to be an unwarranted exercise of the power of alteration or amendment. As was said by Chief Justice Waite:

"All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of any funds actually reduced to possession under contracts lawfully made." *Sinking Fund Cases*, 99 U. S. 720, 25 L. Ed. 496.

It appears, however, that for several years previous to the passage of the act the three corporations had been practically one, and the

power of management had been submitted to Chautauqua Assembly. By chapters 387 and 388, pp. 631, 632, of the Laws of New York of 1885, the control and management of the property and affairs of Chautauqua University, and of the Chautauqua School of Theology, were vested in the board of trustees from time to time existing of the Chautauqua Assembly. Thus the members of Chautauqua Assembly, through the trustees selected from time to time, were in control of the other two corporations. Presumably the membership of the three corporations was composed of the same persons, but, however the fact may have been, it is not material; it suffices that no person had a voice in the control of the two corporations except the members of Chautauqua Assembly. In view of this relation between the three corporations, the validity of the legislation is not fairly open to question. The provisions of section 3 were merely a legislative recognition and approval of the existing relations between them. Concluding, as we do, that the act of 1902 was in all respects a constitutional exercise of the power of the Legislature to alter the organic law of Chautauqua Assembly, it is of no consequence that the trustees did not, by a corporate meeting or otherwise, obtain the assent to the changes of the members of Chautauqua Assembly. Such changes were sanctioned by the members in advance. Every member who enters into such an association is aware of the reservation of the power of the Legislature and of the possibility of its exercise, and must trust to the wisdom and justice of the Legislature that the power will not be abused; and those who become members contract subject to the reservation of power, and the courts are bound to read their agreement with the legislative condition. *Schenectady & Saratoga Plank Road Co. v. Thatcher*, 11 N. Y. 102, 114.

We have not adverted to the charges in the bill which in substance aver that the trustees have arrogated to themselves municipal functions and established police and health regulations over the territory included within the lands of the corporation. It does not appear from the bill that any specific wrong or injury to the complainant has resulted from these acts.

We find nothing in the bill which entitled the complainant to equitable relief, and are of the opinion that the court below properly dismissed the bill.

The decree is affirmed, with costs.

THOMSON-HOUSTON ELECTRIC CO. v. OHIO BRASS CO. et al.

(Circuit Court, D. Massachusetts. April 27, 1904.)

No. 1,236.

1. PATENTS—INVENTION—TROLLEY CROSSINGS AND SWITCHES.

The Van Depoele patents, No. 393,278 and No. 396,313, both relating to crossings or switches for overhead electric conductors, were not anticipated or rendered void for lack of invention by the fact that railroad switches and crossings previously in use were somewhat similar in construction and principles of operation, the adaptation of such principles to an under-running trolley system, and the construction of mechanism therefor, requiring more than mere mechanical skill; nor is there anything anticipatory in prior patents for store-service systems. Claims 4, 5, and 6 of the former patent, and 1, 2, and 3 of the latter, also held infringed.

2. SAME—PRIOR ART—PUBLICITY.

An application for a patent filed prior to a patent in suit can have weight as an anticipation only if there has been some actual use of the invention, so that there are elements of publicity; the application itself not being sufficient to make the invention a part of the prior art.

3. SAME—SEPARATE PATENTS FOR VARIATIONS OF SAME STRUCTURE.

A modification of the device of a patent to adapt it to different situations and wider use may be made the subject of a second patent, where it involves invention, although both inventions may have been made at the same time.

In Equity.

Thomas J. Johnston, for complainant.

Edmund Wetmore and Macleod, Calver & Randall, for defendants.

HALE, District Judge. This suit in equity is for infringement of claims 4, 5, and 6 of letters patent No. 393,278, dated November 20, 1888, to Charles J. Van Depoele, for crossing or switch for overhead electric conductors; also for infringement of claims 1, 2, and 3 of letters patent No. 396,313, dated January 15, 1889, to the said Charles J. Van Depoele, for adjustable crossing and switch for overhead conductors.

Claims 4, 5, and 6 of patent No. 393,278 are as follows:

"(4) A crossing or switch for electric conductors, comprising arms connected with and radiating from a plate or surface in electrical connection with said arms, and a conductor attached to each arm, the extremity of an entering conductor being located opposite to the continuation of said conductor leaving the crossing, substantially as described.

"(5) A crossing or switch for electric conductors, comprising arms connected with and radiating from a plate or surface in electrical connection with said arms, a conductor attached to each arm, the extremity of an entering conductor being located opposite to the continuation of said conductor leaving the crossing, and a projection or flanges upon the plate to prevent lateral displacement of the trolley wheel, substantially as described.

"(6) A crossing or switch for electric conductors, comprising arms connected with and radiating from a centrally located plate or surface in electrical connection with said arms, a conductor attached to each arm, the extremity of an entering conductor being located opposite to the continuation of said conductor leaving the crossing, and a projection upon the central plate arranged to engage the contact device to prevent lateral displacement there-

of when passing upon the plate between the ends of the conductors, substantially as described."

Claims 1, 2, and 3 of patent No. 396,313 are as follows:

"(1) A crossing or switch for suspended electric conductors, comprising two or more adjustably connected members adapted for attachment to the respective conductors, substantially as described.

"(2) A crossing or switch for suspended electric conductors, comprising two or more adjustably connected members and electric conductors secured to the said members, substantially as described.

"(3) A crossing or switch for electric conductors, comprising a contact or surface, members connected, in adjustable relation thereto and extending from the surface, and ribs or extensions upon the members to which the conductors are attached, substantially as described."

The defenses in the case are that the patents involve no invention, that they have been anticipated, and that they have not been infringed. The specification of the first patent states:

"My invention relates to improvements in switches for suspended electric conductors. My improved switches are also applicable to other uses, and may be employed in connection with electric conductors otherwise placed; but, for illustration, I have shown them applied to aerial lines only."

In further describing the arrangement, construction, and operation of his said invention, the patentee describes only suspended or overhead electric conductors.

The use of these patents is stated by the complainant to be in connection with the Van Depoele electric railway system, which consists of an underrunning, upwardly pressed trolley, in combination with a line-wire conductor hung from above, so as to co-operate with the trolley in supplying current to the moving vehicle on the track below.

Claims 1, 2, and 3 of the second patent in suit add the adjustable feature to the crossing described in the claims at issue of the first patent. It is impossible to use a right-angled crossing at an acute-angled intersection. Such attempted use would throw a trolley off the track. Adjustability of the arms or ribs is required to make the first patent adaptable to all situations. This feature is the only matter brought before the court by the second patent.

The defenses of anticipation and of no invention are based upon the claim that the principle of the invention is involved in patents relating to railroad frogs and crossings, car replacers, and store-service apparatus, as well as to certain overrunning electric railway trolleys. In the unpatented art, defendant claims also the prior use in 1888 of a switch at Harrisburg, Pa.

On inquiry into the state of public knowledge in the art at the date of these patents, we find that the case does not show any prior structure embracing a crossing for an underrunning trolley. It is, however, claimed that certain patents for railroad frogs embody a principle which may be applied to such crossing, and that they render the patents in suit void for want of invention. Reference is made to two patents showing a construction of railroad frogs where the rails of one track cross the rails of another track. These frog patents disclose methods by which the wheel of the car is engaged with the rail in the manner similar to the method by which the trolley passes from one arm to the other of the contact plate. They present some sugges-

tions for, and similarities to, the construction of the crossing patents in suit. Can they be regarded as a proper and controlling reference in the art involved in these patents? Or do the patents in the under-running trolley system present a new use and a new result, different from anything shown us relating to railroad crossings?

In *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275, the Supreme Court has settled the principle relating to the transfer of devices from one art to another. Mr. Justice Brown in that case says:

"As a result of the authorities upon this subject, it may be said that, if the new use be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use; but, if the relations between them be remote, and especially if the use of the old device produce a new result, it may at least involve a use of the inventive faculty. * * * Indeed, it often requires as acute a perception of the relation between cause and effect, and as much of the peculiar inventive genius which is characteristic of great inventors, to grasp at the idea that a device used in one art may be made available in another, as would be necessary to create the device *de novo*."

He applies the following test:

"What alterations were necessary to adapt the device to this new use, and what was the value of such adaptation, and what value has such adaptation been to the new industry?"

This leading case of the Supreme Court is discussed suggestively and forcibly by Judge Coxe in *Electric Vehicle Company v. Winton Motor Carriage Company* (C. C.) 104 Fed. 814. In *Guaranty Trust Company v. New Haven Gaslight Company* (C. C.) 39 Fed. 268, Judge Wallace says:

"The fact that the older organizations which it is now claimed were susceptible of being modified by mere mechanical skill into the apparatus of the patent remained without any modification until the patentee made it, and his improvement, when made, was so useful and valuable as to commend itself at once to those skilled in the art to which it relates, is sufficient to resolve any doubt whether the improvement embodies invention in favor of the patent."

The test which the English authorities apply is that, when there is an application of an old invention to a new purpose, such application is regarded as patentable, if there is some novelty in the method of using it. Those authorities go to the extent of holding that a patent may be granted for applying an old machine to an analogous purpose if the result is a "new machine," although that machine may contain old and well-known mechanical appliances. *Edmunds on Patents*, p. 44, and cases cited. In the Second Circuit, in *Thomson-Houston Electric Co. v. Elmira & H. Railway Company*, 71 Fed. 400, 18 C. C. A. 145, the court discussed briefly the question whether it would involve invention to invert the track frog and unite it with electrical conductors in an overhead crossing, but did not find it necessary to decide the question. In speaking of a switch plate very similar to the contact plate of the patents before us, the court said:

"The switch plate of the patents is peculiarly adapted for use with a light, flexible conductor. * * * The ordinary track frog, as a structural device, has only a remote resemblance to it. The suggestion that it could be utilized

in an overhead line-wire junction would seem ludicrous, and it could only be done by denuding it of its most conspicuous characteristics."

The court finds some valuable suggestion in the above expression of Judge Wallace. We also find instruction of value in the cases cited and quoted, and in the English authorities to which we have referred in the text citation. From all the instruction which we can derive from the cases, and from a careful study of the exhibits and models, we have no hesitation in concluding that these patents in the underrunning trolley system present a new result, and practically what the English authorities call a "new machine." It seems clear to the court that it required more than mere mechanical skill to reorganize and invert the ordinary frogs and switches of a railroad track, and apply their principles to the use of suspended conductors in an electric railway system. Such reorganization and application do not create what the Supreme Court calls a "double use." Assuming that the patentee's attention was called to railroad frogs upon surface tracks, we believe that it involved invention to transfer such use to the overhead line-wire as used in the underrunning trolley system. Even assuming that there was mere transference of uses, such transference, with the necessary adaptation, involves more than the act of the mechanic, and should be protected by the court. As to the value of such adaptation, the testimony clearly indicates that the underrunning trolley and the suspended conductor have taken their place in nearly all the electric railway mileage of the country. The great use to which these patents have been put should have some weight with the court in resolving any doubt that might exist as to whether the inventive faculty has been employed in the matter of adapting old uses to new results.

The defendants also refer to the car replacer patents, and urge that they are important, especially in relation to the adjustable features of the second patent. It appears from the exhibit and model before us that the car replacer is a track-frog having one part adjustable, so that the wheel of a car which is off the track may be brought up to ride over the rail, and thus be placed upon the track, and that it is very little more than an adjustable switch, so arranged as to put a derailed car back upon the track. It is well suggested by the complainant that, if this may be differentiated from a railroad frog, then the devices of the patents at bar may be held to be patentably different from the railroad frog as well as from the car replacer.

The cash carrier patents are also referred to by the defendant. These patents bring before us double-track store-service constructions, in which a light car is used to carry cash from one part of a store to another. They do not seem to us to show anything which meets the description in the claims of the patents in suit. There is no single wheel with any device for preserving the alignment of the wheel traveling upon one conductor in passing across any intermediate gap to another. There seems to be nothing to suggest the method of crossing the contact plate. In the cash carrier system, there is no problem analogous to that of forcing the trolley to remain in contact with the trolley wire while the car pursues its own course, guided by another track. Certain patents for an overrunning trolley are also cited as af-

fecting the validity of the patents in suit, but they present no method of crossing which suggests the method of the inventions before us in this case.

Other patents of the patentee are also urged as references. Upon examination of these patents, we find that none of them can be sustained as vital in the matter of anticipation, or as affecting the validity of the patents before us. Nearly all of them are later patents which cannot form a valid defense to the earlier patents.

References are also made to certain patents which are subsequent to those in suit, although their applications appear to have been filed prior to the issue of these patents. The study of the prior art in a patent case is necessary in order to prevent the unlawful appropriation of the invention of another, when that invention had become public. An application prior to the patent in suit can have weight only if there has been some actual use of the invention, so that there may be elements of publicity. Such an application cannot be said to be a part of the prior art unless this element of publicity is present.

In the unpatented art, the defendants cite the Wetmore switch, at Harrisburg, in 1888, as involving the principle of guidance by the groove of the trolley wheel. They insist that the switch is the kind of device shown in the cross-over of the patents in suit. The proof of the use of this switch is rather vague; but if we assume that its use is proved, there appears to us to be an entire want of identity of function with the crossing claimed in these patents. As a matter of fact, it was never modified into a crossing. The patents speak interchangeably of a switch and crossing. This interchangeability is liable to be misleading. A switch presents a distinct and different element from that of a crossing. The purpose of a switch is to direct a car from the course. The purpose of a crossing is to keep it on its course. There is an obvious anomaly in making a switch in the prior art a reference for a crossing, but, if there is any element in the switch which may properly be the subject of such reference, the same element was present in a switch which the complainant is shown to have used at Montgomery, Ala., at a time previous to the use of the Wetmore switch.

After a full examination of the prior patented art, and of the condition of public knowledge in the unpatented art, we must conclude that the evidence before us shows an arrangement and adaptation of mechanical appliances in the patents in suit, some of which were old, but which, taken together, produced a new and useful result by a method different from any old method. In coming to this conclusion, we follow Judge Colt in *Tannage Company v. Donallan* (C. C.) 93 Fed. 912, where he decides that some weight should be given to the fact that a patent has proved successful, and has made a great impression upon the art in which it has its field of operation. The court should properly give some regard to the fact that an invention has met with public acceptance, and has proved a practical and desirable improvement. In *Boyer v. Keller Tool Co.* (C. C. A.) 127 Fed. 130, a case just decided, the court gives great weight to this consideration. Judge Archbald says:

"Convinced, as we are, that the plaintiff has supplied features that have brought success, where others who had preceded him failed, we are not in-

clined to scan narrowly the means by which it has been obtained. The mechanical elements combined are, no doubt, old, and so, to a certain extent, may be the result accomplished. But nowhere do we find the same combination employed to produce it, and the efficiency attained is so much in advance of that which had gone before as of itself to suggest, if it does not prove, the exercise of inventive skill."

The following authorities are important, touching this element of the case: *Palmer v. Johnston* (C. C.) 34 Fed. 336; *Smith v. Vulcanite Co.*, 93 U. S. 436, 23 L. Ed. 952; *Union Biscuit Co. v. Peters* (C. C. A.) 125 Fed. 601; *Guaranty Trust Co. v. New Haven Gaslight Co.* (C. C.) 39 Fed. 268; *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586; *Taylor v. Sawyer Spindle Co.*, 75 Fed. 301, 22 C. C. A. 203; *National Brake Beam Co. v. Interchangeable Brake Beam Co.*, 106 Fed. 693, 45 C. C. A. 544; *Stevenson v. McFassell*, 90 Fed. 707, 33 C. C. A. 249.

In reference to the second patent, it is urged by the defendants that the adjustable feature to which it relates does not show patentability. To adapt the first patent to all situations seems to us rather more than a mere mechanical problem. Even if the element of patentability in the second patent should be held to be broadly a part of the inventive conception presented by the first patent, it seems to us to present a patentable improvement and adaptation of the device to places where such device could not be used under the first patent. Where there are two inventions in the same structure, the law does not require them both to be claimed in the same patent. In *Thomson-Houston Electric Co. v. Elmira & H. Ry. Co.*, cited *supra*, Judge Wallace says:

"While two or more inventions residing in the same combination or structure may be covered by a corresponding number of claims in a single patent, the law does not require them all to be claimed in the same patent, and the inventions may, at the option of the patentee, be secured by different patents. It is quite immaterial that both inventions originate at the same time, and from a single conception."

We think that the invention of the second patent discloses a patentable element, which should be recognized by the court.

Have these patents been infringed? The learned counsel for the defense argues with great force and ability that defendants' device does not infringe, because it presents a case of the electric wires passing uncut above the contact plate, whereas the claim of the patent alleged to be infringed assumes that the wires, in passing below the contact plate, are cut. It contains the following limitation: "The extremity of the entering conductor being located opposite to the continuation of such conductor leaving the crossing." On examination of the specification, we find that a description of the arrangement, construction, and operation of the invention clearly shows that the purpose of the cutting of the wire is to provide for the passage of the trolley wheel across the interrupted trolley line without interference. The problem before the mind of the patentee was to provide "for the passage of the trolley wheel without any change in its horizontal plane, so that no jerking, jumping, and consequent sparking will take place." This is done in the manner shown in the claim; but the patentee, in his specification, refers to the method of arranging the main conductor to

cross the upper side of the plate, instead of being cut, and illustrates this method by drawings. This manner of passage is clearly an equivalent of the way named in the claim. The same result is obtained by a method not functionally different.

The doctrine of equivalents has been fully stated by the Court of Appeals of this circuit in *Reece v. Globe Company*, 61 Fed. 958, 10 C. C. A. 194. In that case a form of machine not mentioned in the specification was held to be an equivalent of that set forth in the specification and claims. In the case at bar the patentee has mentioned a form or method which is clearly an equivalent of the method stated in the claim. If he had not mentioned it in the specification, he would not be debarred from claiming it as an equivalent. By mentioning it he has not sought to establish another invention, and so cannot be held to have abandoned it. He clearly ought not to be held to be in any worse position than he would have been if he had not mentioned it. In *Boyer v. Keller Tool Co.*, a case just decided, cited *supra*, the doctrine of equivalents is stated with great clearness by the court. The case presents facts which make the decision of value in the case at bar. In speaking of the throttle valve which was an element of a combination in question in that case, the court said:

"This they have located the same as the plaintiff, in the grasping portion of the handle, and it operates equivalently to control the admission of fluid pressure into and through the duct. So far as claims 42 to 45 are concerned, no particular form of construction or mode of operation is specified in them, and none is, therefore, to be imposed. The combination is simply of a throttle valve in the handle, in conjunction with a supply duct running through it, and that is all that is required to fulfill their terms. It is true that the inventor, in his specifications, describes a particular kind of valve, the same as shown in his drawings and in the diagram above; and, while a device of that general character may be called for, he expressly declares, as we have already seen, that he does not intend to limit himself with regard to the different parts of his invention—a reservation sufficient, as it would seem, to overcome the customary formula, 'substantially as described,' at the end of the claim. * * * The only possible distinction to be made is that in the one machine (the defendant's) the spring is attached to the plunger, which opens and closes the duct, while in the other (the plaintiff's) it is attached directly to the lever; but this is not material. In each construction the spring serves to hold both the valve and the lever in normal position, and both, against the resistance of the spring, are moved from normal position to open the valve. The same result is therefore accomplished by substantially the same means, acting in substantially the same way, which is sufficient."

To the same effect, we refer also to another case just decided. *Diamond Match Co. v. Ruby Match Co.* (C. C.) 127 Fed. 345.

In *Dowagiac Mfg. Co. v. Minnesota Moline Plow Company et al.*, 118 Fed. 136, 55 C. C. A. 86, the court held that by changing the form of complainant's combination, and not essentially varying the principle or mode of operation, defendant cannot escape infringement.

In the case at bar, if the construction with reference to the wires running over the plate should be held to be an improvement on complainant's device, this fact of improvement does not permit the defendants to appropriate the invention of the patents in suit. In *Electric Smelting Co. v. Reduction Co.* (C. C.) 125 Fed. 926, the court says:

"He [the defendant] does not acquire the right to use the Bradley process simply because he has improved that process. He is entitled to enjoy what

is his, but in so doing he cannot appropriate the property of another. * * * If the inventor produces a new and useful result, he does not lose his reward because he or some one else subsequently renders it more useful."

Taking the whole case together, in the light of the decisions under the patent law, we are of the opinion that the defendants have infringed.

The evidence as to the actual sale of the crossing of the defendants is very slight, but there is some evidence of such sale, and it is not denied by any witness. The device sold did not include the electric conductors, but it was clearly adapted to be used with them, although they had not been attached. The case seems to us to present an instance of contributory infringement, like that in *Bishop & Babcock Co. v. Levine* (C. C.) 119 Fed. 363, 365, where Judge Lacombe, for the Court of Appeals of the Second Circuit, says:

"As it leaves defendant's hands, the cabinet is not the completed structure of the patent. It is made and sold, however, adapted to receive pipes and faucets so as to become an operative apparatus. Its parts are so arranged that, when these are inserted, it will be such a structure as the patent describes and claims. Without this adaptability it could not be sold at all, for it would have no commercial utility. That the defendant knows this, and that he makes and sells his 'shell' with the intention that it shall thus be fitted with pipes and faucets, seems entirely clear. He is a contributory infringer, under all the authorities."

In the case at bar there is certainly as much reason as in the case which we have just cited to hold the defendants as contributory infringers. Taking the whole case, we come to the conclusion that both patents are valid, and have been infringed by the defendants.

A decree is to be entered for complainant for an injunction and for an accounting.

E. REGENSBURG & SONS v. AMERICAN EXCH. CIGAR CO.

(Circuit Court, S. D. New York. May 12, 1904.)

1. PATENTS—VALIDITY—DETERMINING QUESTION ON DEMURRER.

A patent will not be adjudged void on demurrer, where the precise points raised have been previously decided in other suits in the district in favor of the complainant.

In Equity. Suit for infringement of patent. On demurrer to bill. Briesen & Knauth, for complainant.
Holm & Smith, for defendant.

HOLT, District Judge. If the points raised by this demurrer had never been passed upon before, I should consider it a serious question whether the patent was not void for lack of invention. *Conley v. Marum* (C. C.) 83 Fed. 309. But, as the precise questions have been decided on demurrer by Judge Wallace in suits brought by these complainants against other cigar companies, I think that his decision should be followed in this case.

Demurrer overruled, with leave to defendant to answer within 20 days on payment of costs.

WESTINGHOUSE ELECTRIC & MFG. CO. v. AMERICAN TRANSFORMER CO.

(Circuit Court, D. New Jersey. May 10, 1904.)

1. PATENTS—ELECTRICAL CONVERTERS—INFRINGEMENT.

Claim 4 of letters patent of the United States No. 366,362, dated July 12, 1887, issued to George Westinghouse, Jr. for "improvements in electrical converters", sustained, and *held* not infringed.

2. SAME.

The two rectangular coil openings shown in the drawings and description of the converter are not "open spaces in its core" within the meaning of claim 4.

(Syllabus by the Court.)

In Equity.

See 121 Fed. 560.

Drury W. Cooper and Thos. B. Kerr, for complainant.

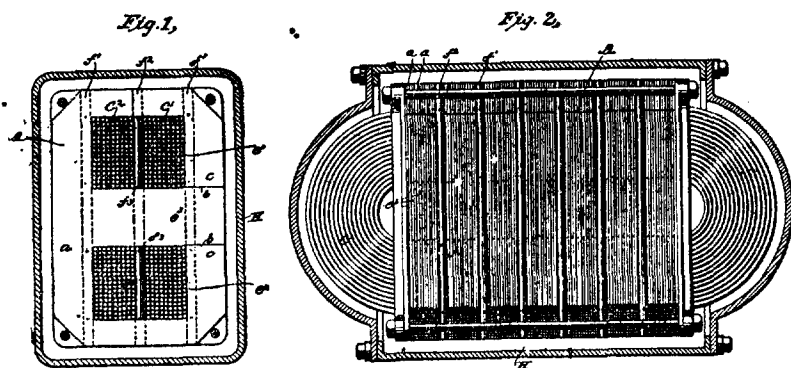
C. V. Edwards, for defendant.

BRADFORD, District Judge. The Westinghouse Electric and Manufacturing Company has brought its bill against the American Transformer Company, charging infringement of letters patent of the United States No. 366,362, dated July 12, 1887, issued to George Westinghouse, Jr., and by him assigned to and now held and owned by the complainant. The patent relates to improvements in electrical converters, now usually called transformers. Heat, representing loss or waste, or, in a strict sense, conversion, of electric energy, is generated or developed in the coils and core of a transformer when in use. In the coils, it is due to the resistance of the copper to the electric current carried by them, and, in the core, it is due to eddy currents, and hysteresis attendant upon the reversals of polarity of the magnetic flux in the core, or, in other words, the magnetization and demagnetization of the core in rapid succession. Heat increases with the size and capacity of the transformer, lessening its efficiency by reducing the conductivity of the coils and augmenting the hysteretic losses in the core, and, if excessive, impairs not only the efficiency but the durability and safety of the apparatus. Hence, it is important that the temperature of the coils and core should not be allowed to rise materially above the proper point, which has been stated to be about 75° centigrade. It appears that where the capacity of the transformer is small, not exceeding five or ten kilowatts, no special provision is necessary in order to get rid of an excess of heat, as the coils and core will remain sufficiently cool through radiation into the surrounding air. Where, however, the transformer has a capacity exceeding ten kilowatts it is necessary to make special provision to avoid an undue increase in temperature. For this purpose oil, or possibly some other suitable liquid, has been used. The transformer is placed in an inclosing metal case filled with oil. When so immersed any excess of heat, within certain limits determined by the size and capacity of the transformer, is dissipated by being carried through conduction and convection from the coils and core to

the inclosing-case and thence by radiation. For present purposes it is unimportant, where the heat is beyond those limits, to consider methods by which the proper temperature best may be maintained. The patent in suit covers particular means for preventing the overheating of transformers. The patentee thus states the general nature and object of his invention:

"The invention relates to the construction of a class of apparatus employed for transforming alternating or intermittent electric currents of any required character into currents differing therefrom in certain characteristics. Such apparatus are usually termed 'induction coils' or 'converters.' The object of this invention is to provide a simple and efficient converter which will not become overheated when employed for a long time in transforming currents of high electro-motive force, and which will be thoroughly ventilated."

The drawings of the patent represent respectively a cross section and a longitudinal section of a converter or transformer. They are as follows:



With respect to these drawings and in describing the invention the patentee says:

"Referring to the figures, A represents the core of the converter, and C¹ and C² the respective coils. The core is preferably composed of thin plates of soft iron a a, separated individually or in pairs from each other by thin sheets of paper or other insulating material. This insulating material is preferably applied to one surface of the plates by being glued or pasted thereto, and these surfaces may lie all in the same direction, thus separating the plates individually, or alternate plates may have their covered surfaces in one direction and the intervening plates have their covered faces in the opposite direction, thus magnetically separating the plates in pairs. The plates are preferably constructed with two rectangular openings e¹ and e², through which the wires pass. For convenience in inserting the coils, or rather in applying the plates to the coils after the latter have been wound, a cut is made from each opening, as shown at b b. By bending the ends c c upward the plates may then be thrust into position, and the ends c c then close about the coils. The tongues e³ of succeeding plates are preferably inserted from opposite sides. I do not, however, herein broadly claim an induction-coil having its core constructed of thin plates formed in the manner just described; but such invention is claimed in an application of even date herewith, filed by Albert Schmid. Each group of—say five or six—plates thus applied is preferably separated from the succeeding group by air-spaces. These may be produced by passing tubes f¹ f¹, which may be of

soft iron or other metal, or of vulcanized fiber, along the lengths of the plates. It may be sufficient in other instances to block the groups of plates apart at intervals instead of extending the tubes the entire length. Preferably, also, the primary and secondary coils C¹ C² are separated from each other in a similar manner. In this instance blocks or tubes f², of non-conducting material, are used. The tubes may be perforated, as shown at f³ f³. Where the converter is to be used in open air, the tubes f¹ and f² would permit a free circulation of air, and thus aid in keeping the converter cool. It may be preferred in some instances to surround the converter with some oil or paraffine or other suitable material, which will assist in preserving insulation and will not be injured by heating. This material when in a liquid form circulates through the tubes and the intervening spaces of the coils and plates, and preserves the insulation, excludes the moisture and cools the converter. The entire converter may be sealed into an inclosing-case, H, which may or may not contain a non-conducting fluid or a gas."

While the patent in suit contains five claims the charge of infringement has been restricted to claim 4. It is as follows:

"4. The combination, substantially as described, of an electric converter constructed with open spaces in its core, an inclosing-case, and a non-conducting fluid or gas in said case adapted to circulate through said spaces and about the converter."

This claim has been the subject of litigation elsewhere and adjudged valid. It was upheld by Judge Hazel in *Westinghouse Electric & Mfg. Co. v. Union Carbide Co.* (C. C.) 112 Fed. 417, and, on appeal, by the court of appeals for the second circuit, 117 Fed. 495, 55 C. C. A. 230. It was also recognized as valid by Judge Adams in *Westinghouse Electric & Mfg. Co. v. Wagner Electric Mfg. Co.*, 129 Fed. 604. Its validity within the limits of a proper construction is admitted here; the whole contention at the hearing being directed to the question of infringement. Most, if not all, of the elements of the combination of claim 4 were old in the art, but the combination itself was new. It has proved of great utility and must, in my judgment, be accorded patentable novelty.

It appears that after the complainant became the owner of the patent in suit and prior to the filing of the bill the defendant manufactured and sold a number of transformers, designed to be used in cases filled with oil, and having space blocks between their core plates. Their construction is shown by complainant's exhibit A. They admittedly infringed claim 4. Upon the bringing of the patent in suit to the attention of the defendant, however, the space blocks were removed from between the core plates, and the spaces in which they had been inserted were filled. And the complainant by stipulation of record on the second day on which evidence was adduced in this case released the defendant from all claims for damages or profits arising from the above mentioned infringement. It further appears that the defendant has not since that infringement manufactured, sold or used any transformer similar to that shown in exhibit A, and that it neither threatens nor intends such manufacture, sale or use. The construction so admitted to infringe had parallel primary and secondary coils, and a core composed of thin plates of soft iron arranged in groups separated from each other by blocks, whereby spaces between the groups were provided; the coils and core being inclosed in a metal case containing oil, which, when the transformer was in

use, circulated through the open spaces in the laminated core. The construction now complained of differs from that shown and described in the patent in suit, and from that just referred to, in that the laminæ or plates of the core are not separated into groups, with intervening spaces through which oil, paraffine or other suitable liquid or fluid may circulate. The elements of the combination of claim 4 are, first, an electric converter; second, open spaces in its core; third, an inclosing-case; and, fourth, a non-conducting fluid or gas in said case adapted to circulate through said spaces and about the converter. Has the defendant's transformer "open spaces in its core" in the same sense in which those words are employed in claim 4? If it has not, it lacks an essential element, and the charge of infringement with respect to it must fall. It has a solid core, unless, indeed, the two rectangular openings for the coils properly can be considered "open spaces in its core." But spaces between the core as a whole and the coils should not be confounded with spaces in the core. The core of the transformer is so constructed as to leave the rectangular openings for the reception or accommodation of the coils. It is made of such form as to surround them. Were it not for coil openings the plates could not constitute the core of a transformer of the general type shown in the patent in suit. The core is perfect and complete irrespective of the presence or absence of coils in its openings. In its entirety and by its necessary construction a core of the type of transformer under consideration has coil openings. Neither a coil opening nor any part of it can legitimately be held to be an open space in the core within the meaning of claim 4. I find nothing in the claims, description or drawings of the patent in suit at variance with this conclusion, but, on the contrary, much to fortify it. Nowhere in the drawings or description is a coil opening, in whole or in part, designated or referred to as a space in the core. To ascertain the true meaning of the words "open spaces in its core" as used in claim 4 regard must be had to the general character of the invention. Its object was to prevent the overheating of the coils and core, and Westinghouse proposed to accomplish it by providing an intervening space between the primary and secondary coils, and by opening up spaces in the core itself in such manner as to expose to the oil or other surrounding medium a heat-dissipating surface of large area. The open spaces in the core thus designed were spaces which would not exist, were it not for the desired cooling of the core. The only open spaces in the core shown in the description or drawings are those produced by the insertion of tubes or blocks between groups of core plates. The patentee states that the drawings represent longitudinal and cross-sections of "a converter involving the features of the invention." Tubes are disclosed in the drawings, but not blocks. Blocks, however, are treated as the equivalent of tubes, for the patentee, referring to the spaces between the groups of plates, says:

"These may be produced by passing tubes f_1 f_1 , which may be of soft iron or other metal, or of vulcanized fiber, along the lengths of the plates. It may be sufficient in other instances to block the groups of plates apart at intervals instead of extending the tubes the entire length."

It is further stated:

"Each group of—say five or six—plates thus applied is preferably separated from the succeeding group by air spaces."

While it is said that the groups are "preferably separated" the fact remains that the only open spaces in the core, described or disclosed, are those produced by separating or dividing its laminæ into groups. The patentee further says:

"Preferably, also, the primary and secondary coils C¹ C² are separated from each other in a similar manner."

The statement that the surrounding medium "when in a liquid form circulates through the tubes and the intervening spaces of the coils and plates" manifestly refers, on the one hand, to the spaces intervening between the primary and secondary coils which "are separated from each other in a similar manner," and, on the other, to the spaces intervening between separated groups of core plates, but not to spaces between the core as a whole and the coils. Be this as it may, however, the "spaces" of claim 4 are "open spaces in its core." The "open space" of claim 1 is that intervening between "parallel primary and secondary coils." The combination of claim 2 has as its elements, first, primary and secondary coils, second, a core composed of laminæ of soft iron arranged in groups and, third, "open, spaces" separating said groups. This claim, aside from the coils, specifically refers to the construction of the core, but lacks the elements of "an inclosing case" and "a non-conducting fluid or gas in said case adapted to circulate through said spaces and about the converter," included in the combination of claim 4. The elements of the combination of claim 3 are, first, a core composed of soft iron plates arranged in groups and, second, "open tubes" intervening. This claim specifically refers to a particular construction of the core, but, like claim 2, lacks two of the elements of claim 4. Claim 5 includes the following elements: first, primary and secondary coils, second, a core composed of magnetically separated laminæ of soft iron arranged in groups, third, "air spaces" separating the different groups from each other and, fourth, the arrangement of the laminæ of the several groups in different parallel planes. This claim also specifically refers to a particular construction of the core, but, like claims 2 and 3, lacks the same two elements of claim 4. In the combination of claim 4 "open spaces in its core" as well as an "inclosing-case" and a "non-conducting fluid or gas" therein, are "substantially as described." No doctrine of equivalency can dispense with the open spaces in the core of the transformer, for they are a necessary element of the combination. Without them the claim cannot be satisfied. Open spaces might be produced in the core other than those specifically set forth in the drawings or description, which would be the equivalent of the latter. The core itself might, for instance, be cut into in various directions in such manner as to expose what may be termed internal heat-dissipating surfaces to the oil or other medium surrounding the transformer, and in such case, the other requirements of the combination being satisfied, infringement could be found. But the essence of the first element of the claim insisted on

is that the open spaces of the transformer must be "in its core." The defendant's transformer, touching which the charge of infringement is now pressed, has no "open spaces in its core" within the meaning of claim 4, and, therefore, the charge of infringement cannot be sustained as to it. This conclusion accords not only with the weight of the evidence, in my judgment, but with judicial decisions involving the consideration of the essential features of claim 4 now in suit. The witness Jenks, one of the complainant's experts here, testified for the complainant in *Westinghouse Electric & Mfg. Co. v. Union Carbide Co.*, supra. The defendant in that case used a transformer having the "open spaces in its core" set forth in the description of the patent in suit. It was admitted that, if claim 4 was valid, it had been infringed. Jenks in his testimony in that case, among other things, said:

"No great step was taken in improvement of their design and protection until the originality of Mr. Westinghouse attacked the problem of enlarging the size of converters and adapting them to extreme conditions of encompassment, without increasing the dangers which accompanied their use. His grasp of the subject, and the skill which has prompted so many of his inventions, indicated to him that the mechanism of the converter must be modified by spreading out and dividing into sections its iron core, and thus increasing the surface from which a dissipation of the heat of the core and the coil might be carried on. * * * The patentee proposed to construct the core of this static converter of thin plates or laminae, such as were well known to the electric art, and to divide these plates into groups, separated from each other by air spaces; also to similarly separate the primary and secondary coils of the converters, also to encase these coils and core, and if necessary seal the case and imprison therein a non-conducting fluid or gas, impliedly other than air, so that a free circulation of this fluid or gas among the coils or groups of plates and between them and the outer case, would be secured. * * * Those skilled in the transformer art turned to entirely different means when it became necessary to dissipate the heat which those transformers developed. Those means included the subdivision of the stationary core, and the combination of such subdivided core with a non-conducting fluid or gas and an enclosing case."

These views are clear and satisfactory. It is difficult, if not impossible, to reconcile them with the opinions expressed by the same witness in this suit. By agreement of counsel in open court the record in *Westinghouse Electric & Mfg. Co. v. Union Carbide Co.* was submitted for consideration by this court. Judge Hazel, in delivering the opinion of the circuit court in that case, said:

"The core of the Westinghouse patent is composed of thin plates of soft iron, in groups having sectional openings, and separated by thin sheets of paper or other insulating material. The insulating material is so arranged as to magnetically separate the plates in pairs. The method of constructing an induction coil or transformer having a core of thin plates is disclaimed by the patentee. It is not claimed to be new in the art to arrange a transformer so as to accomplish a means of ventilation of the parts, and thereby prevent a waste of energy through heating. The claim is that by the arrangement of various known elements, and by the introduction of new elements, to wit, dividing the iron into sections, and separating the coils, thereby increasing the surface over which heat dissipation in the core and coils may be carried on, aided by oil as an insulating material, and adding an inclosing case, a new combination, producing a new and beneficial result not before attained, is contributed to the art. * * * The Westinghouse patent stated that the plates are preferably separated, and that it may be preferred in some instances to surround the transformer with oil

or paraffin or other suitable material. It is stated by the patent that 'the converter or transformer may be sealed in an inclosing case, and may or may not contain a nonconducting fluid or gas.' It is insisted that these are matters of preference or recommendation only and do not constitute essential features of the patent, but this, however, must be read with claim 4 of the patent. It is quite true that a feature which is mentioned only by way of recommendation in describing an invention must usually be considered as a subordinate, and not an essential, part of the patent. * * * But the claim upon which the complainant relies still clearly indicates the intention of the patentee to claim as essential the features described by the specifications as preferably employed."

Judge Townsend, in delivering the opinion of the circuit court of appeals in that case, said:

"The patentee primarily proposed to obviate the serious objection of loss of energy by overheating involved in such transformation by separating the plates of the core and the primary and secondary coils from each other, so as to permit of ventilation. This construction adapted for ventilating purposes is covered by the other claims not in suit, and is not involved herein. * * * Complainant contends that this claim" (claim 4) "covers a transformer whose surfaces are cooled by means of oil circulating through said open spaces in said core and confined in said inclosing case. * * * This claim covers such an inclosing case as will confine the nonconducting fluid, and such open spaces in the core as will permit the circulation of the liquid through them. * * * The patentee seems to be entitled to claim the means by which the external and internal surfaces of the heat-producing parts of a converter were cooled by such an arrangement and separation of parts as would permit the circulation about them of oil, and the means for the retention of said oil within and about said surfaces, whereby the heat from the oil radiated to the surrounding air."

Westinghouse Electric & Mfg. Co. v. Wagner Mfg. Co., 129 Fed. 604, involved the question of infringement of claim 4 of the patent in suit by means of a construction substantially identical with that of the defendant here; there being no separation or division of the core of the transformer by the insertion of tubes or blocks, or otherwise, nor any spaces formed by cutting into the core itself. Judge Adams, among other things, said:

"These numerous parallel open spaces so shown in the drawings and model, and any other open spaces, whether parallel or not, cutting through the body of the surrounding core and extending into the interior opening containing the coils, are in my opinion the 'open spaces in its core' contemplated by claim 4. * * * The invention has for its main purpose only the physical means for effectually securing this circulation of oil. It deals with the core itself and divides it up into groups of plates, each group separate from the other in such way as to make numerous parallel open spaces in the core leading from its outer surface on all its four sides into the interior opening made for the introduction of the coils. This interior opening, called in the patent 'two rectangular openings e¹ and e², through which the wires pass', is not in my opinion 'an open space in its core' within the meaning of claim 4. I adopt the views of Prof. Nipher with respect to this rectangular opening. He says: 'The core is not the core of a transformer or converter until these rectangular openings are made through it.' He says further: 'These openings give character to the core.' 'It is not a core until they exist there.' 'The core is in fact given such a form that it surrounds the coil in a certain sense, and the space so surrounded by the core might be called a coil opening.' The core of a transformer is the iron part of it. It must be so constructed as to permit the introduction of the coils of wire approximately through its center. The wire coil must be put in to make a transformer. I cannot understand how this space left in the inside of the iron for this purpose can be an open space in the core. It might be as well

said that the space left on the outside of the iron, between it and the incasing tank is an open space in the core. The defendant's device has a space between the coils, and has also this rectangular opening for the introduction of the coils into the core, but for the reasons above expressed, these are not 'open spaces in its core' within the meaning of the patent in suit."

It appears by the record in the present case that in *Westinghouse Electric & Mfg. Co. v. Wagner Mfg. Co.*, supra, application was made for a preliminary injunction specifically restraining the further manufacture or sale of the construction ultimately held by Judge Adams not to infringe claim 4. Judge Amidon denied the application for such injunction and in his opinion, not yet reported, among other things, said:

"The defendant's device has no open spaces in its core; the cooling liquid does not circulate through any such spaces. * * * It is manifest from a consideration of the specifications of the Westinghouse patent, that the open spaces in the core are a prominent and distinctive feature of that patent, and that the defendant's device does not contain that element."

Judge Kirkpatrick, in denying a preliminary injunction in this case, 121 Fed. 560, after referring to *Westinghouse Electric & Mfg. Co. v. Union Carbide Co.* and while not passing on the merits, said:

"The construction of the defendant in the case at bar differs from that of the Carbide Company there in suit. * * * The claim of the complainant's patent has been sustained, but it does not appear that the construction there given it was such as is now claimed, or that it would be applicable to the defendant's apparatus."

The apparatus touching which the charge of infringement is controverted is illustrated on pages 4 and 6 of exhibit B. In view of the decisions and for the foregoing reasons, I am satisfied that the bill cannot be sustained as to that construction. The only other type of transformer, manufactured, sold or used by the defendant, of which complaint has been made in this suit, is that illustrated in complainant's exhibit A. Admittedly it infringed claim 4. But the defendant has not at any time since December 1, 1902, manufactured, sold or used any transformer of that type, and was, as before stated, on the second day on which evidence was adduced in this case, namely, February 26, 1903, released from all claims for damages or profits arising from its former acts of infringement with respect to it. And it also appears that the defendant neither threatens nor intends to manufacture, sell or use any transformer of the last-named type. Under these circumstances the bill must be dismissed. There should, however, be an equitable division of the costs, and to that end all the costs of the case which accrued prior to February 27, 1903, should be borne by the defendant; and the residue by the complainant.

Let a decree be prepared in accordance with this opinion.

HUNTINGTON DRY PULVERIZER CO. et al. v. VIRGINIA-CAROLINA
CHEMICAL CO.

(Circuit Court, D. New Jersey. March 12, 1904.)

1. PATENTS—SUIT FOR INFRINGEMENT—JURISDICTION OF EQUITY.

A court of equity has jurisdiction of a suit for infringement of a patent which had not expired when the bill was filed, inasmuch as an injunction might have issued before its expiration, although no preliminary injunction was applied for and the patent expires before a hearing.

2. SAME—CONJOINT USE.

A bill for the infringement of an expired and an unexpired patent states ground for relief in equity, where it alleges that the infringement consists in the use by defendant of a machine which embodies the devices of both patents, so conjoined as to render it practically impossible to apportion the damages and profits resulting from the use of each element of the machine.

3. SAME—MULTIFARIOUSNESS OF BILL.

Such a bill is not multifarious, as joining a legal with an equitable demand, since under its allegations the recovery sought is not separable with respect to the two patents, and a court of equity, having acquired jurisdiction, will grant all appropriate relief in connection with the use of the alleged infringing machine.

4. SAME—LACHES.

A demurrer to a bill for infringement on the ground of laches cannot be sustained, where the only facts to support it appearing from the bill are that the suit was not commenced until a short time before the patent expired and that it had previously been sustained.

In Equity. Suit for infringement of patents. On demurrer to bill.

See 121 Fed. 136.

Frederick S. Duncan, for plaintiff.

Hoke Smith, for defendant.

KIRKPATRICK, District Judge. The bill of complaint in this case is filed by the Huntington Dry Pulverizer Company and Carolina Huntington against the Virginia-Carolina Chemical Company, and relates to the uses of devices embodied in letters patent No. 277,134, granted May 8, 1883, and patent No. 325,804, granted September 8, 1885, and prays, inter alia, for an injunction restraining and enjoining the defendant from making, using, building, or putting in practice, operation, or use any machine or device covered by patent No. 325,804, and asks that the defendant be required to account for and pay to the complainants the profits acquired by it, and the damages suffered by them from defendants' unlawful acts. It appears from the bill of complaint that the patents here in suit have been adjudicated upon in the United States Circuit Court for the

¶ 1. See Patents, vol. 38, Cent. Dig. § 465.

¶ 3. Pleading in patent infringement suits, see note to *Caldwell v. Powell*, 19 C. C. A. 595.

¶ 4. Laches as a defense in patent infringement suit, see notes to *Taylor v. Sawyer Spindle Co.*, 22 C. C. A. 211; *Richardson v. D. M. Osborne & Co.*, 36 C. C. A. 613.

Southern District of New York, and there decreed, in April, 1901, to be valid, and that the inventions patented in and by said letters patent were capable of and were designed for conjoint use in one and the same pulverizing mill, and that they each are conjointly used by the complainants and defendant in a similar single and compact machine. It is further alleged in the bill that the invention of letters patent No. 325,804 is not capable of use, except in connection with and as an added part of the device embodying the invention of letters patent No. 277,134. The bill also alleges that in ascertaining the amount of damages sustained by the complainants, and the amount of profit received by the defendants from their use of grinding mills, infringing both of the aforesaid letters patent, it is necessary to consider the infringing mill so used by the defendant as an entirety, and that it will be impossible, with any degree of accuracy separately to apportion to the different parts of the said single machine the amount of damage sustained by the complainants, and profit made by the defendant by the use of said parts by themselves, and to estimate what damage and profit is attributable to the use of the invention covered by patent No. 277,134, and what to the invention covered by patent No. 325,804. It is pointed out in the complainants' argument that, owing to the difficulty and impossibility of apportioning these damages and profits between the inventions of the two parts sought to be accounted on, and, further, owing to their inseparability as to use, that they must be considered, for the purposes of this suit, as one compact and single machine, and that the unlawful use by the defendant of the devices covered by these patents shall be considered as one continuous tortious act, to the damage of the complainants. The bill also points out that the defendants, though warned to desist, have used pulverizing mills embodying conjointly the principles of operation and the combination of elements described and claimed in the said letters patent. To the bill the defendant enters a demurrer, and asks that the bill be dismissed, upon the ground that the court is without jurisdiction to entertain the bill, that the bill shows no ground for relief in equity, that the bill is multifarious, and that the complainants have been guilty of laches.

It will be observed that the complaint is only in respect to those mills in use by the defendant which make a conjoint use of both patents. The complainants seek relief only in respect to the mills which embody the devices covered by the expired patent, No. 277,134, and the unexpired patent, No. 325,804, where they are so conjointly used in one and the same single compact machine. They do not seek relief on the expired patent, No. 277,134, standing alone. At the time of the filing of the bill one of the patents, No. 325,804, had not expired, and this fact alone, when set up in the bill of complaint, gives this court jurisdiction of matters arising thereunder. It is immaterial that the patent was within a few weeks of expiration at the time of the filing of the bill. This question was considered by the Circuit Court of Appeals in this Third Circuit in the case of *Chinnock v. Paterson*, 112 Fed. 531, 50 C. C. A. 384, and it was held that, inasmuch as an injunction might in that case have

issued within the life of the patent, this court would take jurisdiction. To the same effect is the case of *Ross v. City of Ft. Wayne*, 63 Fed. 466, 11 C. C. A. 288, where the court upheld a bill filed about 2½ months before the expiration of the patent, although no preliminary injunction was applied for. It has been held in *Clark v. Wooster*, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392, and in *Beedle v. Bennett*, 122 U. S. 71, 7 Sup. Ct. 1090, 30 L. Ed. 1074, that if a suit is cognizable in equity at the time the bill is filed, the fact that the patent has expired before final hearing does not oust the court of jurisdiction, and that, if suit be begun in such time that an injunction can be obtained before the expiration of the patent, the court may take jurisdiction and proceed to grant other relief.

Does the bill show ground for relief in equity? Upon this demurrer all the material matters stated in the bill must be taken to be true. As has been said, the bill charges that the infringements complained of consisted of the conjoint use of a single and compact machine, composed of the inventions embodied in both patents in suit, and that it would be practically impossible to apportion in an accounting the amount of damages or profits arising from the different parts of the said compact machine that are covered by the different patents. The bill is in proper form as to allegations and its prayer for relief, and sets up as its ground of complaint the conjoint use of an expired and unexpired patent. This, taken with the fact that the court has jurisdiction and might have issued an injunction against the use of a machine embodying the unexpired patent, is considered sufficient ground on which to grant equitable relief.

It is insisted that the bill is multifarious, and that it seeks to join a legal and an equitable cause of action in the same bill. In *Wilkins Shoe Button Fastener Company v. Webb* (C. C.) 89 Fed. 982, the court thoroughly discusses the objections of multifariousness in joining in a single suit two or more patents which are more or less distinct from each other, but which have, nevertheless, been conjointly used by the defendant. In that case the suit was instituted by a bill seeking relief in equity for the infringement of two patents, and complained of the infringement of both in one bill. A demurrer was filed alleging multifariousness, and the court said:

"If this bill had been confined to the record patents, and after decree another bill should be filed on the first patent, the objection that all damages or causes of action arising out of the same act of the defendant should have been included in the first bill might be fatal."

See *Stark v. Starr*, 94 U. S. 477-485, 24 L. Ed. 276; *The Haytien Republic*, 154 U. S. 118-125, 14 Sup. Ct. 992, 38 L. Ed. 930.

The bill in this suit could not conclusively be considered bad for having included allegations in respect to all the matters of infringement relating to the use of the two patents that covered the device used by the defendant. If it be true that the court has jurisdiction of this case by reason of the unexpired patent, it must be equally true that, having taken jurisdiction, it will, as a court of equity, exercise its power to make a complete and adequate disposition of all the complainants' rights relating to the acts complained of.

Equity, having rightly taken jurisdiction, has full power to grant all appropriate and necessary relief in connection with the particular act complained of, even though it amounts to an infringement of an expired patent, in addition to the infringement of an existing and unexpired one. When we consider the practical impossibility of apportioning the damages or profits resulting from the use of each element entering into the completed patented device, the desirability of determining all the questions in one form is apparent.

Upon this demurrer we can consider only the matters set up in the bill, and it is impossible to hold as a matter of law that the complainants have been guilty of laches, where the only facts before the court are that the bill has been filed before the expiration of the patent and that the patent of which it is founded has been sustained.

Upon the whole case, I am of the opinion that the demurrer must be overruled, with costs.

MILLER v. SCHWARNER.

(Circuit Court, S. D. Iowa, C. D. June 3, 1904.)

No. 2,414.

1. PATENTS—SUIT FOR INFRINGEMENT—EQUITY JURISDICTION.

A court of equity is without jurisdiction of a suit for infringement of a patent where process was not issued until six days before the expiration of the patent, and was returnable thereafter, and no application was made for a preliminary injunction, nor special ground therefor alleged in the bill.

In Equity. Suit for infringement of patent. On demurrer to bill.

Louis K. Gilson, for complainant.

W. S. Cooper, for defendant.

REED, District Judge. The bill prays for an injunction, preliminary and perpetual, and for an accounting and damages because of an alleged infringement by defendant of reissued letters patent No. 10,980 for "a new and useful hame tug," granted to complainant for 17 years from September 14, 1886. The defendant demurs to the bill upon the grounds, in substance, among others, that it does not show a cause for equitable cognizance, in that the patent had expired before the defendant was required to appear or answer, and that complainant had an adequate remedy at law. The bill was filed September 1, 1903, subpoena served September 8th, returnable at the October rule day following, which was October 5, 1903. The patent expired September 14, 1903, 6 days after the subpoena was served, and 21 days before defendant was required to enter an appearance in the suit. No notice was given of an application for an injunction pending the suit, and no application was made therefor. It is plain that, before the defendant would have been in default for want of an answer, or appearance even, the patent would have expired. Under such circumstances an injunction

should not issue, except for special reasons alleged in the bill calling for equitable relief other than the mere infringement of the patent, and the complainant should be left to his remedy at law.

The Revised Statutes of the United States provide:

"Sec. 723. Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." [U. S. Comp. St. 1901, p. 583.]

"Sec. 4919. Damages for the infringement of any patent may be recovered by action on the case in the name of the party interested, either as patentee, assignee, or grantee, and whenever in any such action a verdict is returned for the plaintiff the court may enter judgment thereon for any sum * * * not exceeding three times the amount of such verdict. * * *" [U. S. Comp. St. 1901, p. 3394.]

"Sec. 4921. The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable. * * *" [U. S. Comp. St. 1901, p. 3395.]

Section 723 is held by the Supreme Court to be but declaratory of the existing law, and, whenever it appears that the complainant in a suit in the federal court has an adequate remedy at law, then this section is controlling, and equity will not entertain the suit, but will remit the parties to their legal remedy. *New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205, 2 Sup. Ct. 279, 27 L. Ed. 484; *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167.

In *Root v. Ry. Co.*, 105 U. S. 189, 26 L. Ed. 975, the grounds upon which courts of equity will entertain jurisdiction in patent and other cases are clearly stated, and the authorities, English and American, fully reviewed. At page 212, 105 U. S., 26 L. Ed. 975, it is said:

"The result of the argument is that whenever a court of law is competent to take cognizance of the right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

The conclusion reached is that under section 4921 [U. S. Comp. St. 1901, p. 3395] equity will entertain suits for infringement of patents only when the bill shows that a part of the complainant's remedy is an injunction, and, if the patent has expired, the injunction will not be granted, and the case should not be retained in equity for an accounting and damages only.

In *Mershon v. Pease Furnace Co.* (C. C.) 24 Fed. 741, Mr. Justice Blatchford says:

"Not only, as is suggested in *Root v. Ry. Co.*, 105 U. S. 189, 206 [26 L. Ed. 975], does the language of section 4921 seem to make the power to award profits and damages dependent upon the power to grant an injunction, but the general 'course and principle of courts of equity' make the right to an accounting dependent on the right to an injunction."

There are no facts alleged in the original bill in this case as grounds of equitable relief other than the issuance of the patent and its alleged infringement, and it is upon this ground alone that the injunction, preliminary and perpetual, is prayed. During the

argument upon the demurrer the complainant asked and was granted leave to file an amendment to the bill, and on May 18, 1904, an amendment was filed, in which it is alleged, in substance:

"That prior to the commencement of this suit the defendant had, without the license, consent, or approval of the complainant, manufactured large numbers of hame tugs in infringement of the rights secured to complainant under said letters patent, which hame tugs the defendant intends to place upon the market and sell after the expiration of said letters patent."

By consent the demurrer is to apply to the bill as so amended. It is urged by counsel for complainant that this amendment brings the case within the rule announced by Mr. Justice Blatchford in *Toledo Mower & Reaper Co. v. Johnston Harvester Co.* (C. C.) 24 Fed. 739. In that case a similar, though much stronger, averment of special reasons calling for equitable relief appeared in the original bill. There was time, in the ordinary course of the proceedings of the court, to have obtained an injunction after the filing of the bill and before the expiration of the patent; and it is plain that it was upon this ground that the injunction was granted, for in *Mershon v. Pease Furnace Co.*, above, the opinion in which was filed the same day, Mr. Justice Blatchford sustained a demurrer to a bill when there was not time to procure a writ of injunction in the ordinary course of the proceedings of the court before the patent would expire.

In *Westinghouse v. Carpenter* (C. C.) 43 Fed. 894, Mr. Justice Miller, in dissolving an injunction previously issued during the life of a patent, said:

"We are of the opinion that with the expiration of his patent the plaintiff's right to forbid anybody to make, sell, or use the articles to which this invention refers expires."

See *American Cable Ry. Co. v. Chicago City Ry. Co.* (C. C.) 41 Fed. 522, cited with approval by the Supreme Court in *Keyes v. Eureka Consolidated Mining Co.*, 158 U. S. 150, 15 Sup. Ct. 772, 39 L. Ed. 929. Also, see *Crandall v. Plano Mfg. Co.* (C. C.) 24 Fed. 738, and *Consolidated Safety Valve Co. v. Ashton Valve Co.* (C. C.) 26 Fed. 319.

In *Clark v. Wooster*, 119 U. S. 392, 7 Sup. Ct. 218, 30 L. Ed. 392, it is said:

"If by the course of the court no injunction could have been granted in this time [before the patent would expire], the bill could very properly have been dismissed, and ought to have been."

It is held in this case, however, that if the suit be commenced in such time that by the rules of the court an injunction might have been obtained before the expiration of the patent, though but a few days would then remain for it to run, the discretion of the court in granting the writ would not be interfered with on appeal, especially where there might be some reason for its issuance, though upon narrow grounds, and the defendant did not ask for the dismissal of the bill for want of equitable jurisdiction. In this case the amendment is not made until more than eight months after the expiration of the complainant's patent. There is no allegation of insolvency in the bill or the amendment thereto; nor of any other fact showing that the com-

plainant has not a full, complete, and adequate remedy at law for the recovery of all damages he has sustained or may sustain by reason of the alleged infringement of the patent, or of any sales that may be made after the expiration of the patent of articles that were manufactured before. It is apparent that the purpose of the amendment is an attempt to retain the case in equity for an accounting and damages when no injunction could be issued as a part of the complainant's remedy.

The demurrer is sustained, and the bill dismissed, without prejudice to complainant's right to maintain an action at law for damages.

KING v. HATFIELD et al.

(Circuit Court, D. West Virginia. December, 1900.)

1. FORFEITURE—ENTRY OF LAND FOR TAXATION—CONSTRUCTION OF STATE CONSTITUTION.

Section 6, art. 13, of the Constitution of West Virginia provides: "It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with the taxes thereon, and pay the same. When for any five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more, shall not have been charged on such books with state tax on said land, then by operation hereof, the land shall be forfeited and the title thereto vest in the state. But if, for any one or more of such five years, the owner shall have been charged with state tax on any part of the land, such part thereof shall not be forfeited for such cause. * * *"
Held: That this provision does not apply to land that was on such landbooks and charged with taxes in the name of the owner at the time said Constitution was adopted. Such land, or any land that was entered and charged with taxes upon such landbooks in the name of the owner within the five years next after the year 1869, does not become forfeited by consequence of any subsequent omission of the land or noncharging of state taxes.

2. SAME—DUTY OF OWNER, WHEN FULFILLED—OWNER HAS NO CONTROL OF LAND ONCE ENTERED ON LANDBOOKS—NO FORFEITURE FOR FAILURE OF PUBLIC OFFICERS TO ENTER AND CHARGE LAND.

When land has once been entered upon the landbooks in the name of the owner, his duty with regard to entering it has been fulfilled. He has no control over the entering and charging of such land with taxes thereafter, or over the taxing officers. The land can only be omitted by such officers, and no forfeiture thereof can result from their failure to enter it and charge it with taxes. But if said section 6, art. 13, Const. W. Va., be construed to make it the duty of the landowner to have his land entered upon the landbooks whenever for any cause it may be omitted therefrom, and land has been sold to the state at a delinquent tax sale, and is afterwards redeemed by the owner in a proceeding instituted on behalf of the state in the circuit court of the state to dispose of the land, and the decree of redemption entered upon his petition to redeem directs the clerk of the court to certify copies thereof to the auditor and taxing officers, such owner has done all that is reasonably in his power to have the land re-entered and charged with taxes, in the absence of authority to make the entry and charge in person, and of any statutory direction as to how to "have" it done; and no forfeiture of said land can accrue because the land is not re-entered upon the landbooks and charged with taxes.

3. SAME—CONSTITUTIONAL LAW—VESTING OF TITLE OF ONE PRIVATE PERSON IN ANOTHER—DUE PROCESS OF LAW—FOURTEENTH AMENDMENT.

Section 3 of article 13 of said state Constitution provides that: "All title to lands in this state * * * hereafter forfeited, not redeemed, re-

leased or otherwise disposed of, vested and remaining in this state, shall be, and is hereby transferred to, and vested in" certain classes of persons, if any such there be, for so much of said land as is claimed by them adversely to the person in whose name the same was forfeited, under certain specified conditions. A statute of the state provides for the redemption of land forfeited to the state in a suit to be brought by the state against the former owner for the purpose of selling such land for the benefit of the school fund, but requires such suit to be dismissed as to any land held under said section 3, if, during the pendency of such suit, it shall appear that it is so held; and provides that any redemption that may be had in such suit shall not affect the title of any person holding under said section. *Held*, that as to land purporting to be forfeited under section 6 of said article 13 by reason of the noncharging of state taxes thereon, and falling under the provisions of section 3, construed to operate in futuro, the attempted forfeiture is not through the instrumentality or aid of a judicial proceeding, but without it, and by the operation of the Constitution alone, and is an attempted transfer by the state of the property of one private person, without his consent, to another private person, for his private benefit, by mere legislative action, and not by "due process of law," and is repugnant to the fourteenth amendment, and is invalid and inoperative.

4. SAME.

The Constitution of West Virginia and the statutes of that state, so far as they purport or undertake to forfeit and divest the title of any person to his land and vest the same in another private person, or vest the same in the state without provision for redemption by or on behalf of the owner of the whole or such part of said land as he may desire to redeem, or without provision for a sale thereof and the return of the proceeds to such owner after deduction of all taxes and all proper charges therefrom, attempt to deprive persons of their property without due process of law, and are in contravention of the fourteenth amendment to the Constitution of the United States. There can be no valid forfeiture where such right of redemption or receipt of proceeds is prohibited or not provided for.

5. SAME—CLASS LEGISLATION.

Said provision of the state Constitution in attempting to forfeit tracts containing 1,000 acres or more, and not tracts containing less than 1,000 acres, makes an unreasonable classification and discrimination, and is repugnant to the equality clause of the fourteenth amendment to the Constitution of the United States, and is invalid.

6. SALE OF LAND NOT SUBJECT TO SALE BY STATE.

An ex parte proceeding in the circuit court of the state by a commissioner of school lands for the sale of land as waste and unappropriated which is not waste and unappropriated, nor forfeited, nor otherwise subject to sale by the state, is coram non jndice, and a sale and deed made thereunder are void.

(Syllabus by the Court.)

Maynard F. Stiles, for complainant.

Henry C. Flesher, for defendants.

JACKSON, District Judge. This is a suit to set aside and remove clouds upon complainant's title to portions of a tract of land claimed by him. The case is now heard upon the bill and demurrer.

The complainant claims a tract of 500,000 acres of land under a grant issued to Robert Morris by the commonwealth of Virginia June 23, 1795, and under mesne conveyances from the grantee to the complainant, which tract is situated partly in the state of West Virginia, in Logan, Mingo, Wyoming, and McDowell counties. He files as

exhibits with his bill title papers which show a regular chain of conveyance to him, and alleges that he is in actual possession of said tract. He also files as exhibits copies of two patents—one for 450 acres, and one for 330 acres—issued to Aly Hatfield, now deceased, by said commonwealth, in 1859, and of three deeds from the commissioner of school lands of Logan county to Joseph Hatfield, now deceased, for tracts of 72, 48, and 140 acres, respectively, executed in the years 1884, 1888, and 1889, under proceedings on behalf of the state of West Virginia for the sale of waste and unappropriated land of the state. The defendants claim these tracts by inheritance, but have had no possession of them. Upon the face of the bill it is apparent that the title to the land in dispute is in the complainant, and that the muniments of title under which the defendants claim confer upon them no right whatever, unless the complainant has lost his title thereto by forfeiture of his land for nonassessment of taxes under the provisions of the Constitution of West Virginia, and by virtue of such forfeiture that title has become vested in the defendants, as the defendants claim.

It appears from the bill that by virtue of certain conveyances made by John Peter Dumas, who, as trustee for the creditors of James Swan's estate, was the owner of the Morris grant, and by virtue of a certain judicial sale of three-fourths thereof, the validity of which was disputed by the successors in trust of Dumas, which conveyances and sale were made before the organization of the state of West Virginia, one Louis Antoine des Verges de Maupertuis (sometimes called Mauperture) in 1872 and earlier claimed 300,000 acres of said tract; Robert E. Randall, trustee, claimed 200,000 acres thereof, and a mortgage upon said 300,000 acres for the unpaid purchase money therefor; and one Anthony Lawson claimed an undivided three-fourths of the entire 300,000 acres under said judicial sale. This was the status of the title when the Constitution of West Virginia was adopted in 1872. The complainant claims and exhibits title under all said persons.

Although not much more than 300,000 acres of said tract actually lies in the state of West Virginia, the rest being in Virginia and Kentucky, the said Anthony Lawson and his grantees, James Black and Abraham Suydam, were charged upon the landbooks of Logan county with taxes upon the three-fourths interest or claim at 375,000 acres from 1865 to 1878, when said interest was reduced by the county court to 100,000 acres, after which time said interest was charged to them and to their grantee, the Pittsburg National Bank of Commerce, up to and including the year 1882, all which taxes were paid. Notwithstanding the charging and collection of such taxes, said Randall, trustee, and the heirs of said Maupertuis, then deceased, being unacquainted with the location of said land, had the whole 500,000 acres entered upon the landbooks of Wyoming county in 1869, and charged with taxes thereon—the Maupertuis interest as 300,000 acres, and the Randall interest as 200,000 acres. In 1871 said 200,000-acre interest was sold to the state for unpaid taxes of 1870, and in 1877 the 300,000-acre interest was sold to the state for the unpaid taxes of 1874-75, the prior taxes having been paid. Afterwards, said land

not having been redeemed within one year from the sale, as provided for by the statute, a proceeding was instituted in the circuit court for Wyoming county by the commissioner of school lands on the part of the state to sell the said 500,000-acre grant for the benefit of the school fund, whereupon the said Randall filed his petition to redeem, and the Pittsburg National Bank presented a protest against such redemption, but by a decree entered therein April 10, 1883, it was decreed that Randall, as trustee of the Swan estate, and as creditor of Maupertuis, had the superior title and the right to redeem said 500,000-acre grant; and, the back taxes, interest, and costs being paid into court, the land was decreed to be thereby exonerated and released from all taxes up to and including the year 1883. The Pittsburg National Bank appealed from this decree holding the Randall title to be superior, but the appeal was dismissed upon the ground that the proceeding did not contemplate a contest and adjudication of rival claims of title. *McClure v. Mauperture*, 29 W. Va. 633, 2 S. E. 761.

The decree aforesaid ordered that the clerk certify a copy thereof to the Auditor of the State, and "also to certify, under the direction of Randall or his counsel, a copy thereof to the assessors of the proper assessment districts for taxation." The said 500,000-acre tract was not, however, again charged upon the landbooks of any county of the state of West Virginia in which any part thereof is situated within the five years next succeeding the year 1883, and in 1894 the state brought another suit in said Wyoming county circuit court against the present complainant, King, the said Randall, trustee, the said Pittsburg National Bank of Commerce, and sundry others, under whom King claimed, for the purpose of subjecting to sale for the benefit of the school fund so much of said 500,000-acre grant as was then vested in the state by alleged forfeiture thereof for the nonassessment of state taxes thereon for the five successive years after the year 1883; and the said King filed his answer and petition therein, denying that said land was forfeited, but offering to pay any taxes that ought to have been charged thereon, with interest and costs of said suit, and on September 30, 1897, upon the payment of the taxes, interest, and costs fixed by the court therein, a decree was entered adjudging that said King had the right to redeem said land, and declaring said land, so far as the title thereto was in said state, to be redeemed, and all forfeitures and taxes charged or chargeable thereon to be released and discharged; said decree, providing, however, in conformity with the statute under which the suit was brought, that said "redemption shall not affect the rights that any person not party to this suit may have, if any, under the provisions of section 3 of article 13 of the Constitution of the state of West Virginia."

In 1859 Aly Hatfield procured from the officers of the commonwealth of Virginia who were by law charged with the duty of issuing grants of the waste and unappropriated land of the commonwealth the instruments purporting to be grants for said 450 and 330 acre tracts, and under proceedings in the circuit court of Logan county, instituted by the commissioner of school lands of that county, for the sale of waste and unappropriated land, Joseph Hatfield procured

a deed from said commissioner for a tract of 72 acres of land November 10, 1884; for 48 acres August 24, 1888, and for 140 acres March 14, 1889, upon a sale October 2, 1883. The defendants are sole heirs at law of Aly and Joseph Hatfield, who are now deceased.

As to these patents and deeds the complainant, in his bill, alleges:

"That at the time said pretended grants were issued the land therein described was wholly part and parcel of said Morris grant, and was owned by your orator's said predecessors in title, and was not waste and unappropriated land, or otherwise belonging to said commonwealth, nor within the power of the said commonwealth or of any officer thereof to grant and dispose of, as said Aly well knew, and said instruments were and are wholly null and void; but, being in due form, they purport and appear upon their faces to convey title to the land therein described, and can be shown to be invalid only by evidence aliunde. That all proceedings by said commissioner of school lands were purely *ex parte* and nonjudicial, and without notice to your orator's predecessor in title, the then owner of the said Morris grant; and at the time said tracts were reported and sold and said deed executed by said commissioner of school lands the said lands were not waste and unappropriated, nor forfeited, nor for any other cause subject to sale in any manner or on behalf of the state of West Virginia, as both said commissioner and said Hatfield well knew, and said proceedings were wholly without authority of law, and were *coram non jndice* and void, and gave to said commissioner no right or authority to make sale of said land, or to execute said deeds therefor, and the same are fraudulent, null and void; but said deeds and proceedings, being in form of law, and being regular upon their faces, appear to convey title to the land therein described, and the invalidity of said deeds can only be made to appear by evidence aliunde."

The complainant, in his bill, refers to sections 3 and 6 of article 13 of the state Constitution, and contends that the provision making it the duty of the landowner to have his land entered on the landbooks has never been made operative by appropriate legislation, the duty of entering and charging lands devolving upon the public officers without the aid of the owner, under a complete statutory system; that the provision has no application to land that was on the landbooks at the time of the adoption of the Constitution; and that by the provision in the decree of redemption in 1883 Randall, complainant's predecessor in title, did all that could reasonably be required of him, in the absence of statutory direction, to cause the land to be re-entered upon the landbooks and charged with taxes, if the officers of the state had performed their statutory duty. The complainant alleges that the defendants claim that the title of complainant's predecessor in estate was forfeited in 1888, "by operation of said Constitution," by reason of nonassessment of taxes, and became thereby transferred to Joseph Hatfield to the extent of said 450 and 330 acre grants, the taxes on them having been paid; but the complainant avers that he "is advised and claims that the said provision of said Constitution purporting to forfeit lands for the nonassessment of state taxes for five successive years is in contravention of the Constitution of the United States, and is therefore null and void, and the title thereto could not and did not vest in defendants to any extent or in any manner; and that whether said provision be void, or for any reason valid, it is not the true meaning and intention of said Constitution to vest in any other persons title to any land, forfeited or otherwise, to which the title was not in the state at the time of the

adoption of said Constitution, and, so far as said Constitution purports or attempts, if it does, to transfer to or to vest in any person other than the former owner the title to any land thereafter to become forfeited for nonassessment, your orator is advised and claims that said Constitution is in contravention of the Constitution of the United States, and is null and void."

The foregoing being in brief the principal matters set out in the bill bearing upon the question to be considered, the defendants interposed their demurrer on the ground "that it appears from said bill that the title to the land claimed by complainant was by the Constitution of West Virginia forfeited to said state December 31, 1888, and that the title thereto vested in Joseph Hatfield, under whom these defendants claim, as to the tracts of 330 and 450 acres in said bill mentioned; and that, it being provided by the act of February 23, 1893 (Acts 1893, p. 57), under which the suit was brought in which complainant claims to have redeemed the land claimed by him, that the suit should be dismissed as to any lands that should appear to have been sold in any proceeding for the sale of school lands, said suit could not properly be maintained, nor any decree of redemption properly entered that should affect the lands claimed by these defendants under the sales thereof to said Joseph Hatfield by the commissioner of school lands."

So much of article 13 of the Constitution of West Virginia, relied upon by the defendants, as it is material to consider, is contained in sections 6 and 3, as follows:

"Sec. 6. It shall be the duty of every owner of land to have it entered on the landbooks of the county in which it, or a part of it, is situated, and to cause himself to be charged with the taxes thereon, and pay the same. When for any five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more, shall not have been charged on such books with state tax on said land, then by operation hereof, the land shall be forfeited and the title thereto vest in the state. But if, for any one or more of such five years, the owner shall have been charged with state tax on any part of the land, such part thereof shall not be forfeited for such cause."

"Sec. 3. All title to lands in this state heretofore forfeited, or treated as forfeited, waste and unappropriated, or escheated to the state of Virginia, or this state, or purchased by either of said states at sales made for the nonpayment of taxes and become irredeemable, or hereafter forfeited, or treated as forfeited, or escheated to this state, or purchased by it and become irredeemable, not redeemed, released or otherwise disposed of, vested and remaining in this state, shall be, and is hereby transferred to, and vested in any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees,) for so much thereof as such person has, or shall have had actual continuous possession of, under color or claim of title for ten years, and who, or those under whom he claims, shall have paid the state taxes thereon for any five years during such possession; or if there be no such person, then to any person (other than those for whose default the same have been forfeited, or returned delinquent, their heirs or devisees,) for so much of said land as such persons shall have title or claim to, regularly derived, mediately or immediately from, or under a grant from the commonwealth of Virginia, or this state, not forfeited, which but for the title forfeited would be valid, or who, or those under whom he claims has, or shall have paid all state taxes charged or chargeable thereon for five successive years after the year 1865, or from the date of the grant, if it shall have issued since that year. * * *

The question that the court has now to determine is whether the title that was originally vested by valid grant in Robert Morris, and appears to have descended by regular course of record conveyances to the complainant, has in fact been transferred, by due process of law, to the defendants to the extent of the land described in the patents and deeds acquired and claimed in hostility to the said Morris grant. The answer to this question involves not only the interpretation of the above-mentioned provisions of the Constitution of West Virginia, but the question of their consistency or inconsistency with the Constitution of the United States, and their consequent validity or invalidity.

It is contended on behalf of the complainant, both in the bill and in the argument of counsel, that the provisions of section 6 of the Constitution do not apply to any land that, like complainant's, was on the landbooks when the Constitution was adopted, and have not been made operative upon any land by proper legislation, and are not self-enforcing; that complainant's predecessor in title, Randall, did all that was reasonably in his power to have the land now claimed by complainant re-entered and charged with taxes on the landbooks after the redemption thereof in 1883, and that no forfeiture can be claimed because that was not done; that the Constitution does not intend, by said section 3, to transfer to third persons titles forfeited after the adoption of said Constitution, and that, so far as the said Constitution does purport or undertake to forfeit the title to land and vest it in third persons or in the state without any judicial proceedings or without any right of redemption, to that extent it is in contravention of the Constitution of the United States. The defendants dispute these propositions.

Provisions somewhat similar to that contained in said section 6 of article 13, requiring landowners to enter their lands on the landbooks, are found in the statutes of Virginia in the acts of February 5, 1810 (Acts 1809-10, p. 17, c. 16), and February 27, 1835 (Acts 1834-35, p. 11, c. 13). It was recited in the former act "that many persons omit to enter their land upon the land books and thereby elude the payment of any revenue thereon," and provided that, "if any person having title to a tract or tracts of land in this commonwealth shall fail to enter the same on the commissioners' book of that county in which the land lies within eighteen months after the passage of this act, the same shall be forfeited to the commonwealth." By the Act of February 9, 1814 (Acts 1813-14, p. 15, c. 3), forfeitures under the act of 1810 were released, and a system provided for the entering and charging of lands by the commissioners of the revenue. The act of 1835 recited that it was known to the General Assembly that "many large tracts lying west of the Alleghany Mountains, granted before April 1, 1831, never were or for many years last past have not been entered on the books of the commissioners of the revenue," and required that "every owner or proprietor of any such tract or parcel of land should on or before July 1, 1836, enter or cause to be entered on said books" all such lands owned by him, her, or them, and have the same charged with all the taxes and damages in arrear or properly chargeable thereon, and pay the same; and prescribed

the penalty of forfeiture for their failure to do so. This act applied only to lands omitted prior to 1831. Lands other than those that "never were or had not for many years past" been on the books could well be found and entered by the commissioners without assistance from the owners. An act passed April 1, 1831 (Acts 1830-31, p. 94, c. 28), provided that no person in any suit then pending or thereafter to be brought for the recovery of land west of the Alleghany Mountains against a bona fide claimant under a grant from the commonwealth issued prior to the passage of the act, who had had said land entered on the landbooks and paid all taxes thereon, should be allowed to give in evidence any grant from the commonwealth in support of his title to the demanded premises, unless he should show that he too had had the demanded land entered upon the landbooks and charged with taxes, and had paid all taxes chargeable thereon. The case of *Taylor v. Burdett*, 11 Leigh, 347, arose under this act in 1835, upon a grant dated June 16, 1786, under which the plaintiff claimed, and which was excluded by the circuit court. In reversing this ruling the Court of Appeals, per Judge Tucker, said in part:

"First, as to entering the land with the commissioner. This was first required by the act of 1810, and accordingly it appears that the lands were on the commissioner's books in 1811, for they are on the auditor's list as delinquent for that year. Now, if they were once on the books, it would seem that this duty was fulfilled, as it was not required to be repeated every year."

The reasoning and authority of that case seem conclusive against any forfeiture of the Morris grant, so far as forfeiture is the penalty of any fault, default, or delinquency of the owner; for it appears that said tract had been entered by its owners and continued on the landbooks of both Wyoming and Logan counties long before, at the time of, and long after the Constitution of West Virginia was adopted; and in the language of Judge Tucker "it would seem that that duty was fulfilled, as it was not required to be repeated every year," at least not by express terms, nor by any inference warrantable, when so terrible a consequence as the forfeiture of thousands of dollars worth of property is to follow such inference. Only the most clear and cogent language, or a manifest condition of affairs demanding it for public well-being, would warrant such a construction of the first clause of section 6 as would extend the duty of landowners beyond a primary compliance with the requirement of that clause, with a penalty of forfeiture for failure in that respect, in spite of the fact that the state has nowhere and at no time made definite provision for the discharge of such duty by the owner, but has, by a system the most elaborate and complete, provided for the entering and taxing of lands by her public officers.

The early Virginia acts were occasioned by the fact that many large tracts of land "never were or had not been for many years" entered on the landbooks, and consequently were not within the knowledge of the taxing officers. When they were once put on the books, and went into the hands of the officers, those officers could see to the taxing of them thereafter, which was a part of their official duty; and after 1835 Virginia did not require land to be entered by the owners under penalty of forfeiture.

After the erection of the state of West Virginia, and after the close of the Civil War, during which courthouses were burned, landbooks lost, records destroyed, many landowners killed or scattered, and the evidence of ownership of land left in such condition that the public officers could not, in many instances, either from their own knowledge or from any record information, properly enter and charge all lands, it was made the duty of landowners to have their lands entered on the landbooks of the proper counties. When that was once done, the land came under the control of the public officers; and so complete and specific is the provision of the law governing the subject (chapter 29 of the Code of West Virginia of 1887) existing prior to the formation of the state and ever since, that a tract of land once on the landbooks will ever after continue on them, and be charged with taxes year after year so long as the officers of the state appointed and paid for the purpose attend to their duties. It is not in the power of the owner to prevent such charging, and nothing he can do can get the land off the books. Only in the event of a sale to the state for unpaid taxes, in which event it ceases to be chargeable, can the land get off of the books, except solely by the fraud or negligence of some public officer. To hold, then, that the duty imposed on the landowner by said section 6 is not fulfilled if at the time of its adoption or afterwards he had his land entered on the landbooks, and charged with taxes, is not required by the language of that section, nor by anything to be found in the condition of things existing at its adoption or afterwards. Indeed, it seems not even to be permitted by the language: "But if for any one or more of such five years the owner shall have been charged with state tax on any part of the land, such part thereof shall not be forfeited for such cause." This applies to the whole tract as well as to "any part" of it. To what time do the words "any one or more of such five years" refer, if not to any one or more of "any five successive years after the year 1869"? Is not all forfeiture under this section expressly prevented by a charging of the land for any year, at least if charged before the full five years next after 1869 expired? It is clear to my mind that if the tract, or any portion of it, was entered within said five years, as provided for in section 6, it could not be forfeited.

If the position here taken be sound, there could be no forfeiture of the land in question by the Constitution as a penalty for the default of the owner. Any forfeiture for nonassessment must be independent of any act or default of the owner. But suppose the duty of the landowner to have his land entered, etc., arises every time they get off the books for any cause, what is the situation presented by this case? The Supreme Court, in *King v. Mullins*, 171 U. S. 404, 18 Sup. Ct. 925, 43 L. Ed. 214—a case arising upon the provision in question—answering the argument that "the land may be forfeited by reason of the landowner not having been in fact charged on the landbooks with the taxes due from him, although he was not responsible for such neglect," said:

"We do not so interpret the state Constitution or the statutes enacted under it. If the landowner has done all that is reasonably in his power to have his land entered upon the landbooks, and to cause himself to be charged with taxes

thereon, no forfeiture can arise from the owner not having been charged on such books with the state tax. The state could not acquire any title to the lands merely through the neglect of its agent having custody or control of its landbooks."

It cannot be denied that the owner of the Morris grant did all that, in the language of Mr. Justice Harlan, was "reasonably in his power to have his lands entered upon the landbooks, and to cause himself to be charged with taxes thereon." In determining what is "reasonably" in the power of the landowner, and what negligence, which can occasion the state no loss whatever, should subject him to the dire consequence of losing his land, the state, through her agents, being in default, we must bear in mind that we are dealing with forfeitures, odious in law, which courts will not enforce where there is any escape; that the landowner is without precedent, guide, or direction for the discharge of his duty; and that the requirement is in invitum. It appears that the land had been purchased for the state at a sale for delinquent taxes prior to 1883, and the state, through her commissioner of school lands, had instituted proceedings in the circuit court to dispose of the land under a statute which permitted the owner or person in whose name it was sold to come in and redeem. The state, the claimant, and the land were all before the court, and it was ordered by the very same decree that permitted payment to the state of the redemption money, which was accepted and applied by her, that the clerk of the court, a public officer charged by the statute with that duty, should certify a copy of the decree to the State Auditor, and also certify copies to the county assessors for taxation, the latter under the direction of Randall or his counsel. This seems to have been all that the court, the state, and Randall supposed to be necessary to insure the re-entering of the land upon the landbooks. It was, in effect, a direction by the court as to what was necessary in the matter. As the law authorizing assessors to enter the land upon the landbooks had very recently been repealed, and that duty required to be performed by the clerks of the county courts, and as the circuit court clerk was required by law, independently of the direction in the decree, to certify to the clerk of the county court an abstract of the decree, and of that clerk to enter the lands, this requirement of the decree that a copy be certified to the assessors was ineffectual and unimportant, and it is immaterial whether or not it was complied with. This decree having been passed by the court upon the petition of Randall, he had the right to rely upon it, and had reason to suppose that the land would go back on the landbooks without further action by him, and that there was nothing more that he, a nonresident trustee, need do; neither the Constitution, the statute, nor anything else but the decree giving any direction or hint as to how he should proceed to "have" his land entered.

When the fact that the land is subject to entry and taxation upon the landbooks has been brought to the attention of the officers or agents of the state charged by statute with the matters of assessment and taxation, it should seem that the landowner should not suffer the forfeiture and transfer of his land to the state or to a

stranger because of the negligence of such officers; yet if the state, since 1883, or these defendants, has or have acquired any title to the land claimed by the complainant, it has been "merely through the neglect of the agent of the state having custody or control of its landbooks," but for which neglect no question of forfeiture could possibly have arisen. I do not overlook the proceeding in the court of Wyoming county and the decree of redemption, so called, of 1897. In that suit King denied that the land was forfeited, but offered to pay any taxes that might be chargeable thereon. The decree does not adjudge that the land was forfeited, but releases it from the taxes chargeable and any forfeitures that there may have been, subject to the rights of persons, not parties, claimed under the Constitution. The principal effect of the decree of September, 1897, is to eliminate the state and cut off the general defense of title outstanding in the state, which the defendants might otherwise have sought to rely upon. This is not their defense, however, except as to the tracts sold by the commissioner of school lands, as to which they say the decree was improperly entered. Their contention is that the title to the land in controversy is in them, and not in the complainant or the state.

If the construction of the provisions of the state Constitution under consideration, and the question of what acts and facts bring lands within their operation, rested ultimately with this court, instead of the state Supreme Court, I might be content to pursue this discussion no further, but, being uncertain whether that court will concur in the views I have expressed, I prefer to rest my decision of this cause also, and principally, upon a decision of the graver and more fundamental question presented by this record—the question of the constitutional validity of those provisions; and in reaching my conclusion I am not unmindful of the respect due to the laws and authority of the state, but I am controlled by what I consider to be the spirit and meaning of the federal Constitution. The Constitution is not the supreme law of the land if it be not given effect according to the letter and spirit, in all the states alike, at all times and in all circumstances, or if all or any doubts be resolved against it. It is contended on behalf of the defendants that, by reason of the fact that the tract of land now claimed by complainant was not charged with taxes upon the landbooks within the five years following the redemption thereof in 1883, the title of said land, then held by Reed, trustee, under whom the complainant claims, became forfeited on the last day of the year 1888, and vested, by force and operation of the Constitution, in Joseph Hatfield to the extent of said 450 and 330 acre tracts, which are not affected, and do not purport to be affected, by the decree of the Wyoming county circuit court of 1897, and that said decree should not affect the "school lands" tracts, because the suit in which it was rendered should have been dismissed as to such tracts. Concerning the lands claimed by the defendants, it is sufficient to say that the patents under which they claim, having been issued after the grant to Morris, and when the title to that grant was unquestioned and unquestionable, gave no right whatever to the land embraced in them within the Morris grant;

and the proceedings in the circuit court of Logan county, had before the five years after 1883 had expired, were unauthorized, and were coram non judice, and the deeds made thereunder were nullities. If, then, the defendants have title or any right to any of the land embraced in the Morris grant and in said patents and deeds, they have got it solely by operation of the Constitution of West Virginia.

It is claimed by counsel for the complainant that section 3 is not a law, but a legislative grant, operating only upon land that was at the time the Constitution was adopted subject to the disposal of the state; that the words, "shall be and is hereby transferred to and vested in," are not words of lawmaking, but words of grant in *præsenti*, and cannot affect land to which the state did not have title in 1872, so as to convey it to some person, perhaps not then in being, when afterwards the state should happen to acquire title and such person should come into being; and that, therefore, the lands claimed by the defendants do not come within the operation of that section, nor any lands within the saving clause of said decree of 1897. It cannot be denied that there is great force in this position; but, as the section speaks of lands "hereafter forfeited," and as the act of February 23, 1893, commonly called the "School Land Act," seems to provide for the redemption only of lands forfeited to West Virginia, which redemption is not to affect any lands held under said section 3, and as there could be no lands forfeited to West Virginia for nonassessment prior to the adoption of the Constitution, that section would seem to have no operation upon lands forfeited by the Constitution, unless construed to operate in the future, which seems to be the construction given to it by the state court, so far as can be determined from expressions found in the few cases in which it has been before it in any way.

Giving, then, to these provisions of the Constitution and the school land act the application contended for by the defendants, we have the result that by mere act of ostensible legislation, without any proceeding or action whatever, judicial or otherwise, before or afterwards, the full legal and equitable fee-simple title to land is taken out of one private person, without compensation, and vested, without consideration, in another private person for his private use and benefit. This result can only be avoided by adopting a construction of the provisions of the Constitution and act in question that would leave them little meaning, or by denying them legal validity so far as they apply to cases like the present. Can such a result legally obtain under the Constitution of the United States? It was held by the Supreme Court in *King v. Mullins*, *supra*, that this forfeiture provision of the West Virginia Constitution, when considered and applied in connection with the statutes that authorize a suit to be brought by the state against the claimant of the land affected, in which all questions of title, location, and boundary, etc., can be tried, and in which the landowner can redeem, does not deprive the landowner of his property without due process of law; the court reserving its opinion upon the question whether the state Constitution, "alone considered," is consistent with the national Constitution, until the decision of that question should become necessary. That ques-

tion is now presented. In the Mullins Case the defense was merely that the title claimed by the plaintiff was outstanding in the state, not that it had been by forfeiture vested irredeemably in the defendants. There was nothing that appeared in the record of that case to show that there was any legal obstacle to the full and effectual redemption by the plaintiff of every acre of the grant claimed by him. It had previously been held by the state court that these statutes had no application, and that no suit provided for by them could be instituted, except as to land the title to which had theretofore vested in the state in some legal way; and it would seem that the inquiry as to what is due process of law should be confined to the act of deprivation by which the state had acquired the title and the landowner had lost it, without looking to any later provision by which the person deprived may in some cases have restitution. But in cases like the present there is no refuge in the statute and the suit thereunder. The suit of the state cannot, according to the statute, be maintained against any land to which the title is not then in the state. Section 6, Act Feb. 23, 1893 (Acts 1893, p. 60), provides:

"And if at any time during the pendency of any such suit, it shall appear to the court that any part of any tract of land in question therein has been sold by the state in any proceeding for the sale of school lands, and the taxes regularly paid thereon since such sale, or is held by any person under section 3 of article 13 of the Constitution of this state, the bill, as to such part, shall be dismissed, and the suit proceeded with to a final decree as to the remainder."

If that fact should not appear to the court, and the suit should proceed as to such land, and a claimant be permitted to pay the taxes thereon and get a decree of redemption, the same act (section 17, Acts 1893, p. 66) provides:

"But such redemption shall in no wise affect or impair any right, title, or interest any other person may have in said real estate or any part thereof, by purchase from the state, or under and by virtue of section 3 of article 13 of the Constitution of this state."

This provision is found in all prior acts, and it would result, independently of this provision, that, if the Constitution had previously transferred the title of the complainant to another person, no proceeding that the Legislature could devise could divest that other person of the title, and revest it in the original owner. And since the title must be divested before it can revest, it likewise results that where it is vested by the Constitution in any person the former owner of that title must have been deprived of it by the Constitution, or by something anterior to it, and not in any measure by any proceedings subsequently had. Due process must be found, in such a case, in the operation of deprivation—in the Constitution alone considered; and if, as I understand the opinion of the Supreme Court in *King v. Mullins*, the Constitution was held to be valid by reason of the support given by the judicial proceedings provided by statute and the right of redemption therein, then that provision of the Constitution is inoperative where that support fails. That the right of redemption, which was held to put the landowner in a position where he had no substantial right of complaint—none that he could not

remove by a payment of his taxes—was the most potent consideration with the court in sustaining the validity of the Constitution and statutes considered as a system, upon reasoning that does not seem to me wholly satisfactory, is obvious from the declaration of the court that that part of the Code “which has the most direct bearing on the question” is the provision (Code W. Va. 1887, c. 105, § 14) by which the former owner is permitted “to redeem such part or parts of any tract of land so forfeited, or the whole thereof, as he may desire” (page 426, 171 U. S.; page 933, 18 Sup. Ct., 43 L. Ed. 214), and which it deemed a “remedy whereby he could be relieved from such forfeiture” (page 423, 171 U. S.; page 932, 18 Sup. Ct., 43 L. Ed. 214). But, as has been seen, he cannot redeem any of his land that falls within any of the three classes mentioned in section 3, art. 13, Const. W. Va.; as, for instance, any land upon which a claimant under a junior patent has paid five years’ taxes—the situation of the lands claimed by the defendants. If we assume a case of a tract of 1,000 acres alleged to be forfeited, which is entirely covered by a larger junior grant coming within the terms of said section 3, it is obvious that the claimant could never redeem a foot of it; that the court would not permit the state to file a bill that disclosed that situation; that no judicial inquiry or proceeding concerning it is authorized or permitted; and that any apparent redemption that might be had would be ineffectual. The whole matter would begin and end with the constitutional provisions; and that is the case with any tract to the extent of such adverse claims. To the Constitution only must we then look, and see if “by operation” thereof it provides that “due process of law” by which only a state may deprive any person of his property. If by that operation it furnishes no such due process, then I hold that sections 3 and 6 of article 13 of the Constitution, forfeiting the title of one citizen to his land and transferring that title to another, is null and void.

Both in England and America forfeitures and confiscations have always been odious, and it is therefore incumbent upon parties who claim property by virtue of a forfeiture to establish the validity of such forfeiture, consistently with the federal Constitution, by controlling precedent or by convincing reasoning. Such precedent in support of the claims of the defendants is sought in the Virginia act of February 27, 1835, already mentioned, and cases arising upon it which departed from the long-established rule of law that an inquest of office, or some judicial proceeding or its equivalent—some public transaction subsequent to the commission of the act out of which the forfeiture arose—was necessary to the actual divestiture of the title, the completion of the forfeiture.

There are points of similarity between the act of 1835 and the provisions of the Constitution of West Virginia under consideration, but the points of difference are such that that act, itself an anomaly in legislation, cannot stand as a precedent for the constitutional provisions. That act related to lands omitted prior to 1831, not to all lands that were then omitted, not to lands that had been admitted only since 1831, nor to any lands that might be omitted any time in

the future, and only to land in that terra incognita the region "west of the Alleghany Mountains." It was directed at a certain class of persons who had been long delinquent in the past. It did not deal with future delinquencies. It had no operation in the future beyond the day set when the lands should be entered and the back taxes paid or the penalty of forfeiture incurred. It ceased to have force or effect after that day. It did not need to be repealed to arrest its action. It became *functus officio* by its limitation. The Constitution, on the other hand, has reference not to the past, but to the future. No particular day is named on which to suffer or avert the forfeiture. It does not cease to operate at a fixed date, but goes on until arrested by repeal. Whatever may be the advantage of one over the other in point of merit or legality, the act of 1835 can be regarded as a precedent only for an exactly similar act.

The cases that have construed the act of 1835—*Statts v. Board*, 10 Grat. 400; *Wild's Lessee v. Serpell*, Id. 405; *Hale v. Branscum*, Id. 418; *Levasser v. Washburn*, 11 Grat. 572—are not applicable as authority in the present case, both because of the difference in the two measures and the conditions that existed when they were enacted, and because I fail to find any reasons assigned to support the conclusions of the court except they were enforcing the terms of the statute under which the proceedings were had. The court was content to declare simply how the act took effect, and that the enactment was "within the constitutional competency of the Legislature." But it should be noted that the Constitution of Virginia did not then contain the prohibition, found probably in the Constitution of every other state, against depriving a person of property without due process of law; the provision being "that no man be deprived of liberty except by the law of the land or the judgment of his peers." The Legislature of Virginia had, prior to the fourteenth amendment, a power over property, so far as express restraint was concerned, that no other state, so far as I am advised, has ever had.

The objection that the act of 1835 was unconstitutional as wanting in "due process" has never arisen in Virginia, and it is too late now for such a question to arise, because due process was not required by the Constitution of Virginia, and because the fifth amendment to the Constitution of the United States, which provided that no citizen could be deprived of his property without due process of law, was a limitation upon the powers of the federal government only (*Barron v. Baltimore*, 7 Pet. 247, 8 L. Ed. 672), and because the act of 1835 had ceased to have any operation for over 30 years before the fourteenth amendment was adopted; and while that amendment would have annulled the act, by reason of its repugnance, if it had been one of continuing operation, and had been then in force, it could not reach back over the intervening 30 years to nullify the effect of an act that was not, when it was passed and when it passed out of existence, in conflict with any existing Constitution. So, when the Supreme Court, in *Armstrong v. Morrill*, 14 Wall. 120, 20 L. Ed. 765, gave effect to the act of 1835, "as construed by the Supreme Court or court of appeals of the state," it did not pass upon, and

had no power to question, the validity of the act for want of due process, and no such question arose.

The proposition that the West Virginia forfeiture is due process of law under the fourteenth amendment, because, as it is contended, such forfeitures were "the law of the land" in this state and in Virginia when the amendment was adopted, is shown to be unsupported when we consider that at that time West Virginia had never passed a forfeiture act, and that there was none in force in Virginia, either at that time or at the time when West Virginia was made a state, and had not been for many years, and that there never had been any of a general or continuous operation. But whatever may have been the power of any state over the life, liberty, or property of persons under its own Constitution or the rulings of its own courts, prior to the adoption of the fourteenth amendment, it was intended that thenceforth the life, liberty, and property of the citizen should be held "secure from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice." *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896. It cannot be that that amendment only looked to the prohibition of new wrongs yet to be invented, and left the states free to repeat even those that had called forth that amendment.

In *White v. Crump & Shanklin*, 19 W. Va. 583, 592, it was held that:

"Before the ratification of the fourteenth amendment to the Constitution of the United States, the Legislature might, if authorized by the state Constitution, divest vested rights of property where such rights were not vested by contract; that since the ratifications of said amendment such vested rights of property can only be divested by a state by due process of law."

While the courts have not, in general, undertaken to give a comprehensive definition of "due process of law," they have, with complete concurrence, declared what is not due process of law in cases of various exertions of asserted power, which is quite as much to our present purpose. Thus it has been held:

"'Due process of law,' without which the Constitution declares no person shall be deprived of life, liberty, or property, is not merely an act of the Legislature. * * * In *Wynehamer v. People*, 13 N. Y. 378, Comstock, J., says: * * * 'To say, as has been suggested, that "the law of the land," or "due process of law," may mean the very act of the Legislature which deprives the citizen of his rights, privileges, or property, leads to a simple absurdity. The Constitution would then mean that no person should be deprived of his property or rights unless the Legislature shall pass a law to effect the wrong, and this would be throwing the restraint away.' * * * Selden, J., in the same case, says: 'To give this clause [of the Constitution above referred to] * * * any value, it must be understood to mean that no person shall be deprived by any form of legislative or governmental action of either life, liberty, or property, except as the consequence of some judicial proceeding appropriately and legally conducted. It follows that a law, which, by its own inherent force, extinguishes rights of property, or compels their extinction without any legal proceedings whatever, comes directly in conflict with the Constitution.'" *Baker v. Kelley*, 11 Minn. 480 (Gil. 358).

"It must be ascertained judicially that he has forfeited his privileges, or that some one has a superior title to the land he possesses, before either can be taken from him. It cannot be done by mere legislation. If the Legislature can take the property of A. and transfer it to B., they can take A. himself, and either shut him up in prison or put him to death. But none of these

things can be done by mere legislation. There must be due process of law." *Taylor v. Porter*, 4 Hill (N. Y.) 145, 40 Am. Dec. 274, per Judge Bronson.

"By 'the law of the land' is meant not that arbitrary edict of any body of men—not an act of the assembly, though it may have all the outward form of the law—but due process of law, by which either what one alleges to be his is adjudged not to be his, or is forfeited upon conviction by his peers of some crime for which it was by law subject to forfeiture when the crime was committed. If this be not so, every restriction upon legislative authority would be a vain formula, without life or force. If an act of assembly can deprive a man of his property without trial and judgment, for even legal cause of forfeiture, it may in like manner deprive him of his life or his liberty, imprison him in a dungeon or hang him without judge or jury." *Palaioret's Appeal*, 67 Pa. 479, 5 Am. Rep. 450, per Judge Sharswood.

"Forfeiture of rights and property cannot be adjudged by legislative act; and confiscation without a judicial hearing, after due notice, would be void, as not being process of law." *Calhoun v. Fletcher*, 63 Ala. 574, quoting *Coolcy's Const. Lims.*

"An act of the Legislature is not the due process of law mentioned in the Constitution. The words, as remarked by Judge Bronson in the case last cited [*Taylor v. Porter*], cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms of ascertaining guilt or determining the title to property; in other words, a man cannot be legislated out of life, liberty, or property." *People v. Toynbee*, 20 Barb. 219.

These authorities, and a multitude of others to the same effect from all parts of the country, are conclusive of the objection to the provisions of the state Constitution under consideration. Taken together, those provisions do not contemplate nor permit the intervention or aid of any judicial or other proceedings, but purport by their own operation to effect the divestiture and transfer of title. This is not due process of law. As was said by the Supreme Court of Virginia (*Martin v. Snowden*, 18 Grat. 100) of a less objectionable act, "literally speaking, it is not any process at all."

It is not important at this time to inquire what is or what is not due process in proceedings for the assessment and sale of land for taxes. Due process in such cases relates to the regularity of the assessment, the levy, the notices of delinquency or proposed sale, to the sale and the report of sale, etc. It can have no application where, as in the case at bar, there is nothing to which it can apply—where the whole scheme, process, and operation of taxation is wanting, and the object savors of land robbery. If the land in this case had been taxed and sold, the question of assessment, sale, and deprivation without the due process applicable to such proceedings might have arisen, but the question of forfeiture never could arise. It is not a matter of taxation. The Constitution does not even put it under the head of "Taxation," but under the head of "Land Titles."

The Constitution undertakes to forfeit tracts of 1,000 acres and more, and not tracts of less than 1,000 acres, and it is urged that for want of just ground of such discrimination it is repugnant to the equality clause of the fourteenth amendment. In *King v. Mullins* the Supreme Court held that the discrimination was reasonable because of the difference in the facilities for ascertaining the extent and boundaries of large and of small tracts for purposes of assessment and taxation. The court was probably not aware that under the method of assessing lands in West Virginia, unlike that followed in most of the states, lands are not described on the landbooks by their

boundaries, but only by the number of acres stated in the deed or grant and by the general locality. Since that decision the Supreme Court of Appeals of West Virginia, in *State v. Swann*, 46 W. Va. 128, 33 S. E. 89—a case in which it was urged that an act of the Legislature, passed subsequently to the Constitution, forfeiting tracts of less than 1,000 acres, was within an implied prohibition of section 6, art. 13, of said Constitution—said, per Judge English:

"I think not, and see no good reason why a man owning 990 acres of land, who neglects to have it entered upon the landbooks, should be protected from forfeiture when one holding 1,005 is not."

This ruling of the state court is conclusive that there is no good ground for the classification and discrimination made by the state Constitution, which thus comes under the prohibition of the equality clause of the amendment. But the court asks: "What is to prevent the constitutional provision and the act from standing together?" The answer is obvious. The Constitution being adopted before the act was passed, and being then in contravention of the equality clause of the fourteenth amendment, it was void and inoperative, and could not stand by itself till it had the statute to stand with, even if they could have stood together if adopted contemporaneously; and, the provision of the Constitution being void and dead, it could not be revived or validated by subsequent action of the Legislature. But whatever aid the constitutional provision could get from a statute while in force forfeiting what the Constitution spared, it can get none now, because the act of 1882 (Acts 1882, p. 387, c. 130), which by implication repealed the act of April 9, 1873 (Acts 1872-73, p. 308, c. 117), forfeiting lands for nonassessment for five years "after" its passage, provides for forfeiture of tracts less than 1,000 acres for nonassessment only for five successive years "since" the 9th day of April, 1873, which expression, by its terms, covers the period of the time from April 9, 1873, the date of the passage of the act of 1873, to the time of the passage of the act of 1882, and no more; so that there is now, and has been since 1882, no law attempting to forfeit tracts of less than 1,000 acres for nonassessment either "after" or "since" 1882, and the constitutional provision stands—or rather falls—alone.

But the most serious objection to the provisions in question is that they undertake to take the lawfully acquired property of one private person without his consent, and bestow it gratuitously upon another private person for his private use and enjoyment. If these provisions are effectual, the fee-simple title to land which one instant before midnight on the last day of the year 1888 was in John R. Reed, trustee, was, without his act, knowledge or consent, without hearing, notice, complaint, or proceedings of any kind, at one instant past midnight transferred from him and vested in Joseph Hatfield, without his knowledge or request, and without any action of any human being, but by the mere effluxion of time and the operation of the pre-existing legislative act, the Constitution. One instant Hatfield owned nothing, the next he had title to 780 acres of Reed's land. Reed owed Hatfield nothing, was under no legal, moral, or other obligation to him, had done him no harm, and derived and

expected no advantage in any way from him. Hatfield had asked nothing, and had no right to ask or expect anything, from Reed. Neither, probably, was aware of the existence of the other. As between them and the state, Hatfield and his predecessors had paid the state taxes on 780 acres for 28 years at the utmost. Reed's predecessors had paid the state taxes on 875,000 acres for 18 years, and on 500,000 acres for more than half a century, aside from taxes remitted in 1838. No compensation was exacted from Hatfield either for Reed or for the state. No obligation or duty towards either was put upon him by reason of this donation. All things remained as they were before, except that the state had taken Reed's title to certain land out of him and put it into Hatfield. It requires neither authority nor argument to show that such a transfer cannot be a valid exercise of governmental power. The very sense of justice revolts at it. Free government could not exist where such a power existed. The courts, with one voice, have denied the existence of such power wherever it has been asserted.

The Supreme Court, in *Holden v. Hardy*, 169 U. S. 366-390, 18 Sup. Ct. 383, 42 L. Ed. 780, says:

"Recognizing the difficulty of defining with exactness the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation."

It was said in *Bloodgood v. M. & H. R. R. Co.*, 18 Wend. 56, 31 Am. Dec. 313:

"It has never been allowed to be a rightful attribute of sovereignty in any government professing to be founded upon fixed laws, however firm the government might be, to take the property of one individual or subject and bestow it upon another. The exercise of such a power would be incompatible with all government, and would subvert the foundation principles upon which the government was organized."

The Supreme Court, in *Davidson v. New Orleans*, 96 U. S. 102, 24 L. Ed. 616, says:

"It seems to us that a statute which declares in terms, and without more, that the full and complete title to a described piece of land, which is now in A. shall be, and is hereby, vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision."

And the same court in *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U. S. 266, 17 Sup. Ct. 992, 41 L. Ed. 994, referring to this language, says:

"Such an enactment would not receive judicial sanction in any country having a written Constitution distributing the powers of government among three co-ordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such Constitution. It would be treated, not as an exertion of legislative power, but as a sentence—an act of spoliation."

In *Wilkinson v. Leland*, 2 Pet. 657, 7 L. Ed. 542, the court, speaking by Mr. Justice Story, said:

"We know of no case in which a legislative act to transfer the property of A. to B. without his consent has ever been held a constitutional exercise of

power in any state in the Union. On the contrary, it has constantly been resisted as inconsistent with first principles by every judicial tribunal in which it has been attempted to be enforced."

In *Loan Association v. Topeka*, 20 Wall. 664, 22 L. Ed. 455, it is declared:

"To lay with one hand the power of the government on the property of the citizens and with the other to bestow it upon favored individuals * * * is none the less robbery because done under the forms of law and called 'taxation.' This is not legislation. It is a decree under legislative forms. Nor is it taxation."

The Supreme Court of West Virginia, in *Varner v. Martin*, 21 W. Va. 534, 548, Judge Green, on behalf of the court, says:

"It is true that there is neither in our Constitution nor in the Constitution of other states any express provision forbidding that private property should be taken for the private use of another, or any constitutional provision forbidding the Legislature to pass laws whereby the private property of one citizen may be taken and transferred to another for his private use, without the consent of the owner. It was doubtless regarded as unnecessary to insert such a provision in the Constitution or Bill of Rights, as the exercise of such an arbitrary power of transferring by legislation the property of one person to another without his consent was contrary to the fundamental principles of every republican government; and in a republican government neither the legislative, executive, nor judicial department can possess unlimited power. Such power as that of taking the private property of one and transferring it to another for his own use is not in its nature legislative, and it is only legislative power, which, by the Constitution, is conferred on the Legislature. Such an act, if passed by the Legislature, would not, in its nature, be a law, but would really be an act of robbery; the exercise of an arbitrary power not conferred on the Legislature. There is an entire concurrence of all the authorities in the proposition that private property cannot be taken for private use, either with or without compensation."

It has been suggested that in the present case the property transferred by legislative act to a private person is not the property of another private person, but of the state, and that the state can do with its property as it sees fit; that for the mere point of time without duration, where one joined another, the title of Reed became the property of the state before it passed into Hatfield, so that the state gave its own land, not the land of another. I cannot give my assent to that proposition for the reason that the transfer to the state would only by "mere legislative act," not for any public purpose, but for the purpose of the gratuitous transfer to another private person for his own private uses, and without the right of redemption. It would be a taking from one person and giving to another by the state, even though it became the property of the state for an instant of time. No such evasion of the federal Constitution could be tolerated; but it appears that the title does not vest in the state at all, for by said section 3, if effectual, it has previously been transferred to the junior claimant.

The language of the Constitution is, "All title to lands in this state * * * hereafter forfeited * * * shall be and is hereby transferred to and vested in any person," etc., so that when the title becomes forfeited it is to vest, not in the state, but directly in "any person," etc., if such there be, constituting the legislative transfer of A.'s property to B. without A.'s consent, which the Supreme Court

has repeatedly said never has received, and never can receive, judicial sanction under a constitutional government.

My attention has been called to sundry cases thought to militate against the views here expressed. It is unnecessary to analyze them. They arose upon wholly different states of facts from the case at bar, and, properly understood, are found to have no application to the present case, nor to have the effect supposed. I have found no well-considered decision, nor is it hazarding too much to predict that none will ever be found, to sustain the position that there is any legal power in the government, state or national, to transfer by mere legislation the property of one private person, without his consent, to another private person for his private use, for any cause whatever, or that a legislative act can become "due process of law" by the mere act of its adoption—which are the important questions in this case.

My opinion and conclusion is that the aforesaid provisions of the Constitution of West Virginia and the statutes of that state, so far as they purport or undertake to forfeit and divest the title of any person to his land and vest the same in any other private person, or to vest the same in the state without provision for redemption by or on behalf of such owner of the whole or such part of said land as he may desire to redeem, or without provision for a sale thereof and the return of the proceeds to such owner after deduction of all taxes and proper charges therefrom, are attempts by said state to deprive a person of his property without due process of law, and are prohibited by the Constitution of the United States, and that there can be no valid forfeiture where such right of redemption or receipt of proceeds is prohibited or not provided for.

It does not appear that the defendants have paid all taxes "since the sale" upon the tracts claimed by them under the commissioner of school lands, so as to bring them within section 6 of the school land act of 1893 (Acts 1893, p. 59), requiring the state's bill to be dismissed as to such lands. They are therefore not withdrawn from the provision for redemption nor from the operation of complainant's decree. But if they were withdrawn, then for the reasons above stated there could be no valid forfeiture of complainant's title thereto, and it would still be in him. The title to the land in controversy appears from the bill to be in the complainant, and he appears to be entitled to the relief prayed for.

The demurrer will be overruled, with leave to the defendants to answer.

ROME PETROLEUM & IRON CO. v. HUGHES SPECIALTY WELL
DRILLING CO.

(Circuit Court, N. D. Georgia, N. W. D. May 26, 1904.)

No. 49.

1. REMOVAL OF CAUSES—JURISDICTION OF FEDERAL COURT—DISTRICT OF SUIT.

Under the judiciary act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 509], a cause is removable by a defendant who is a nonresident of the state, on the ground of diversity of citizenship, although neither party is an inhabitant of the district.

On Motion to Remand to State Court.

Dean & Dean, for plaintiff.

J. Branham, Denny & Harris and Geo. A. H. Harris, for defendant.

NEWMAN, District Judge. This is a motion to remand. The suit was originally brought in the superior court of Floyd county, Ga., by the Rome Petroleum & Iron Company, a corporation of the state of South Dakota, against the Hughes Specialty Well Drilling Company, a corporation of the state of South Carolina. The defendant has by proper proceedings removed the case into the Circuit Court of the United States for the Northwestern Division of the Northern District of Georgia. Neither of the parties are citizens or residents of the state of Georgia.

The question is whether under Act Cong. March 3, 1887, c. 373, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], such a suit is removable. This depends upon the construction to be given certain clauses in the first and second sections of that act. In the beginning of the first section it is provided:

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, * * * in which there shall be a controversy between citizens of different states."

In the latter part of the first section it is provided:

"But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The second section of the act, so far as material here, provides that:

"Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being non-residents of that state."

¶ 1. Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullagham*, 27 C. C. A. 298.

Since the passage of this act, the Circuit Courts have differed as to the construction of these provisions of sections 1 and 2 of this act. Soon after the passage of the act (August 29, 1887), Mr. Justice Field and Judges Sawyer and Sabin, in the Circuit Court for the Northern District of California, rendered a decision, which has since been often quoted, in which it was held that:

"Under section 1 of the removal act, as amended by an act of March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508], the Circuit Court cannot take cognizance of a suit brought against a party in a district of which he is not an inhabitant, and section 2 does not authorize the removal of a suit brought in a state court against a party not an inhabitant of the district. Section 2 of said act, as amended, does not authorize the removal of a suit from a state court to the United States Circuit Court which could not have been originally brought in said circuit court."

In *Wilson v. Western Union Telegraph Co.* (C. C.) 34 Fed. 561, Mr. Justice Field and Circuit Judge Sawyer expressly stated that the views announced in *Yuba v. Mining Co.* were erroneous. In the opinion by Mr. Justice Field this is said:

"The evident object of this motion is to obtain a reconsideration of the decision of the circuit court in the case of *County of Yuba v. Mining Co.*, rendered in August, 1887, and reported in 32 Fed. 183. It was there held that, under section 1 of the act of 1887, the Circuit Court could not take cognizance of an action brought against a party in a district of which he was not an inhabitant, and that, under section 2, no removal could be made to the Circuit Court of the United States of an action brought in a state court against a party who was not an inhabitant of the district. In that case the plaintiff was a county of the state of California, and the defendants were corporations of the state of Nevada. The opinion in the case was written by my associate, the Circuit Judge, but I concurred in it, and in the judgment which followed. I have, however, long been satisfied that we fell into an error, and I am happy that we have so early an opportunity of correcting it."

Afterward, in the opinion, this occurs:

"Passing now to the second section of the act of 1887, we find the cases mentioned in which a removal of suits of a civil nature may be had from the state court to the Circuit Court of the United States. They embrace, among others, first, suits of a civil nature arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which by the previous section of the act the Circuit Courts are given original jurisdiction, but which are pending or may be brought in a state court; and, second, other suits of a civil nature of which the Circuit Courts are given original jurisdiction by the first section, but which are pending or may be brought in a state court. These may be removed by the defendant or defendants therein being non-residents of the state. In one of these classes of suits a removal may be asked by the defendant or defendants without regard to his or their residence. In the other class a removal can be asked only when the defendant or defendants reside without the state. According to this construction of the two sections, the corporations of Nevada, defendants in the *Yuba County Case*, had a right to its removal to the Circuit Court of the United States, and we erred in remanding it back to the state court. So in the present case the defendant the Western Union Telegraph Company has a right to its removal to the Circuit Court, and, the removal being made, the motion to remand the case back to the state court must be denied. Since the decision in the *Yuba County Case*, the same question has been before several Circuit Courts, and the decisions rendered by them, after a careful consideration of the subject, have been against the one we made, and which we now overrule. See *Fales v. Chicago, etc., Railroad Co.* (C. C.) 32 Fed. 673; *Gavin v. Vance* (C. C.) 33 Fed. 84; *Loomis v. Coal Co.*, Id. 353; *St. Louis, V. & T. H. Railroad Co. v. Railroad Co.*, Id. 385."

In *Fales v. Chicago, etc., Railroad Co.*, cited by Justice Field, Judge Shiras, delivering the opinion, says in this connection:

"It seems to me that the question of federal cognizance is confounded with the question of the place of bringing suit by original process. The latter question has nothing to do with the right of removal. The question whether the action might have been brought by original process in any federal court was material, in order to determine whether it was a case of federal cognizance; but, that question being decided in favor of the federal jurisdiction, the question of the proper place or district in which the suit might have been brought by original process is wholly immaterial on the question of removal."

And again in the same opinion:

"If, however, the plaintiff, having a cause of federal cognizance by reason of diverse citizenship, chooses to bring suit thereon in the state court, then he has made his election, and he cannot afterwards remove the case into the federal tribunal. If such a suit is brought in the courts of the state of which defendant is a resident, then it cannot be removed, because it is supposed the defendant can have no objection to a trial by the courts of the state of which he is a resident. If, however, a suit is brought in a case of federal cognizance in a court of a state of which defendant is not a resident, then the election is given to such nonresident defendant to carry the case by removal into the federal court."

In *Duncan v. Associated Press*, 81 Fed. 417, in the Circuit Court for the Southern District of California, Judge Wellborn discusses this question, and, after quoting the authorities, says:

"The foregoing citations establish, beyond question, that the right of removal does not depend in any way upon the residence of the parties, or, in other words, that the restrictions as to residence do not apply to jurisdiction by removal; and such jurisdiction exists where the parties are citizens of different states, even though neither of them be a citizen of the state where the suit is pending."

In *Cowell v. City Water Supply Co. et al.* (C. C.) 96 Fed. 769, Judge Woolson took a similar view of the question.

In the recent case of *Whitworth v. Railroad Co.*, 107 Fed. 557, Judge Evans, of the Circuit Court for the District of Kentucky, reviews most of the cases on this question, and decides in favor of the right of removal by a nonresident defendant, although neither the plaintiff nor defendant was a citizen of the state in which suit was brought. In a still later case (*Foult v. Gray et al.*, 120 Fed. 156) Judge Keller, in the Circuit Court for the Southern District of West Virginia, after reviewing the authorities on this subject, takes a contrary view, and holds that such a case is not removable.

It seems clear that the provision of section 2 of the act of 1887 quoted above, which controls on this question, refers to the first part of section 1, giving cognizance to the Circuit Courts of the United States generally, rather than to the latter part of the section, fixing the locality or particular district in which suit may be brought by original process or proceeding. This was pointed out by Mr. Justice Brewer (then Circuit Judge Brewer), in *Kansas City & T. R. Co. v. Interstate Lumber Co.* (C. C.) 37 Fed. 3, in this language:

"The same distinction between the general matter of jurisdiction and the particular court for suit and trial is recognized in *Fales v. Railway Co.* (C. C.) 32 Fed. 673; *Gavin v. Vance* (C. C.) 33 Fed. 84; *Loomis v. Coal Co.*, Id. 353. Turning to the second section, we find that the removable suits are those of which, by the first section, the federal courts are given jurisdiction. The

language speaks of jurisdiction generally, and of courts in the plural. Any suit is removable of which any federal court might take jurisdiction, and the mere fact that the defendant could have successfully objected to being sued in any one or more particular federal courts does not destroy the general jurisdiction of federal courts or prevent its removal. Take the case at bar. If the suit had been commenced in this court, and process served personally upon the defendant, and it had raised no question other than upon the merits of the controversy, this court would have had undoubted jurisdiction, and the judgment it rendered would have been valid. If the jurisdiction of the court upon his failure to insist upon his personal privilege be conceded in the one case, why should there be doubt of the jurisdiction when he voluntarily seeks the court? I am aware that in the case of *Harold v. Mining Co.* (C. C.) 33 Fed. 529, I concurred with Judge Hallett in an opinion different from that herein expressed, but further reflection, after hearing the question discussed at length and frequently, has satisfied me that that opinion was erroneous. It is perhaps unnecessary to carry this discussion any further, and it is enough to say that we hold that the fact that both parties are nonresidents of this district does not oust this court of jurisdiction in a case removed from the state court by a nonresident defendant."

In *First National Bank v. Merchants' Bank*, 37 Fed. 657, 2 L. R. A. 469, decided in this district, in the opinion, after citing some cases taking a different view, this is said:

"My conclusion as to the proper construction of these two sections is different. I do not think that it can be said that jurisdiction is given by the language quoted from the latter part of section 1. It relates to the locality in which suits may be brought by original 'process or proceeding,' and is intended for the benefit of defendants. It provides where they may be required to answer suits originating in the federal courts. Jurisdiction is conferred on the Circuit Courts by the first part of section 1, and that jurisdiction, when founded on citizenship, is between citizens of different states, provided the jurisdictional amount is involved; and it is to that portion of the section, instead of the latter part, fixing the place where suits may be brought by original 'process or proceeding,' section 2 refers."

Without going further into the decisions on this question, I am of opinion that this matter is determined by the Supreme Court of the United States in *Davidson v. Railroad Co.*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672. It is but a few words in the concluding portion of the opinion by the Chief Justice, and is as follows:

"Section 2, however, refers to the first part of section 1, by which jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought." Citing *McCormick Machine Co. v. Walthers*, 134 U. S. 41, 10 Sup. Ct. 485, 33 L. Ed. 833.

In the latter case it was said in the opinion by the Chief Justice, after quoting the latter part of section 1 of the act of 1877:

"The jurisdiction common to all the Circuit Courts of the United States in respect to the subject-matter of the suit, and the character of the parties who might sustain suits in those courts, is described in the section, while the foregoing clause relates to the district in which suit may originally be brought."

It is unnecessary to go further in the discussion of this question. The subject is exhausted in the decisions heretofore rendered. My own opinion is still that expressed some years ago in *First National Bank v. Merchants' Bank*, supra.

I think the case was removable under the act of Congress. Consequently the motion to remand will be denied.

JACOBS et al. v. MEXICAN SUGAR CO.

(Circuit Court, D. New Jersey. May 31, 1904.)

1. JURISDICTION OF FEDERAL COURT—SUIT FOR DISSOLUTION OF CORPORATION—ENFORCEMENT OF STATUTORY REMEDY.

A proceeding by a stockholder or creditor of a corporation for an injunction and the appointment of a receiver for the corporation as an insolvent, under the New Jersey corporation act (P. L. 1896, p. 298, § 65), which authorizes such proceeding in the Court of Chancery whenever a corporation shall become insolvent or suspend its ordinary business for want of funds, is one involving a money controversy, so as to that extent to be within the jurisdiction of a federal court, where diversity of citizenship exists and the requisite amount is in dispute.

2. EQUITY JURISDICTION—FEDERAL COURTS—SUIT BASED ON LEGAL DEMAND.

A simple contract creditor of a corporation cannot maintain a suit in a federal court of equity to establish his claim and for the seizure and application thereon of the property of the corporation, although the state statute may authorize such a proceeding in a state court.

3. SAME—SUIT FOR DISSOLUTION OF CORPORATION—STATUTORY REMEDY.

A suit by a stockholder of an insolvent corporation for the dissolution of the corporation and the winding up of its affairs is within the jurisdiction of a federal court of equity, where such remedy is expressly given the stockholder by a state statute.

In Equity.

James E. Howell and Nathan Bijur, for complainants.

Lindley M. Garrison, for defendant.

ARCHBALD, District Judge.* The defendant, the Mexican Sugar Company, is a corporation organized under the laws of New Jersey with a capital stock of \$600,000, all of which has been issued; and the complainants Arthur Jacobs and Solomon R. Jacobs are stockholders, being joint owners of 495 shares of the par value of \$49,500, and several owners of 2 and 3 shares respectively. They are the further owners of voting trust certificates representing 1,500 shares issued to Henry J. Braker and Solomon R. Jacobs as voting trustees, such certificates standing in the name of Arthur Jacobs. Solomon R. Jacobs is also a creditor of the company to the extent of over \$10,000. The two complainants, with Henry J. Braker, James B. Craven, and Arthur E. Dowler are the directors; Henry J. Braker being president and manager, Arthur E. Dowler secretary, and Solomon R. Jacobs treasurer. The business of the company is the raising and manufacture of sugar, molasses, and their by-products; its capital being chiefly invested in a lease from the Mexican Sugar Refining Company of a sugar plantation in the state of Vera Cruz, Mexico, having a sugar refinery in course of construction thereon, with the usual stock, implements, and appliances. The bill charges that the company is insolvent, and does not intend to and cannot carry on its business for want of funds; that, unless the court intervenes for the protection of its stockholders and creditors, its assets will be totally lost and dissipated;

¶ 1. Dissolution of foreign corporations, see note to *Republican Mountain Silver Mines v. Brown*, 7 C. C. A. 421.

* Specially assigned.

and that on April 25, 1904—two days before the filing of the bill—at a meeting of the directors, and by the votes of Braker, Craven, and Dowler against the votes of the two complainants, all the available assets of the company were turned over to one James W. Cunningham, a representative of Braker, to secure an indebtedness of \$45,537.69; and an indebtedness of \$4,956.06 confessed for insurance to the Mexican Sugar Refining Company, from whom the lease of the plantation in Mexico was obtained, which it is claimed was not in fact due. There are other matters set forth in the bill, but this will suffice to indicate its general trend. The prayers are: (1) That the defendant be declared to be insolvent, and be restrained by injunction from exercising its franchise or collecting, transferring, or disposing of any of its property; (2) that a receiver be appointed on behalf of creditors and stockholders, with all the ordinary powers; (3) that the rights of the complainant Solomon R. Jacobs and all other creditors be ascertained, and the assets of the defendant company be administered, to the end that the rights, liens, and equities of such creditors be established and enforced against the same.

The insolvency of the company is admitted, and the other charges not denied; but the jurisdiction of the court in the premises is contested, and that is the question to be disposed of. The bill is based on section 65 of the general corporation act of 1896 of the state of New Jersey (P. L. p. 298), which is as follows:

"Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, any creditor or stockholder may by petition or bill of complaint setting forth the facts and circumstances of the case apply to the Court of Chancery for a writ of injunction and the appointment of a receiver or receivers or trustees and the court being satisfied by affidavits or otherwise of the sufficiency of said application and of the truth of the allegations contained in the petition or bill, and upon such notice if any as the court by order may direct may proceed in a summary way to hear the affidavits proofs and allegations which may be offered on behalf of the parties, and if upon such inquiry it shall appear to the court that the corporation has become insolvent and is not about to resume its business in a short time thereafter with safety to the public and advantage to the stockholders, it may issue an injunction to restrain the corporation and its officers and agents from exercising any of its privileges or franchises and from collecting or receiving any debts or paying out selling assigning or transferring any of its estate moneys funds lands tenements or effects, except to a receiver appointed by the court until the court shall otherwise order."

A case is undoubtedly stated in the bill which brings it within the provisions of the statute, if the court has authority to assume jurisdiction under it. The general power of the federal courts to take cognizance of and enforce a right created by state law which is essentially equitable in its nature is too well established to call for extended discussion or citation of authorities. *Land Title & Trust Co. v. Asphalt Co.* (C. C. A.) 127 Fed. 1. Conceding that such is the case, however, it is contended that a proceeding under the law in question does not involve a money dispute such as is essential to the jurisdiction of this court under the acts of Congress. It is, on the contrary, as decided by Vice Chancellor Stevenson in *Gallagher v. Asphalt Co.* (N. J. Ch.) 55 Atl. 259, in the nature of an equitable quo warranto, to determine the right of the corporation to continue its business. But, whatever

its character, I cannot accept the view that it does not present a dispute measurable in money, within the meaning of the federal law. The complainant in such a bill, whether as stockholder or creditor, comes into court to protect his pecuniary interest, which is imperiled by the insolvency of the corporation and its inability to further carry out with success its corporate purposes. He seeks the intervention of the court in its affairs, in the manner provided by the statute, to save himself as far as possible from financial loss. No merely benevolent purpose to shield the general public from imposition by reason of its insolvent condition brings him there; nor does he move in behalf of the state, of which the corporation is a creature, as would the attorney general or other representative executive officer of the state government. So far as the defendant is concerned, its continued existence is, of course, involved; but the proceeding is prosecuted by the complainant because of the direct personal interest which he has to subserve. If successful, there will, in the final outcome, when the corporate affairs are wound up, be a money decree establishing his right to a share in what is realized if the assets go far enough, or in favor of others who are necessarily brought into court by the proceeding if they do not. This clearly presents a money controversy, of which, if it exceeds the limit established by Congress, and is between citizens of different states, the Circuit Court has jurisdiction. By some of the federal judges, the value of the assets of the corporation which the court is called upon to administer is regarded as determining the limit (*Hill v. Glasgow R. R.* [C. C.] 41 Fed. 610; *Towle v. American Building & Loan Society* [C. C.] 60 Fed. 131; *Taylor v. Decatur Mineral Land Co.* [C. C.] 112 Fed. 449; *Jones v. Mutual Fidelity Co.* [C. C.] 123 Fed. 506), while by others it is held that the amount in controversy as to each complainant is his particular claim, which must therefore be sufficient in itself to confer jurisdiction (*Putney v. Whitmire* [C. C.] 66 Fed. 385; cf. *Stewart v. Dunham*, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329; *Handley v. Stutz*, 137 U. S. 366, 11 Sup. Ct. 117, 34 L. Ed. 706). But without stopping to determine which is the true standard, upon either basis in the present instance we have enough. The objection to the court's jurisdiction on the ground of the want of a proper money dispute is not, therefore, well taken.

So far as the complainant Solomon R. Jacobs is a simple contract creditor, having no lien by way of pledge or otherwise on the property of the defendant company, and his claim not having been reduced to judgment, he has no standing in this court to prosecute the present bill, the state law to the contrary notwithstanding. This question was not passed upon in *Land Title & Trust Co. v. Asphalt Co.* (C. C. A.) 127 Fed. 1, the pursuing party, as is there pointed out by Gray, J., being a lienholding creditor as pledgee of nearly all the assets of the company. But it is declared by Mr. Justice Brewer in *Hollins v. Briarfield Coal & Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, to be the settled law of the federal courts "that such creditors cannot come into a court of equity to obtain the seizure of the property of their debtor and its application to the satisfaction of their claims; and this notwithstanding a statute of the state may authorize such a proceeding in the courts of the state." It is said in *Darragh v.*

Wetter Manufacturing Co., 78 Fed. 7, 23 C. C. A. 609, and in Jones v. Mutual Fidelity Co., 123 Fed. 506, that this is an obiter dictum, there being no state statute in the case before the court which justified the proceeding; but there was in the prior cases of Scott v. Nealy, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, and Cates v. Allen, 149 U. S. 457, 13 Sup. Ct. 977, 37 L. Ed. 804, where the same doctrine is enunciated and enforced; the fact that in the latter instance the defendants were individuals, and not a corporation, making no difference. Neither was it so regarded in Morrow Shoe Manufacturing Co. v. New England Shoe Co., 60 Fed. 341, 8 C. C. A. 652, 24 L. R. A. 417, First National Bank v. Prager, 91 Fed. 689, 34 C. C. A. 51, and Harrison v. Farmers' Loan & Trust Co., 94 Fed. 728, 36 C. C. A. 443, in each of which the right of a simple contract creditor to prosecute a bill of this character, although sanctioned by the state law, was denied. The point is that, for the federal courts to take jurisdiction in equity where the bill is founded on a legal claim, adjudicating and establishing it if denied, runs counter to the provisions of the Constitution which secures to parties the right to a trial by jury; and this objection state legislation cannot, of course, remove. This may not be true where there is no controversy as in the case of Tompkins v. Catawba Mills (C. C.) 82 Fed. 780, where the validity of the plaintiff's claim was admitted by the answer, and the jurisdiction was sustained upon that ground. But, even if that position is a sound one, it cannot be assumed in the present instance that the alleged debt of Mr. Jacobs will not ultimately be contested and denied.

But both of the complainants come also into court as stockholders with large interests, alleging the insolvency of the company and the maladministration of its affairs, and the question is whether in that capacity they are entitled to be heard. It is well settled that, in the absence of enabling statutes courts of equity have no general jurisdiction at the instance of a shareholder to decree the dissolution of a corporation and to wind up its affairs. 9 Am. & Eng. Encycl. Law (2d Ed.) 601; 10 Cycl. Law & Pro. 988, 1035; Worth Mfg. Co. v. Bingham, 116 Fed. 785, 54 C. C. A. 119. But in the present instance there is such a statute, and, if the right to intervene which it confers is essentially equitable in character, it is properly appealed to; and that it is, as it seems to me, there can be little doubt. Towle v. American Building, etc., Society (C. C.) 60 Fed. 131. Says Mr. Justice Bradley in Graham v. Railroad, 102 U. S. 148, 26 L. Ed. 106:

"When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which in other circumstances are as much the absolute property of the corporation as any man's property is."

Commenting upon this in Hollins v. Briarfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, already referred to, it is said by Mr. Justice Brewer:

"With reference to the suggestion in this last paragraph, it may be observed that the court does not attempt to determine who are proper parties to maintain a suit for the administration of the assets of an insolvent corporation. All that it decides is that, when a court of equity does take into

its possession the assets of an insolvent corporation, it will administer them on the theory that they in equity belong to the creditors and stockholders, rather than to the corporation itself. * * * Solvent, it holds its property as any individual holds his, free from the touch of a creditor who has acquired no lien; free, also, from the touch of a stockholder, who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, place the property in a condition of trust, first for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property as such, for the direct benefit of either creditor or stockholder."

From these authorities it plainly appears that the administration of the affairs of an insolvent corporation falls strictly within the prerogatives of a court of equity, which may therefore be rightfully exercised in their behalf when once they are properly invoked. The only question is at whose instance and under what circumstances this can be done. That it cannot be where the moving party is a simple contract creditor in a court where the distinction between legal and equitable rights is strictly observed, we have already seen. Neither can it—having regard to the general principles of law—on the complaint of a shareholder. But it is just at this point that the statute of the state steps in. By it a single stockholder, alleging the insolvency of the corporation and its inability to further carry on its business with safety to the public and advantage to those interested therein, may ask the intervention of the court to enjoin the exercise of its franchises and wind up its affairs. The court, where this course is taken, is thus put in possession of the case by one who has the undoubted right to invoke its jurisdiction, and the rest is a mere matter for the exercise of its recognized equity powers. The bill is therefore well brought, and must be sustained.

Let a decree be drawn awarding an injunction and appointing a receiver as prayed for.

WALKER et al. v. GLOBE NEWSPAPER CO.

(Circuit Court, D. Massachusetts. May 25, 1904.)

No. 1,412.

1. COPYRIGHT—MAPS—REMEDY FOR INFRINGEMENT.

Rev. St. § 4965 [U. S. Comp. St. 1901, p. 3414], imposing a penalty for infringement of the copyright of any map, picture, work of sculpture, etc., unlike section 4964, relating to books, does not give the proprietor a right to maintain a civil action at law to recover damages for the infringement, and, the exclusive right of property in such artistic productions being purely statutory, the remedy for infringement is limited to that prescribed by the statute, there being no common law of the United States which can be invoked to supplement such remedy.

At Law. Action to recover damages for infringement of copyright. On demurrer to declaration.

H. L. Boutwell, for plaintiffs.

William Quinby and Charles T. Gallagher, for defendant.

HALE, District Judge. This case comes before the court on the defendant's demurrer to the plaintiffs' declaration. That declaration charges infringement of the plaintiffs' copyrighted map known as "Map of the Electric Railways of the State of Massachusetts, Accompanying the Report of the Railroad Commissioners, 1899." Under this declaration the plaintiffs seek to recover damages for an invasion of their copyright. They do not seek a forfeiture and penalty under section 4965 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3414]. The defendant sets out eight causes of demurrer. The vital question raised by demurrer is stated in the first ground: "That the statutes relating to copyrights provide no remedy by civil action on behalf of the owner of the copyright of the map." The plaintiffs admit that section 4965, relating to copyrights, does not give any action for damages for the piracy of any map or any other article therein mentioned; that section 4964 [U. S. Comp. St. 1901, p. 3413] provides such remedy only in case of books; that this form of action is not expressly given by the statutes of the United States relating to copyrights. But the plaintiffs urge with great force and ability that where a right, previously existing by the common law, is secured by a statute, which provides no remedy for its protection, common-law remedies are available. They insist upon the application of the rule that their ordinary common-law remedy is not taken away because a special one is given by the statute. Plaintiffs' declaration is drawn, then, for the purpose of enforcing their common-law rights. The question is thus brought clearly before the court whether they have any rights under the common law. The plaintiffs found their right of recovery under a common-law declaration upon principles laid down by the English courts. They urge that the statute of 8 Anne was a law similar to our copyright law in this respect: that it enacted that an author should have the sole right and liberty of printing his book for a limited number of years, and then affixed penalties for transgressing the law; that the act therefore vested property in literary works in the author for a limited period, and that it provided penalties for those who infringed the property. But plaintiffs urge that, in addition to these statute penalties, the courts of England allowed an action on the case for damages, on the ground that the law confers no right without a remedy to enforce it; and that, while forfeitures and penalties were provided for by the act, the provision for such forfeitures and penalties did not prevent an injured author, whose copyright had been infringed, from having damages at the common law. Plaintiffs base their contention largely upon *Beckford v. Hood*, 7 T. R. 620, in which Lord Kenyon, in an elaborate and famous decision, supported the common-law rights under an infringed copyright. Lord Kenyon said:

"Then, the statute having vested the right in the author, the common law gives the remedy by action on the case for the violation of it. Of this there could have been no doubt made if the statute had stopped there. But it has been argued that as the statute, in the same clause that creates the right, has prescribed a particular remedy, that and no other can be resorted to. And, if such appeared to have been the intention of the Legislature, I should have subscribed to it, however inadequate it might be thought. But their meaning in creating the penalties in the latter part of the clause in question certainly was to give an accumulative remedy. Nothing could be more incomplete as

a remedy than those penalties alone; for, without dwelling upon the incompetency of the sum, the right of action is not given to the party aggrieved, but to any common informer. I cannot think that the Legislature would act so inconsistently as to confer a right and leave the party whose property was invaded without redress. On the fair construction of this act, therefore, I think it vests the right of property in the authors of literary works for the times therein limited, and that consequently the common-law remedy attaches if no other be specifically given by the act."

The learned counsel for the plaintiffs urges that all the reasoning of Lord Kenyon in this famous decision applies in full force to the common-law rights of an author under section 4964 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3413]. It is clear that our copyright law provides a remedy by civil action to the owner of the copyright of a book, but does not provide any remedy in favor of the owner of the copyright of a map, under section 4965 [U. S. Comp. St. 1901, p. 3414]. Section 4964 provides that a person who infringes the copyright in a book shall forfeit every copy of his offending publication, "and shall also forfeit and pay such damages as may be recovered in a civil action." But section 4965 has no such provision. The portion of this section which is important in this case reads as follows:

"If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this act, shall, within the term limited, contrary to the provisions of this act, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, dramatize, translate, or import, either in whole or in part, or by varying the main design, with intent to evade the law, or, knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale."

It will be observed that this section provides for no action of damages, but provides for the forfeiture of every sheet of the offending map, chart, or drawing, and for the further forfeiture of one dollar for every sheet of the same found in the possession of the infringer; and this is the sum of all the relief provided by Congress for the infringement of a copyrighted map. This section has been repeatedly before the courts. It is a penal statute, and must receive a strict interpretation. This has been decided many years ago in *Backus v. Gould*, 7 How. 798, 12 L. Ed. 919. In construing this statute in *Sarony v. Ehrich* (C. C.) 28 Fed. 80, Judge Coxe said:

"No authority has been cited to sustain the proposition that when the piratical prints are out of the possession and beyond the control of the infringer the proprietor of the copyright can recover of him their value in an action at law. It would require an exceedingly strained construction—almost a distortion—of the act to make it fit the present circumstances. It is no answer to say that the remedy provided by law is ineffective; that the wrongdoer may escape the consequences of his infringement; that the opportunity for

redress diminishes in proportion to the success of the infringement, and ceases wholly when the wrong is fully consummated. These arguments might, with great propriety, be addressed to the lawmaking power, and Congress could, perhaps, be induced to render effectual by a few simple amendments provisions which, in their present form, are so obviously defective and inadequate. With these considerations, however, the courts have nothing to do. They must deal with the law as it is, not as it ought to be."

In *Bolles v. Outing Company*, 175 U. S. 262, 20 Sup. Ct. 94, 44 L. Ed. 156, the Supreme Court held that in an action under this statute to recover the penalty of one dollar provided for every copy of engraving or photograph infringing the copyright of another, the plaintiff's recovery is limited to copies actually found in the possession of the defendant, and does not extend to copies sold and put in circulation. In that very recent case the whole body of American law is reviewed.

But the learned counsel for the plaintiffs contends that under the reasoning of Lord Kenyon in the English court, upon the statute of Anne, the rights of the plaintiffs, being secured by the statute which provides no adequate remedy, the common-law remedies are available. The vital and conclusive answer to enforcing this proposition in the federal courts is that there is no common law of the United States. In the famous case *Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 1055, which is the leading and controlling case upon this whole subject, it is held, in construing the copyright law, that while a man is entitled to the fruit of his own labors, he can enjoy them only, except by statutory provision, under the rules of property which regulate society. Mr. Justice McLean, speaking for the Supreme Court, at page 657, 8 Pet., 8 L. Ed. 1055, said:

"But if the common-law right of authors were shown to exist in England, does the same right exist, and to the same extent, in this country? It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs, and common law. There is no principle which pervades the Union and has the authority of law that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption. The question respecting the literary property of authors was not made a subject of judicial investigation in England until 1760; and no decision was given until the case of *Miller v. Taylor* was decided in 1769. Long before this time the colony of Pennsylvania was settled. What part of the common law did Penn and his associates bring with them from England? The literary property of authors, as now asserted, was then unknown in that country. Laws had been passed regulating the publication of new works under license. And the King, as the head of the church and the state, claimed the exclusive right of publishing the acts of Parliament, the book of common prayer, and a few other books. No such right at the common law had been recognized in England when the colony of Penn was organized. Long afterwards literary property became a subject of controversy, but the question was involved in great doubt and perplexity; and a little more than a century ago it was decided by the highest judicial court in England that the right of authors could not be asserted at common law, but under the statute. The statute of 8 Anne was passed in 1710. Can it be contended that this common-law right, so involved in doubt as to divide the most learned jurists of England at a period in her history as much distinguished by learning and talents as any other, was brought into the wilds of Pennsylvania by its first adventurers? Was it suited to their condition? But there is another view still more conclusive. In the eighth section of the first article of the Constitution of the United States it is declared that Congress shall have power 'to promote the progress of science and useful arts,

by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.' And in pursuance of the power thus delegated, Congress passed the act of the 31st of May, 1790 [1 Stat. 124, c. 15]. This is entitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.' In the first section of this act, it is provided 'that from and after its passage, the author and authors of any map, chart, book or books, already printed within these United States, being a citizen, etc., who hath or have not transferred to any other person the copyright of such map, chart, book or books, etc., shall have the sole right and liberty of printing, reprinting, publishing and vending such map, book or books, for fourteen years.' In behalf of the common-law right an argument has been drawn from the word 'secure,' which is used in relation to this right, both in the Constitution and in the acts of Congress. This word, when used as a verb active, signifies to protect, insure, save, ascertain, etc. The counsel for the complainants insist that the term, as used, clearly indicates an intention not to originate a right, but to protect one already in existence. There is no mode by which the meaning affixed to any word or sentence by a deliberate body can be so well ascertained as by comparing it with the words and sentences with which it stands connected. By this rule the word 'secure,' as used in the Constitution, could not mean the protection of an acknowledged legal right. It refers to inventors as well as authors, and it has never been pretended by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented. And if the word 'secure' is used in the Constitution in reference to a future right, was it not so used in the act of Congress?"

It will thus be observed, then, that in this great case the Supreme Court has fully passed on all questions of common-law rights under the copyright law. Further in the opinion the court fully discusses *Beckford v. Hood*, supra, in which Lord Kenyon's decision was given, which is relied upon in the case at bar. We must therefore come to the conclusion that the courts of this country have long ago passed adversely upon the right to bring a common-law action under the section of the copyright law which is now before us. Under the copyright laws that now exist there can be no such right. As Judge Coxe has said in *Sarony v. Ehrich*, supra, "We must deal with the law as it is, not as it ought to be."

Demurrer sustained; the declaration adjudged insufficient at law.

In re DANIELS.

(District Court, N. D. Iowa, C. D. June 3, 1904.)

No. 508.

1. BANKRUPTCY—FEES OF REFEREE—EXTRA ALLOWANCES.

Under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 409], the only allowance which can be made to a referee in addition to the fees and commission expressly prescribed therein is for expenses necessarily incurred, a detailed account of which must be kept and returned to the court, verified by the oath of the referee, and accompanied by vouchers when they can be procured.

In Bankruptcy. On adjustment of referee's account.

REED, District Judge. In this matter the referee's account and record are before the court for approval. In the account, as shown

by his record, are the following named items or charges made by the referee against the bankrupt's estate:

| | | |
|-------------------|--|----------|
| 1903 | | |
| Dec. 12. | Mailing 117 notices of first meeting of creditors..... | \$ 5 85 |
| Dec. 9. | Notices by mail, for sale..... | 5 85 |
| 28. | Notices of trustee's report, by mail..... | 5 85 |
| | Notice of discharge, by mail..... | 5 85 |
| | Office rent | 15 00 |
| | Clerk hire | 15 00 |
| Aggregating | | \$ 53 40 |

In addition to the above are charges for

| | |
|---|----------|
| Filing claims, at 25 cents each..... | \$ 25 25 |
| Publishing notice of first meeting..... | 2 90 |
| Record book | 50 |
| 1% commission on money disbursed by trustee to creditors..... | 6 03 |
| Other charges for traveling and hotel expenses and amount paid to stenographer, aggregating | 15 35 |
| Total | \$103 43 |

It becomes necessary to determine which of these charges may rightfully be allowed to the referee in addition to his compensation as fixed by the bankrupt act.

The four items of \$5.85 each for "mailing 117 notices of the first meeting of creditors," and other matters referred to, evidently include the preparation of such notices, for in no other way could such an amount of expense be incurred. The duties of the referee are prescribed in section 39 of Act July 1, 1898, c. 541, 30 Stat. 555, 556 [U. S. Comp. St. 1901, p. 3436]. Among other things, he is required to "(4) give notices to creditors as herein provided; * * * (7) safely keep, protect and transmit to the clerks the records required to be kept by him when the cases are concluded." Section 42, 30 Stat. 556 [U. S. Comp. St. 1901, p. 3437], provides that the records of all proceedings in each case before a referee shall be kept in a separate book or books, as nearly as may be in the same manner as records in equity cases are now kept in the Circuit Courts of the United States; and when the case is concluded before the referee the record shall be certified to by him, and, together with the papers on file before him, transmitted to the court of bankruptcy, and there remain as a part of the records of the court. "Sec. 58a. Creditors shall have at least ten days notice by mail to their respective addresses * * * of (1) all examinations of the bankrupt; (2) all hearings upon applications for confirmations and compositions or the discharge of bankrupts; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee; and the time when and place where they will be passed upon. * * * (c) All notices shall be given by the referee unless otherwise ordered by the judge." 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]. These provisions required of this referee as a part of his duties that he give to the creditors the four notices for each of which he has charged \$5.85 in his account.

The compensation of the referee for the duties required of him is fixed by the act as follows:

"Sec. 40a as amended. Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, * * * twenty-five cents for each proof of claim filed for allowance, to be paid from the estate, if any, as part of the costs of administration, * * * and one per cent. commission on all moneys disbursed to creditors by the trustee." Act Feb. 5, 1903, c. 487, § 9, 32 Stat. 799 [U. S. Comp. St. Supp. 1903, p. 414].

For actual and necessary expenses incurred, it is provided by section 62a:

"The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred." 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446].

The general orders provide as follows:

"No. X. Before incurring any expenses in publishing or mailing notices, or in travelling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal, or referee may require from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as a part of the costs of administering the same." 89 Fed. vi, 32 C. C. A. xiii.

"No. XXVI. Every referee shall keep an accurate account of his travelling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him, and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month." 89 Fed. xi, 32 C. C. A. xxvii.

"No. XXXV. * * * (2) The compensation of referees prescribed by the act shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in travelling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge." 89 Fed. xiii, 32 C. C. A. xxxiv.

By the amendment of February 5, 1903, c. 487, § 18, 32 Stat. 800 [U. S. Comp. St. Supp. 1903, p. 418], it is provided:

"Sec. 72. That neither the referee nor trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed by this act."

As the act requires that the referee keep a record of the proceedings before him, and give notices to the creditors by mail of the proceedings and other matters named, it follows that the referee must prepare suitable notices, and place the notices in the mails, as a part of his duties. If, however, he pays the necessary postage on such notices, or the actual cost of publishing the same, and for the books in which to make and keep the required record of cases referred to him, he may be allowed the amount so paid from the bankrupt estate in which such expenses have been actually incurred, though under general order No. 10 he may require indemnity before incurring the expenses there referred to, which expense

shall be repaid from the estate, if any, to the bankrupt or other person who actually pays the same. If the notices required to be given by mail were sent by the referees in penalty envelopes, nothing can then be allowed for postage on notices so sent. Necessary traveling expenses, hotel bills, amounts paid stenographers, and for other expenses may also be allowed by special order of the judge, when a detailed account thereof, verified by the oath of the referee that they were necessarily and actually incurred, and showing the amount paid by him therefor, is returned to the bankruptcy court (with proper vouchers when they can be procured), as provided by the general orders. In this case the referee has not verified his account. Nothing appears in his records which would authorize the charge of \$15 for office rent, or \$15 for clerk hire, and these items cannot be allowed.

Much criticism was made of prior bankruptcy acts because of the large amount of fees and expenses incurred in the administration of the bankrupt estates. It was the manifest purpose of Congress that such criticism could not rightly be made of the present law, and it fixed the compensation of referees and other officers very low. They may be inadequate in some cases, but the court is powerless to increase them. By the amendment of February 5, 1903, it is expressly provided that the court shall not allow, under any form or guise whatever, any other or further compensation for services than that expressly authorized by the act. From the amount of the commission charged by the referee at 1 per cent., viz., \$6.03, it would appear that the value of this estate was but little more than \$600, and yet the total amount of the referee's account is \$103.43; more than 17 per cent. of the amount distributed to creditors.

If the referee shall verify his account, showing that the items of expense aggregating \$15.35 were necessarily incurred and actually paid by him, such items, together with the fee for filing claims, publishing notice, the 1 per cent. commission, and cost of record book will be allowed; but the items for giving the four notices to creditors at \$5.85 each, office rent \$15, and clerk hire \$15, aggregating \$53.40, will be disallowed.

VAN HOUTEN et al. v. HOOTON COCOA & CHOCOLATE CO.

(Circuit Court, D. New Jersey. June 10, 1904.)

1. UNFAIR COMPETITION—ADOPTION OF SIMILAR NAME—GROUNDS FOR INJUNCTION.

Complainants have for many years manufactured in Holland, and for a number of years have widely advertised and sold in the United States, a preparation known as "Van Houten's Cocoa," which has attained a high reputation and large sale. Defendant, the Hooton Cocoa & Chocolate Company, was organized in 1897, and commenced the manufacture and sale of cocoa under the name of "Hooton's"—a man by that name having been a stockholder and the first president, but afterwards severing his connection with the company. There was no imitation of complainants' packages,

¶ 1. Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

nor was there any evidence that the name "Hooton's" was adopted for any fraudulent or dishonest purpose; but it was shown that it had a tendency to confuse purchasers, and that, in a number of cases, dealers had been deceived into believing defendant's product to be that of complainants. *Held*, that such liability to confusion and deception was ground for the granting of an injunction restraining defendants from using the name unless accompanied by a clear statement that its cocoa was not that of complainants.

In Equity. Suit for unfair competition in trade.

Antonio Knauth, for complainants.

John R. Hardin, for defendant.

ARCHBALD, District Judge.¹ The complainants manufacture at the city of Weesp, Holland, a fine grade of cocoa, which they put out under the name of "Van Houten's Cocoa." The business was founded by C. J. Van Houten in 1828, and the superior standard of excellence maintained received recognition in 1889 by a grant from the King of Holland entitling the owners to name their establishment "The Royal Cocoa Factory." About that time it began to be extensively introduced into the United States, and, by advertisement in numerous newspapers and periodicals, as well as on billboards throughout the country, at an expenditure of two or three hundred thousand dollars, a large and valuable trade has been built up, and a good will secured, which is estimated to be worth half a million dollars. The cocoa is packed in small cylindrical tin cans, holding various quantities—a pound, half pound, quarter pound, and two ounces—and is prominently labeled, "Van Houten's Pure Soluble Cocoa." The wrapper also displays the complainants' names—C. J. Van Houten and Zoon—the place where the cocoa is manufactured, directions how to use it as a beverage, and certain commendatory notices. All the lettering is in pale gilt on a white ground. On the top of the can, in raised letters, the names are again given, with the quantity.

In the fall of 1897 the defendant corporation, the Hooton Cocoa & Chocolate Company, was organized by certain parties employed at the time by the Brewster Cocoa Manufacturing Company, among whom was one Robert T. Hooton, an assistant superintendent or foreman, who was possessed of a number of years of experience as a practical manufacturer of cocoa and chocolate; the others being W. D. Morrison, an office superintendent of the Brewster Company, H. D. Buttel, a salesman, and O. H. Dunning. William Walter, a chocolate machine manufacturer, was also taken in. Of these, Hooton was made president, and gave his name to the company, insisting on this as a condition of his going into it. The business was started January 1, 1898, at Newark, N. J., and Hooton soon afterward assigned to the company certain written formulas or recipes for various kinds of chocolates and cocoas, and the use of his name in connection therewith; receiving in return \$5,800 of stock, a part of which he transferred to his associates, so that each should have \$3,000; the others putting in cash to this amount, excepting Walter, who furnished machinery. Hooton continued with the company a year and a half, for six months of which

¹ Specially assigned.

he was president, and the rest of the time superintendent of manufacture, on a salary. The company in the beginning does not seem to have prospered, and in July, 1898, Hooton and Morrison sold out to George W. Dodd, who became president and treasurer, and undertook the financial management. Hooton stayed on with the company for a year for the sake of his services, but is no longer in any way connected with it.

The principal business of the company has been the manufacture of cocoa, which is sold in half-pound and fifth-pound packages, at one-half the prices charged by the complainants. It is put up in square tins, closed with round screw tops, across which, in a scroll, is the word "Hooton's," in raised letters. On two sides of the cans are the words "Hooton's Soluble Breakfast Cocoa," prominently displayed, and in smaller lettering the words, "Dutch process, made by Hooton Cocoa & Chocolate Co., Newark, N. J., U. S. A." On the other two sides are the words, "Hooton's Cocoa," followed on one with directions for using, in English and German, and on the other with commendatory remarks. The coloring on the can is distinct and special. The top and bottom are gilt; the sides, buff; the plain lettering, red; and the display lettering and design work, white or gilt touched off with red. Neither in size, shape, coloring, nor ornamentation is there any imitation of the packages of the complainants. There is nothing, in fact, of which the plaintiffs complain, except the similarity of the two names, "Hooton" and "Van Houten," and the use of the term "Dutch process," which is claimed to be misleading; and not until the bill was served did the defendants have notice that there was any objection to these. The words "Dutch process" are sought to be justified on the ground that they refer, as it is claimed, to a method of manufacturing cocoa and chocolate well known in the trade, in which an alkali is used, and there is some evidence to sustain this contention. Since the filing of the bill, in the summer of 1901, one of the defendant's salesmen took a number of orders for Van Houten cocoa, evidently intending to fill them with his own goods. But the scheme was never carried out, and, when it was brought to the attention of the defendants, he was discharged. Neither in the inception of the defendant company, including the choice of a name, nor in the display of their goods or the conduct of their business, am I able to discover any intent to infringe the rights of the complainants, or to profit by the good will which they have built up. So far as the bill proceeds upon this basis, and seeks an accounting for trade purposely diverted, it cannot, therefore, be sustained.

There is, however, an undoubted similarity in the names by which these two parties put forth their goods, which is calculated to confuse, if not deceive. Perhaps it would not if "Van Houten" was always pronounced as it should be, but the trouble is that it is not. It is correctly pronounced as though the latter part of the name was spelled "Howton," but it is often pronounced, as well as spelled, "Hooten," nor is the prefix "Van" always observed. Several examples of confusion resulting from this appear in the evidence; and the question is whether the defendants, now that their attention has been called to it, should not be willing, or, if not willing, should not be compelled, to so modify the

trade-name which they use that all ground of complaint shall be removed. The complainants were first in the field, by a number of years, and have secured, at large expense, an established reputation and trade, which they have the right to enjoy unimpaired. And while innocent of artifice in the beginning, the refusal of the defendants to grant this concession, and their insistence on the continued employment of that which is shown to be objectionable, and can make no material difference to them on any honest basis, may warrant a somewhat different conclusion as to their present intention, which of itself might call for relief. As suggested in *Singer Manufacturing Co. v. June Manufacturing Co.*, 163 U. S. 169, 188, 16 Sup. Ct. 1002, 41 L. Ed. 118, the use of the name which they employ, under the showing which has been made, without any precaution to indicate a distinction, might of itself amount to an artifice which equity would restrain. But without stopping to discuss that phase of the question, it is well established that the use of a corporate, if not an individual, name will be enjoined, which, though adopted with perfect innocence, is calculated to confuse and deceive. Ground for such interference is to be found in the detriment to the complainant, which cannot be otherwise remedied or reached. In *North Cheshire & Manchester Brewery Co. v. Manchester Brewery Co.*, L. R. Appeal Cases (1899) 83, a new brewery company introduced into its corporate name that of an old company having an established business in the same locality, and it was held by the House of Lords that the use of it was properly enjoined. "When one comes to see what the real question is," says the Lord Chancellor, "it is in a single sentence: Is this name so nearly resembling the name of another firm as to be liable to deceive?" And again: "In the result, it is perfectly immaterial to my mind whether they [the intentions of the appellants] were fraudulent or not. The question is whether this is an injury to the plaintiff's rights. If it is, * * * it is perfectly immaterial whether they intended it or not. The court must restrain them from that which is injuring another person, however inadvertently they may have done it."

In *American Clay Mfg. Co. of Pennsylvania v. American Clay Mfg. Co. of New Jersey*, 198 Pa. 189, 47 Atl. 936, the plaintiff was a Pennsylvania corporation, and the defendant a corporation of New Jersey authorized to do business in Pennsylvania. Both were engaged in the same line of trade at Pittsburg, and the result was a confusion in correspondence and in the drawing and honoring of checks and drafts; and the defendants were enjoined. "There are two classes of cases," says Mitchell, J., "involving judicial interference with the use of names: First, where the intent is to get an unfair and fraudulent share of another's business; and, second, where the effect of defendant's action, irrespective of his intent, is to produce confusion in the public mind, and consequent loss to the complainant. In both cases the courts of equity administer equitable relief." In *Charles S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769, the defendant company was organized by Charles S. Higgins, who had been previously interested in and connected with the complainant company, which he had also helped to organize. Both were engaged in the manufacture of soap, in which the complainants

and their predecessors had built up an extended trade, their products being commonly known as "Higgins Soap"; and it was held that they were entitled to an injunction restraining the use by the defendants of the word "Higgins" in their business, as tending to produce confusion and a diversion of trade. Similar rulings are to be found in a bead-roll of cases, among which may be mentioned *Holmes Booth & Haydens v. Holmes Booth & Atwood Mfg. Co.*, 37 Conn. 278, 9 Am. Rep. 324; *Cement Co. v. Le Page*, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* (C. C.) 32 Fed. 94; *Clark Thread Co. v. Armitage* (C. C.) 67 Fed. 896; *R. W. Rogers Co. v. William Rogers Mfg. Co.*, 70 Fed. 1017, 17 C. C. A. 576; *Walter Baker & Co. v. Sanders*, 80 Fed. 889, 26 C. C. A. 220; *Wycoff, Seamans & Benedict v. Howe Scale Co.*, 122 Fed. 349, 58 C. C. A. 510. That a case is presented on the proofs, within the equitable principle announced and enforced in these decisions, I am convinced. As already pointed out, the two names "Hooton" and "Van Houten" are not readily distinguished; and, while the correct pronunciation may somewhat differentiate them to the ear, and the spelling, also, in a measure, to the eye, neither is known to a certainty by the public, and that is what must guide. As said by Lord Halsbury in *North Cheshire & Manchester Brewery Co. v. Manchester Brewery Co.*, *supra*, "When you are dealing with the question of the public's being deceived, that negatives the idea of their having certain knowledge, or else they could not be." But without resting the case on probabilities, there are examples of actual confusion to be found in this record which are sufficiently significant. The deception which the defendants' salesman was able to perpetrate, to which allusion has been made, is a forcible one. In that case, orders for Van Houten's cocoa were taken on defendants' order slips, although the name "Hooton" was on each of them, in plain sight, at the top. That this was without fault on the part of the defendants does not alter the force of the circumstance, nor the fact that the orders were never filled. With George W. Crary, a grocer of Albany, N. Y., the same salesman effected the exchange of Van Houten's cocoa, which Mr. Crary had on hand, for Hooton cocoa, which he received and sold as though it was the same, and did not ascertain that it was different until he was informed by complainants' agent a few weeks before his testimony was taken. C. L. Rayner testifies that a week or two after an exhibition or demonstration, as it is called, had been given at Houghton & Dutton's department store, in Boston, of complainants' cocoa, another similar demonstration was given of the Hooton goods, in the course of which one lady customer was heard to observe to another that that was the cocoa which she had heard so much about, but which she was surprised, on pricing, to find cost about half what she thought; thus evidently confusing the higher-priced Van Houten cocoa of the previous demonstration with the Hooton cocoa which was then being displayed. The same witness gives examples of merchants whom he approached for the purpose of selling complainants' goods, but who stated that they already had a supply on hand, producing the Hooton cocoa in proof. Since this case began, A. H. Williams & Co., wholesale druggists of Utica, N. Y., wrote to the complainants—addressing them as Van Houten & Zoon—stating that they

had had considerable trouble with their cocoa, and that customers who had used it in soda fountains had returned it to them after trial; but it turned out that the goods which they had were the defendants' and not the plaintiffs' at all. In addition to this, several misspelled and misdirected letters have been produced, some of which, intended for the plaintiffs, would have gone to the defendants, except as they were redirected by the post-office authorities; and others just the reverse. All this unmistakably goes to show the liability to confusion in the public mind growing out of the use of these two names applied to the same article in the same trade, which, now that their attention is called to it, the defendants, in conscience, ought to be willing to correct, if they desire, as they profess, to have nothing but their own, the best proof of which will be the removal of the cause. Mr. Hooton is no longer associated with them, and while they have the undoubted right, so far as he is concerned, to use his name, except in corporate matters, there is no purpose to be served by doing so. It either should be dropped entirely, or there should be something to clearly distinguish it from that of the complainants. It may be that it would be sufficient if, as has been suggested, they should designate their goods as "R. T. Hooton's Cocoa," which somewhat varies it to both ear and eye. It would be in the same line, also, to omit the words "Dutch process," which, if they mean anything to the manufacturing trade, certainly do not to the general public, and aid in the possible confusion. But the court cannot say what shall, so much as what shall not, be done, the limit of which would seem to be that, as already indicated, they shall not use the word "Hooton" to designate their cocoa, except as they clearly and unmistakably state in the same connection that such cocoa is not the Van Houten cocoa manufactured by the complainants, Van Houten & Zoon. *Singer Manufacturing Co. v. June Mfg. Co.*, 163 U. S. 169, 204, 16 Sup. Ct. 1002, 41 L. Ed. 118; *Tarrant & Co. v. Hoff*, 76 Fed. 959, 22 C. C. A. 644; *Royal Baking Powder Co. v. Royal (C. C. A.)* 122 Fed. 337, 348. This relief being based on what has been developed by the bill, rather than by that which had preceded it, there will be no costs.

Let a decree to that effect be drawn.

NEW HAVEN PULP & BOARD CO. v. DOWNINGTOWN MFG. CO.

(Circuit Court, D. Connecticut. June 8, 1904.)

No. 539.

1. FOREIGN CORPORATIONS—JURISDICTION OF FEDERAL COURT—LAW GOVERNING.

The question whether a federal court acquired jurisdiction over a foreign corporation defendant by the service made is one of general jurisprudence, to be determined by the federal law, and which cannot be affected by a state statute.

¶ 1. State laws as rules of decision in federal courts, see notes to *Griffin v. Overman Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

2. SAME—VALIDITY OF SERVICE—DOING BUSINESS IN STATE.

An officer and authorized agent of defendant, a manufacturing corporation of another state, was in Connecticut on business connected with a contract made with plaintiff by the predecessor of defendant, to whose rights and liabilities it had succeeded, when he was served with summons in an action brought by plaintiff against defendant in the federal court for Connecticut for breach of the same contract. Neither defendant nor its predecessor had ever maintained an office or agent in Connecticut, but they had made a number of sales in the state, including the one to plaintiff which was in controversy. *Held*, that the service was good, and gave the court jurisdiction of defendant.

At Law. On plea in abatement and to the jurisdiction.

A plea in abatement and to the jurisdiction having been filed, the issue came on to be heard upon the following stipulated facts:

(1) The plaintiff is a Connecticut corporation located in New Haven, and engaged in the business of manufacturing cardboard and card middles.

(2) The defendant corporation was organized under the laws of Pennsylvania in January, 1903, for the purpose of taking over the plant and business formerly carried on by a so-called limited partnership by the name of the Downingtown Manufacturing Company, Limited. The defendant did take over said plant and business, and has assumed the liabilities of its predecessor, and the stockholders and officers of the defendant corporation are the same as those of its predecessor. Said corporation is, and its predecessor was, located in the town of East Downingtown, Pa., and engaged in the manufacture of paper machines, and equipment of paper, pulp, and cardboard mills.

(3) The defendant has never been a corporation organized under the laws of the state of Connecticut, has never had an office actually located in the state, and has never appointed, in writing or otherwise, any person as its agent or attorney within the state, upon whom process might be served.

(4) The defendant's predecessor has purchased machinery from the New Haven Manufacturing Company, a Connecticut corporation located in New Haven, to the value of \$9,151.94, at different periods from 1895 to January, 1903, and the officers and agents of the defendant's predecessor have visited New Haven for the purpose of selecting and ordering said machinery, and have made contracts for the same.

(5) The defendant's predecessor and the defendant have sold machinery to the value of \$43,211.21 in said state of Connecticut to the following concerns: McArthur Bros., Danbury; C. H. Dexter & Sons, Windsor Locks; F. H. Whittelsey, Windsor Locks; Emerson Manufacturing Company, for the Anchor Mills, Windsor Locks; the New Haven Pulp & Board Company, New Haven; Tait & Son, Bridgeport; Walker Manufacturing Company, Burnside; Ingalls & Co., South Manchester. All of the above sales were made prior to January 1, 1903, except the following sales in 1903 made by the defendant corporation to the plaintiff: May 2d, knife bar, \$35; May 6th, drier head, \$20.63; May 11th, sleeve and friction pulley, \$12; May 15th, two drier frames, \$22; June 4th, one box and cap, \$10—which were ordered by letter, and shipped to the plaintiff.

(6) During the year 1901 the defendant's predecessor contracted with the plaintiff to equip and furnish its mills in New Haven with a certain paper machine, and with three Miller Duplex Beating Engines; said machinery constituting a substantial part of the plant of the New Haven Pulp & Board Company, which was then beginning business. During said year of 1901 the agents and officers of the defendant's predecessor were in New Haven for the purpose of negotiating in regard to the contracts for said machinery, which contracts were actually made, and for the purpose of supervising the installation of said machines in the plaintiff's mills.

(7) A difference having arisen between the plaintiff and defendant's predecessor as to the performance by it of its contract for said machines, Guyon

¶ 2. Service of process on foreign corporations, see note to *Eldred v. American Palace Car Co.*, 45 C. C. A. 3.

Miller, secretary of the defendant's predecessor, came to New Haven in January, 1902, to adjust said differences.

(8) On that occasion a check for \$1,500 and a note for \$3,000, payable in New Haven, were given in settlement of said differences. The defendant's predecessor indorsed said note to the New Haven Manufacturing Company in payment of machinery ordered by it. The note was presented for payment by the New Haven Manufacturing Company, and payment refused by the plaintiff on the ground that the note was given upon certain conditions, which had not been fulfilled.

(9) The New Haven Manufacturing Company thereupon brought suit upon the note in its own name, though the expense of defending said action was borne by the defendant's predecessor. Said action was decided in favor of the New Haven Manufacturing Company, the nominal plaintiff, and on appeal to the Supreme Court of Errors for the state of Connecticut the judgment was affirmed. Both Mr. Miller, the secretary and treasurer of the defendant's predecessor, and Mr. Tutton, chairman of the defendant's predecessor, were present in New Haven at the trial of said cause, and said Miller was a witness therein.

(10) On August 7, 1903, the said A. P. Tutton, at that time president of the defendant company, stopped in New Haven, and visited the office of the New Haven Manufacturing Company, where he met Leslie Moulthrop, secretary and treasurer of said New Haven Manufacturing Company; the New Haven Savings Bank, where he met Robert A. Brown, president of said New Haven Manufacturing Company, and talked with him in a general way concerning machinery to be ordered from said company, and about the litigation aforesaid; the office of Bristol, Stoddard, Beach & Fisher, attorneys for the said New Haven Manufacturing Company in the litigation aforesaid, and conferred with them concerning their bill in said litigation, and the disposition of the proceeds of the judgment, which at that time was paid by the plaintiff. Said Tutton arrived in New Haven at or about 6 o'clock in the evening of August 6th, and left New Haven for Northfield, Mass., at or about 10 o'clock on the morning of August 7th, to attend the Annual Christian Endeavor Conference to be held at that place. The said Tutton was not present in New Haven for any other than the purposes aforesaid.

(11) The said A. P. Tutton, upon whom the service of writ was made, is a citizen of, and resident in, the state of Pennsylvania, and was not, and never has been, a citizen of, and resident in, the state of Connecticut.

(12) The present suit is brought for an alleged breach of warranty on the part of said defendant's predecessor in connection with its contract with the plaintiff for the machinery aforesaid, and service was made in the same by placing a true and attested copy of the writ and complaint herein in the hands of said Tutton while present in New Haven on the 7th day of August, 1903, as aforesaid.

Watrous & Day, for plaintiff.

Bristol & Stoddard and Beach & Fisher, for defendant.

PLATT, District Judge (after stating the facts as above). It is contended that the service would have been good under section 571, Gen. St. Conn. Revision 1902, but the question here is one of general jurisprudence, and the federal court is not bound by the action of the state court in a similar situation. The jurisdiction of this court depends upon the acts of Congress relating thereto, and cannot be enlarged or abridged by a state statute. *Goldrey v. Morning News Co.*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517.

It is conceded that Mr. Tutton was the qualified agent of the defendant. One question alone remains, and, for safety's sake, that will be made narrower than might in another case be necessary. Was the agent in New Haven on business of his corporation when the papers in this suit were placed in his hands? We must look into

the stipulated facts for the answer; premising that this plea is not looked upon with favor, and that defendant's contention must be clearly established. The court did not invite the cause, but it is here, and, unless an inexorable sanction exists, it is not inclined to force a domestic corporation to migrate to a foreign forum in search of justice. It would seem ungracious for the defendant to permit its agent to visit Connecticut concerning matters which touch one branch of a transaction, and to object to service upon such agent of a notice that the plaintiff seeks to recoup in one direction what it has lately lost in another. The stipulation sufficiently states acts of business done by the defendant to sustain the validity of the service. Certain articles were sold by the defendant to the plaintiff which were confessedly to be used upon, and in connection with, the very plant over which this dispute arises. Further than that, the defendant corporation, through its agent, was attending to business which cannot be divorced or distinguished from the original contract. It had made that contract its own, and Mr. Tutton was in New Haven concerning the same. It had absorbed a limited copartnership of the same name, composed of and officered by the same parties. It is very technical to insist that the corporation had acquired every prerogative and obligation of the copartnership, except the duty of responding to the demands of the plaintiff in a sister sovereignty. During the transfer of entities such an obligation ought not to evaporate so easily. It was dealing with matters turned over to it by its predecessor, and, until the exploitation is final, it is not fair to stand aside and await events in its home state. *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113, is not persuasive. It is simply a reaffirmance of *Goldey v. Morning News Co.*, supra. The matter then in controversy was entirely with the defendant corporation, and the fact that officers and stockholders were same as those of a former company could not affect in any way the transactions of the new company. The attempt then was to show that fraud in the formation of the new corporation vitiated the transfer. The Supreme Court found no facts upon the record sufficient to enable it to overrule the master's report as sustained by the Circuit Court.

It is impossible to assent to the proposition that doing business within a state means a persistent or continuous condition of doing or offering to do business, usually leading to the appointment of an agent or the establishment of an office within the state. *Doe v. Springfield Boiler Mfg. Co.*, 104 Fed. 684, 44 C. C. A. 128, is not in point. That matter was in admiralty, and the meaning of a California statute was in discussion. The law is clear that a monition in admiralty can be served in accordance with a state statute. *In re Louisville Underwriters*, 134 U. S. 493, 10 Sup. Ct. 587, 33 L. Ed. 991. In *St. Louis Wire Mill Co. v. Cons. Barbed Wire Co. (C. C.)* 32 Fed. 802, the facts are illuminating. The defendant, through its agent, Henley, purchased wire of the plaintiff, and trouble arose about the payment. Thereafter Henley, with his wife, attended the St. Louis Fair. He was called upon at his hotel in relation to an adjustment of the old account. The parties failed to agree. Henley asked casually for a quotation on wire at the office of the plaintiff, but none was given. Under the

Missouri laws, the service was good. Having such a transaction in mind, Judge Thayer held, as it seems to me quite properly, that in the federal law the carrying on of business within a state means something more than a casual or occasional purchase of goods; that the business must be continuous, or "at least of some duration." The conclusion would have fitted the facts if he had used the word "isolated" instead of the words "casual or occasional." In *Louden Machinery Co. v. Am. Malleable Iron Co.* (C. C.) 127 Fed. 1008, the defendant, as in the *Goldey Case*, *supra*, did no business in the state.

The cases involving interstate commerce relate to attempts on the part of the states to forbid or regulate the doing of certain business within their borders. It strikes the court as a non sequitur to say that, because the state cannot forbid or regulate the transaction of interstate trade, the federal court loses the right to acquire jurisdiction of the defendant when it comes within the state on matters connected with the transaction. At best, such reasoning could only serve in an attack upon the state statute, and becomes futile when addressed to a forum which has ample jurisdiction in respect of interstate trade.

Let the plea in abatement and to the jurisdiction be overruled, with costs.

CONNERS et al. v. UNITED STATES.

(Circuit Court, D. Massachusetts. June 3, 1904.)

No. 1,257.

1. BUILDING CONTRACT—EXTRA COMPENSATION—RISKS ASSUMED BY CONTRACTOR.

A proposal for bids for a contract for the construction of a building for the United States contained the following provision: "All necessary excavation is to be done and is to extend at least four feet below the surface and to bedrock. * * * Levels of the rock at various points are shown approximately on the plans, but the bidder must satisfy himself of the accuracy of these and of the rock surfaces in general." *Held* that, in the absence of some extraordinary circumstance, which would entitle him to equitable relief, the contractor assumed the risk of the depth of excavation, and could not recover extra pay because the levels shown on the plans were inaccurate, and it was necessary to go to a greater depth than four feet to reach bedrock.

2. SAME—CHANGES IN PLANS.

A contract for the construction of a building for the United States construed with reference to the manner of determining the amount to be deducted from the contract price because of a change in the plans by the government by which certain work was omitted.

3. SAME.

Proposals for the construction of a government building were invited in three different forms: First, for the complete work; second, for the complete work omitting a railroad track; third, for the complete work omitting fireproofing. Plaintiffs submitted in a consolidated form a proposition to do the complete work for a specified price, with a deduction of a certain amount if the railroad was omitted, and a deduction of a different amount if fireproofing was omitted. The government accepted the proposition with the deduction on account of the railroad, taking no notice of the deduction for fireproofing proposed. *Held*, that what was submitted with reference to fireproofing was ineffectual,

and there was no contract for a deduction of the sum proposed therefor, upon a change in the plans by which fireproofing was omitted.

4. SAME—MODE OF FIXING COMPENSATION.

The rule applied that provisions in a building contract that the increased or diminished compensation of the contractor incident to changes in the plans shall be fixed by a competent person or tribunal named, whose decision shall be binding, are valid.

At Law. Trial to the court. Findings of law and fact by the court.

Findings of Law.

(1) The findings of law are sufficiently stated in the opinion filed this day in this case, which the court adopts as a part hereof.

Findings of Fact.

(1) The court adopts as a part of these findings the "agreed facts" filed February 25, 1904.

(2) The court finds that, as alleged in their declaration, the plaintiffs were compelled to excavate for the foundations more than four feet below the surface in order to reach bedrock, and at points to the depth of fourteen feet, as alleged by them, and to fill the excavation to within four feet of the surface with concrete; and that the same involved ninety-eight and one-half yards of excavation and concrete, as stated in their complaint; and that the cost of doing the same, with the necessary incidentals thereof, as well as the reasonable worth thereof, was six hundred forty-nine dollars and ninety-four cents. The court, however, does not find that there was any improper testing of the ground, as alleged in said complaint, or that the said testing was insufficient, except so far as insufficiency may be implied, if it can be implied, from the following additional facts: The testing of the ground by the United States was such as was reasonable and usual, but it failed, without fault on the part of the United States, to disclose the actual depth at the point at which the plaintiffs were compelled to excavate, as alleged in said complaint.

(3) The court does not find that bedrock was not reached at an average depth of two feet below the surface where the foundations were laid; nor does it find that the cost of excavating and filling with concrete, as alleged in the plaintiffs' complaint, was greater than the cost to the plaintiffs would have been if bedrock had been found at the same locality at two feet below the surface, involving thereby excavating the rock to a point at least four feet in depth; nor does it find that the entire cost to the plaintiffs of excavating and filling with concrete, as the work was actually done, or the reasonable worth thereof, was greater than would have been if the entire excavation had necessarily been made to the depth of four feet at all points.

(4) The court finds that the contract required the plaintiffs to excavate at all points to a depth of at least four feet, even though to reach that depth excavation was necessarily made through solid ledge.

(5) All the foregoing relates in no part to the two pits referred to in the contract, but to excavation for foundations, to which particular excavation the court finds the plaintiffs' complaint relates exclusively.

(6) The court finds that, subsequent to the bid stated in the "agreed facts" and the acceptance thereof by Endicott under date of April 28, 1900, a formal contract covering the work to be done by the plaintiffs was executed, which contract was put in evidence before the court.

(7) The court finds that that contract contained the following provisions, among others:

"Third. The party of the first part further agrees that if during the progress of the work it shall be deemed, by the party of the second part, necessary or desirable to make any changes or modifications in the said plans and specifications, affecting the cost of the work to be done hereunder, said changes or modifications, and the amount of the increased or diminished compensation to be paid the party of the first part in consequence thereof, shall be stipulated and agreed to in writing by the parties to the contract before the work contemplated by such changes or modifications is begun; and such increased or

diminished compensation shall, when exceeding \$300, be assessed by a board of naval officers appointed for the purpose, and shall be based upon the actual cost."

"Fourteen. Changes. Should it be to the interests of the Government to make any changes in the plans or specifications exceeding \$300 in value, the increased or decreased compensation to which the contractor may be entitled is to be determined by a board of three naval officers, and the contractor shall be bound by its decision, if the decision of the Board is approved by the Chief of Bureau of Yards and Docks, and no further payments shall be made until its decision, so approved, shall be accepted by the contractor in writing. Changes in plans or specifications not exceeding \$300 in value may be made by mutual agreement, in writing, between the contractor and the Chief of Bureau of Yards and Docks."

(8) The court finds that under the circumstances stated in the "agreed facts" the omission of fireproofing was not within the foregoing fourteenth paragraph relating to "changes," but was a necessity arising from mutual mistake; that, therefore, the ascertainment of decreased compensation at the sum of thirty-seven hundred forty dollars by the board of three naval officers, approved by the chief of bureau of yards and docks, as stated in the "agreed facts," was ineffectual, and not appropriate to the existing conditions; and that under the existing conditions the amount by which the compensation stipulated in the contract should be decreased was ascertainable, and is to be ascertained, by the rules of common law, independently of any special provision of the contract.

(9) The court, however, finds that no contract was ever made between the plaintiffs and the United States by virtue of which the decreased compensation on account of the omission of fireproofing should be fixed at nine hundred dollars, or any other sum; so that, therefore, so much of the plaintiffs' complaint as alleges that the decreased compensation should be fixed at that amount, is inapplicable to the existing conditions.

(10) The court therefore further finds that on the pleadings and the proofs submitted it cannot pass on the merits of the case with reference to determining the amount of decreased compensation on account of the want of fireproofing, if the compensation should be decreased on that account; so that, therefore, in so far as the judgment in this case relates to the matter of decreased compensation on account of fireproofing, the merits are not touched; but the case goes off on a variance, which should not bar, and does not bar, a subsequent complaint framed in accordance with the existing conditions.

Bernard D. O'Connell and Hiram P. Harriman, for complainants.

The United States Attorney and William H. Garland, Asst. U. S. Atty.

PUTNAM, Circuit Judge. This is a complaint brought against the United States, arising out of a contract between the plaintiffs and the United States for the construction of a foundry, including the excavation, at the Navy Yard at Kittery, Me., the contract having been negotiated between the plaintiffs and the Navy Department. The complaint concerns two items: First, a claim of \$649.94 for excavation for the foundations in excess of the approximate excavation shown by the plans and specifications. The plaintiffs allege that the plans and specifications showed an average depth of excavation of two feet to reach bedrock, which the plaintiffs were required by the contract to reach, while in fact at one point they were compelled to excavate to a depth of fourteen feet. The other relates to the fact that the United States have deducted from the contract price of the work, and refuse to pay the plaintiffs, \$3,605, as the alleged decreased compensation arising from the fact that certain fireproofing called for by the contract was omitted.

So far as concerns the claim for increased compensation growing out of the alleged excessive excavation, a provision of the contract, which is also stated in the "agreed facts," is as follows:

"All necessary excavation is to be done and is to extend at least 4 feet below the surface and to bedrock; two pits are to be excavated to depths as shown on plan. Levels of the rock at various points are shown approximately on the plans, but the bidder must satisfy himself of the accuracy of these and of the rock surfaces in general."

This is a usual and plain provision, by which the contractor was clearly bound to assume the risk of the depth of the excavation, unless under some extraordinary circumstances, where there might possibly be relief on equitable principles. There are no such circumstances in any view of the present case. Moreover, the court is unable to perceive that, even at this particular portion of the work, the excavation required any additional cost beyond what might have been caused under circumstances which the contractors clearly consented to assume, pointed out in this case in the "findings of fact" filed herewith, or that there are any circumstances which, on the whole, show that the entire work of excavating the foundations imposed any burden on the plaintiffs beyond what might reasonably have been expected to have been the average thereof. On that point, therefore, the court is clear that the case is with the United States.

The other claim of the plaintiffs is that the United States deducted from the contract price of the work \$3,605, estimated on account of the decreased cost by reason of the omission of certain fireproofing provided for by the contract, which \$3,605 the United States has not yet paid the plaintiffs, so that the plaintiffs now claim to recover the same. The contract contains the following paragraphs:

"Third. The party of the first part further agrees that if during the progress of the work it shall be deemed, by the party of the second part, necessary or desirable to make any changes or modifications in the said plans and specifications, affecting the cost of the work to be done hereunder, said changes or modifications, and the amount of the increased or diminished compensation to be paid the party of the first part in consequence thereof, shall be stipulated and agreed to in writing by the parties to the contract before the work contemplated by such changes or modifications is begun; and such increased or diminished compensation shall, when exceeding \$300, be assessed by a board of naval officers appointed for the purpose, and shall be based upon the actual cost."

"Fourteen. Changes. Should it be to the interests of the Government to make any changes in the plans or specifications exceeding \$300 in value, the increased or decreased compensation to which the contractor may be entitled is to be determined by a board of three naval officers, and the contractor shall be bound by its decision, if the decision of the board is approved by the Chief of Bureau of Yards and Docks, and no further payments shall be made until its decision, so approved, shall be accepted by the contractor in writing. Changes in plans and specifications not exceeding \$300 in value may be made by mutual agreement, in writing, between the contractor and the Chief of Bureau of Yards and Docks."

The fireproofing was omitted, and the United States claimed a right to proceed in accordance with paragraph 14. It is agreed that a board of three naval officers was appointed as provided in the paragraph, which board estimated the decreased compensation on account of the omission of the fireproofing at the sum of \$3,605, already

named, and that the decision of the board was approved by the chief of bureau of yards and docks, as further provided in that paragraph. There is nothing in the case to show that the plaintiffs assented to this method of ascertainment, or even knew thereof prior to the refusal of the United States on this account to pay the contract price. It is agreed that the lumber furnished by the contractor and accepted by the United States, which was to be fireproofed, was yellow pine, and that, after experimenting, it was ascertained that this particular kind of lumber was not fit for the process of fireproofing, and that its value for the purpose for which it was intended would not be increased thereby. It is also agreed that thereupon it was decided by the chief of bureau of yards and docks, who, for the purposes of this contract, represented the United States, not to insist on the fireproofing.

Paragraph 14 is limited by its express terms and reasonable construction to changes made in the interest of the United States, and has no relation to changes arising out of unforeseen necessities involving mutual mistake like that in question here. That paragraph 14 does not cover the entire subject-matter so far as to reach the case at bar is plain, from the fact that paragraph third supplements it to some extent. That relates to changes "necessary or desirable," and might, perhaps, therefore, be construed to meet the present case if it had been used for that purpose. It, however, requires that the assessment by the board "shall be based upon the actual cost"—a provision not found in paragraph 14, and of an essential character. Moreover, it appears by the "agreed facts" that the United States proceeded under paragraph 14. Therefore in no event can it be said that there has been any ascertainment by any board of naval officers or any other board which reaches this case.

On the other hand, however, the plaintiffs' complaint alleges that there was a contract by virtue of which, in case fireproofing was omitted, \$900 should be assessed against them as the equivalent thereof, and it bases the plaintiffs' claim expressly and exclusively on that proposition. It is clear that there never was any such contract. The chief of bureau of yards and docks invited proposals for the work in three different forms: First, a price for the complete work; second, a price for the complete work omitting a railroad track; and, third, a price for the complete work omitting fireproofing. The plaintiffs submitted in a consolidated form a proposition to do the complete work for \$39,820, with a deduction of \$600 if the railroad was omitted, and a deduction of \$900 if fireproofing was omitted. Omitting the railroad alone, left the bid \$39,220. The bureau telegraphed the plaintiffs as follows:

"Your bid for foundry, Portsmouth, New Hampshire, Item 3, thirty-nine thousand two hundred twenty, is accepted."

The navy yard, of course, is at Kittery, instead of at Portsmouth, but it is ordinarily spoken of as the "Portsmouth Yard." Item 3 was the item asking for bids omitting the railroad, and nothing else. Therefore the bureau took no notice of the deduction for fireproofing proposed by the plaintiffs, and, in order

to make positive and clear what the department intended, it named specifically in its telegram the price, \$39,220, which was exactly the bid less the deduction on account of the railroad. Therefore it is entirely clear that whatever was submitted with reference to fireproofing was ineffectual, and therefore, further, as already said, no contract was ever made in reference thereto. It follows that, as the plaintiffs rest their case by their pleadings and by the "agreed facts" on a claim that there was a specific contract in reference to the omission of the fireproofing at the sum of \$900, the present complaint cannot be maintained, and must be dismissed. Nevertheless, as, on the record as made, neither party to the controversy has submitted to us the case according to its true merits, and as the pleadings and the "agreed facts" and proofs, as they come before us, do not permit us to pass on the merits, the case goes off, so far as this claim of \$3,605 is concerned, on a variance, and ought not to bar a new complaint based on the existing conditions, if one is hereafter made. So far, however, as the claim of the plaintiffs to increased compensation for excavation is concerned, we reject it on its merits, it not being sustainable on any view which may be taken of the pleadings, either on this complaint or any other.

The plaintiffs maintain that the provisions of paragraphs 3 and 14 are ineffectual, on the ordinary rule that an executory agreement aimed at depriving the courts of jurisdiction over a controversy is invalid. It is well settled, however, that this does not apply to agreements of the character found in this contract, even if the ascertainment is to be made by an engineer or other person, whose position entitles him to credit as impartial and competent, although nominally in the employment of one of the parties. This exception to the general rule has been stated by the Supreme Court in its most substantial phases in *Martinsburg & Potomac Railroad Company v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255, which case has been subsequently reaffirmed and broadly applied by that court. So far as the federal courts are concerned, this is beyond possibility of controversy.

Let there be a judgment for the United States.

UNITED STATES v. COLE.

Circuit Court, N. D. California. March 15, 1904.)

No. 13,399.

1. CASHIER OF MINT—LIABILITY FOR THEFT BY CHIEF CLERK—OFFICERS.

The cashier of a mint, appointed under Rev. St. § 3504 [U. S. Comp. St. 1901, p. 2340], providing that the superintendent of the mint shall appoint assistants and clerks, is not an officer of the mint, within section 3506 [page 2341], providing that the superintendent of each mint shall be the keeper of all bullion or coin in the mint, except while the same is legally in the hands of other "officers"; Const. art. 2, § 2, providing that the president shall nominate, and, by and with the advice and consent of the Senate, shall appoint, all officers of the United States "whose appointments are not herein otherwise provided for," but Congress may vest the ap-

pointment of inferior officers in the President alone, in courts, or in the heads of departments; so that, where the combination of the lock of the vault of the mint was in the possession of the superintendent, the chief clerk, and the cashier of the mint, the cashier was not liable for the theft of money therefrom by the chief clerk.

Demurrer to Answer, and Motion to Strike Out Parts of Answer.

M. B. Woodworth, U. S. Atty.
Frederic W. Hall, for defendant.

MORROW, Circuit Judge (orally). This is an action against the defendant, Cole, personally, to recover the sum of \$30,000. The allegations of the complaint charge that Cole, in his official capacity as cashier of the United States mint, lawfully received into his possession all the moneys in the mint, amounting to \$47,940,930, and was charged by law with the custody and safe-keeping of the same, and the accounting for and the paying over of the same to the United States, and that he has failed to account for and pay over \$30,000 of the amount received by him. The United States prays for judgment against him in the sum of \$30,000 on account of his failure to so account and pay over.

To this complaint the defendant, Cole, filed a demurrer on the ground that it was not his legal duty, as cashier of the mint, to receive possession of, or to have the custody of, or to safely keep, or to account for, or to pay over to the United States, the moneys of the United States mint; and it was argued in support of this demurrer that the complaint undertook to hold the defendant responsible as an insurer of the moneys that came into his possession. It was, however, claimed on behalf of the plaintiff that the complaint did not attempt to hold Cole as an insurer, but only to an ordinary accounting as a mere bailee for hire. The demurrer was accordingly overruled.

The defendant thereupon filed his answer, in which he denies generally and specifically the allegations of the complaint, and for a further defense to the action he sets forth what he alleges to be the facts connected with the loss of the money for which the action seeks to make him responsible. He alleges that the said \$47,940,930 received into the mint was received and receipted for, and came into the possession of the superintendent of the mint, who was charged by law with the safe-keeping of and accounting for the same to the United States; that \$22,500,000 of said money was placed by the superintendent in the melter and refiner's vault in said mint, and that the combination of the lock of said vault was placed by the superintendent in the possession of the superintendent of the mint, of the chief clerk of the mint, and of the defendant, as cashier in the mint, all of whom had legal and actual access to said vault. The defendant denies that he received this money, or had it in his possession or custody or safe-keeping or under his control, or that it was his duty to account for or pay over the same to the United States. He alleges that all of the money in this vault was duly accounted for and paid over to the government by the superintendent of the mint; that

the remainder of the money, to wit, \$25,440,930, which had been received by the superintendent, was by the superintendent placed in the vault known as the cashier's vault, and that the combination of said vault was, by order of the superintendent, placed in the possession of the superintendent, the chief clerk of the mint, and of the defendant, as cashier of the mint, and that each of the three persons had legal and actual access to said vault. He denies that he received the money in this vault, or had it in his possession or custody or safe-keeping or under his control, or that it was his duty to account for or pay over the same to the United States, but alleges that the superintendent has accounted for and paid over to the United States all but \$30,000 of this money. He alleges that Walter N. Dimmick was at the time chief clerk of the mint, and, as such, had legal and actual access to the cashier's vault; that, in the absence of the defendant and of the superintendent, and while acting as superintendent, Dimmick stole and carried away the \$30,000 in question, without any fault or negligence of the defendant; that Dimmick has been indicted, tried, and convicted for stealing the \$30,000; that the government demanded from Dimmick's bondsmen the full penalty of his bond, to wit, \$5,000, and the same has been paid by the surety on Dimmick's bond to the government, leaving the shortage \$25,000.

To each part of this answer plaintiff has demurred on the ground that it does not constitute a defense; and plaintiff has also moved to strike out all that part of the answer relating to the theft by Dimmick, on the ground that it constitutes no defense to the action.

The facts set out in the answer as a defense must be taken as true, so far as this demurrer is concerned. We therefore have before us the question whether or not the defendant, Cole, having that connection with the money in dispute which is set out in the answer, can be held to have had that money in his possession and safe-keeping, so as to make him responsible as an insurer of the money deposited in the mint, and therefore accountable for the money stolen by Dimmick.

It will be observed that the theft alleged in this answer is not merely the ordinary theft of a subordinate or stranger, but a theft by Cole's superior officer, who was by law the acting superintendent of the mint at the time of the theft, and by law given the actual custody and control of all the money in the mint, including the money in the cashier's vault. The Revised Statutes place the duty of receiving, possessing, safely keeping, and accounting for the money in a mint upon four officers in the mint, to wit, the superintendent, the assayer, the melter and refiner, and the coiner.

Under section 3497 of the Revised Statutes [U. S. Comp. St. 1901, p. 2338], the superintendent of the mint is made the treasurer of the mint. This section provides as follows:

"Sec. 3497. The superintendent of the mints at Philadelphia, San Francisco, and New Orleans shall be, and perform the duties of, treasurers of said mints respectively."

Under section 3506 of the Revised Statutes [U. S. Comp. St. 1901, p. 2341], the superintendent of the mint is required to receive and

safely keep all the moneys in the mint, except when the same is legally in the hands of other officials. The section reads as follows:

"Sec. 3506. The superintendent of each mint shall receive and safely keep, until legally withdrawn, all moneys or bullion which shall be for the uses or expenses of the mint. He shall receive all bullion brought to the mint for assay or coinage; shall be the keeper of all bullion or coin in the mint, except while the same is legally in the hands of other officers."

Section 3496 [U. S. Comp. St. 1901, p. 2338] provides who the officers of the mint shall be. It reads as follows:

"Sec. 3496. The officers of each mint shall be a superintendent, an assayer, a melter and refiner, and a coiner; and, for the mint at Philadelphia, an engraver; all to be appointed by the President, by and with the advice and consent of the Senate."

The Revised Statutes provide when and in what cases and under what circumstances the superintendent of the mint can place coin or bullion legally in the hands of the assayer or the melter and refiner or the coiner, but there is no provision for his placing coin or bullion legally in the hands of any one except the officers named.

The defense is that Cole was not an officer of the government; that he was merely an employé of the mint.

The Constitution of the United States provides, in article 2, § 2, that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint, ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments."

It appears that the defendant, Cole, was appointed an employé of the mint under section 3504 of the Revised Statutes [U. S. Comp. St. 1901, p. 2340], which provides that the superintendent of the mint "shall also appoint all assistants, clerks, one of whom shall be designated 'chief clerk,' and workmen employed under his superintendence. * * * He shall forthwith report to the director of the mint the names of all persons appointed by him, the duties to be performed, the rate of compensation, the appropriation from which compensation is to be made, and the grounds of the appointment; and if the director of the mint shall disapprove the same, the appointment shall be vacated."

The appointment of Cole by the superintendent, and his designation as cashier in the mint, did not make him an officer of the United States, under the provisions of the Constitution. He is therefore not one of the persons under whose control or in whose custody money or bullion may be placed, under the provisions of section 3506 of the Revised Statutes. In other words, he is not an officer of the United States. The cashier in a mint is a mere clerk appointed by the superintendent of the mint, performing only such duties as the superintendent may direct. He is not a public officer charged with the receiving or safe-keeping or accounting for the money which comes

into the mint, but only acts for the superintendent, and his receiving, keeping, and accounting for, is merely that of the superintendent, whose clerk he is.

In *United States v. Germaine*, 99 U. S. 508, 25 L. Ed. 482, the defendant was a pension surgeon, who had been appointed by the Commissioner of Pensions under the act of March 3, 1873, c. 234, 17 Stat. 576 (Rev. St. § 4777 [U. S. Comp. St. 1901, p. 3293]); his duties being to make periodical examination of pensioners, and to examine applicants for pension when necessary, receiving a prescribed fee for each examination. He was indicted, under chapter 65, § 12, of the act of March 3, 1825 (4 Stat. 118), for extortion in having unlawfully collected fees from pensioners. A demurrer was interposed, and the question whether the defendant, under his appointment, was an officer of the United States, within the meaning of the act, was certified to the Supreme Court of the United States. After reciting the provisions of the Constitution above quoted, the court said:

"The Constitution, for purposes of appointment, very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that, when offices became numerous and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment, there can be but little doubt. This Constitution is the supreme law of the land, and no act of Congress is of any validity which does not rest on authority conferred by that instrument. It is therefore not to be supposed that Congress, when enacting a criminal law for the punishment of officers of the United States, intended to punish any one not appointed in one of those modes. If the punishment were designed for others than officers as defined by the Constitution, words to that effect would be used, as 'servant,' 'agent,' 'person in the service or employment of the government'; and this has been done where it was so intended, as in the sixteenth section of the act of 1846, concerning embezzlement, by which any officer or agent of the United States, and all persons participating in the act, are made liable. 9 Stat. 59."

The court held that as the defendant was not appointed by any of the persons designated by the Constitution, or in the manner there provided, he was not an officer of the United States, within its meaning, and therefore not indictable under the act of 1825.

The case of *United States v. Smith*, 124 U. S. 531, 8 Sup. Ct. 595, 31 L. Ed. 534, is directly in point; the question submitted to the Supreme Court being whether or not a clerk appointed by the collector of customs at New York, who had assigned to him the duty of receiving public money paid into the office of the collector, was a public officer of the United States, under section 3639 of the Revised Statutes [U. S. Comp. St. 1901, p. 2422], and charged with the safe-keeping of the money received by him, and required to account for the same to the United States. The court held that he was not. The decision was rendered by Justice Field, in which he says:

"He [the defendant] is designated as a clerk in the office of the collector of customs, and is thus shown not to be charged by an act of Congress with the safe-keeping of the public moneys, contrary to the averments of the indict-

ment. The courts of the United States are presumed to know the general statutes of Congress, and any averment in an indictment inconsistent with a provision of a statute of that character must necessarily fail, the statute negating the averment. No clerk of a collector of customs is, by section 3639 of the Revised Statutes [U. S. Comp. St. 1901, p. 2422], charged with the safe-keeping of the public moneys. * * *

"A clerk of the collector is not an officer of the United States, within the provisions of this section; and it is only to persons of that rank that the term 'public officer,' as there used, applies. An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law, or the head of a department. A person in the service of the government who does not derive his position from one of these sources is not an officer of the United States in the sense of the Constitution. This subject was considered and determined in *United States v. Germaine*, 99 U. S. 508 [25 L. Ed. 482], and in the recent case of *United States v. Mouat*, 124 U. S. 303 [8 Sup. Ct. 505, 31 L. Ed. 463]. What we have here said is but a repetition of what was there authoritatively declared.

"The number of clerks the collector may employ may be limited by the Secretary of the Treasury, but their appointment is not made by the secretary, nor is his approval thereof required. The duties they perform are as varied as the infinite details of the business of the collector's office, each taking upon himself such as are assigned to him by the collector. The officers specially designated in section 3639 are all charged by some act of Congress with duties connected with the collection, disbursement, or keeping of the public moneys, or to perform other duties as fiscal agents of the government. A clerk of a collector, holding his position at the will of the latter, discharging only such duties as may be assigned to him by that officer, comes neither within the letter nor the purview of the statute. And we are referred to no other act of Congress bearing on the subject, making a clerk of the collector a fiscal agent of the government, or bringing him within the class of persons charged with the safe-keeping of any public moneys.

"The case of *United States v. Hartwell*, 6 Wall. 385 [18 L. Ed. 830], does not militate against this view. The defendant there, it is true, was a clerk in the office of the Assistant Treasurer at Boston, but his appointment by that officer under the act of Congress could only be made with the approbation of the Secretary of the Treasury. This fact, in the opinion of the court, rendered his appointment one by the head of the department, within the constitutional provision upon the subject of the appointing power. The necessity of the secretary's approbation to the appointment distinguishes that case essentially from the one at the bar. The secretary, as already said, is not invested with the selection of the clerks of the collector; nor is their selection in any way dependent upon his approbation. It is true, the indictment alleges that the appointment of the defendant as clerk was made with such approbation, but, as no law required this approbation, the averment cannot exert any influence on the mind of the court in the disposition of the questions presented. The fact averred, if it existed, could not add to the character or powers or dignity of the clerk. The Constitution, after providing that the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint, ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not otherwise provided for, which should be established by law, declares that 'the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.' There must be, therefore, a law authorizing the head of a department to appoint clerks of the collector before his approbation of their appointment can be required. No such law is in existence.

"Our conclusion, therefore, is that section 3639 of the Revised Statutes does not apply to clerks of the collector, and that such clerks are not appointed by the head of any department, within the meaning of the constitutional provision."

Under the law as declared by the Supreme Court in these two cases, the allegations of the answer of the defendant in this case

constitute a sufficient defense to the action. The demurrer to the answer is therefore overruled, and the motion to strike out parts of the answer denied.

UNITED STATES v. COLE et al.

(Circuit Court, N. D. California. March 16, 1904.)

No. 13,400.

1. CASHIER OF MINT—BOND.

Though, under Rev. St. § 3496 [U. S. Comp. St. 1901, p. 2338], the cashier of the mint is not an officer thereof, and by section 3506 [U. S. Comp. St. 1901, p. 2341] the superintendent of the mint is declared to be the keeper of all bullion or coin therein, except while it is legally in the hands of other officers, yet, under section 3501 [U. S. Comp. St. 1901, p. 2339], providing that each officer of the mint shall give bond for faithful and diligent performance of the duties of his office, and that similar bonds may be required of the assistants and clerks, which shall not relieve the officers from liability for acts and omissions of their subordinates or employes, the cashier of the mint may be required to give a bond for the faithful performance of any duty intrusted to him; and a bond taken of him, describing him as cashier of the mint, conditioned that he will perform, execute, and discharge all the duties of his position according to the laws and the regulations of the department, will be assumed to have been taken under section 3501, though the bond recites, and the complaint thereon alleges, that the cashier was an officer of the mint; such allegation and recital being treated as surplusage, as may be done.

On Demurrer to the Complaint.

M. B. Woodworth, U. S. Atty.

F. W. Hall, for defendant Cole.

C. H. Wilson and Van Ness & Redman, for defendant Fidelity Co.

MORROW, Circuit Judge (orally). This is an action on the part of the United States to recover the sum of \$20,000 upon a bond executed by the defendant W. K. Cole, with the Fidelity & Deposit Company of Maryland as surety. The bond is in the sum of \$20,000, and the conditions are as follows:

"That Whereas, the said William K. Cole hath, pursuant to law, been appointed cashier in the Mint of the United States at San Francisco, California:

"Now, Therefore, if the said William K. Cole has faithfully and diligently performed, executed, and discharged, and shall continue faithfully and diligently to perform, execute, and discharge all the duties of the said office according to the laws of the United States and the Regulations of the Treasury Department made in conformity therewith, then this obligation to be void and of no effect; otherwise to be and remain in full force and virtue. Signed, sealed," etc.

The plaintiff alleged in the complaint that the defendant Cole did not perform all his duties as cashier in the mint according to law and the regulations of the Treasury Department, in this: that he failed to account and pay over the sum of \$30,000 that was intrusted to him as cashier of the mint, and that by reason of that default the United States is entitled to recover \$20,000, the penal sum of the bond.

To this complaint a demurrer has been interposed, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and is uncertain, in not specifying wherein the defendant Cole has failed to comply with any law of the United States, or regulations of the Treasury Department, so as to make the defendants liable on the bond in suit. This demurrer is directed to the allegations of the complaint and the provisions of the statutes of the United States upon this subject.

The Revised Statutes of the United States provide that the officers of the mint "shall be a superintendent, an assayer, a melter and refiner, and a coiner." It will be observed that a cashier of the mint is not mentioned. Section 3506 [U. S. Comp. St. 1901, p. 2341] provides that:

"The superintendent of each mint shall receive and safely keep, until legally withdrawn, all moneys or bullion which shall be for the use or expenses of the mint. He shall receive all bullion brought to the mint for assay or coinage; shall be the keeper of all bullion or coin in the mint, except while the same is legally in the hands of other officers."

The contention on the part of the defendants is that as the cashier of the mint is nowhere declared to be an officer, and he is not charged by the statutes with the custody or the safe-keeping of the money, a recovery cannot be had upon this complaint and upon this bond. But an examination of section 3501 [U. S. Comp. St. 1901, p. 2339] shows that a bond may be required under the statute from an assistant or clerk in the mint. That section provides:

"The superintendent, the assayer, the melter and refiner, and the coiner of each mint, before entering upon the execution of their respective offices, shall become bound to the United States, with one or more sureties, approved by the Secretary of the Treasury, in the sum of not less than ten nor more than fifty thousand dollars, with condition for the faithful and diligent performance of the duties of his office. Similar bonds may be required of the assistants and clerks, in such sums as the superintendent shall determine, with the approbation of the director of the mint; but the same shall not be construed to relieve the superintendent or other officers from liability to the United States for acts, omissions, or negligence of their subordinates or employes; and the Secretary of the Treasury may, at his discretion, increase the bonds of the superintendents."

It is clear that under that section a bond could be required of any assistant or clerk in the mint; that it might be required by the United States or by the superintendent of the mint, the superintendent prescribing the amount. This bond may be assumed to have been required of the defendant Cole under that provision of the statute. The objection that is made to this assumption is that the action is to recover upon the bond as an official bond, whereas, under the statute, the cashier is not made an official or the custodian of any funds of the mint, and that therefore a recovery cannot be had upon the bond.

As I read this section of the Revised Statutes, I understand the law to be this: That the four principal officers of the mint—that is to say, the superintendent, the assayer, the melter and refiner, and the coiner—are required to give bonds under the statute for the faithful and diligent performance of the duties of their respective offices.

These bonds necessarily include the safe-keeping and custody of the funds of the mint, and these officers are primarily responsible for all the bullion and coin that may come into their possession as such officers of the mint. But the statute goes further, and provides that the assistants and clerks may also be required to give bonds for the faithful performance of the duties of their respective positions, and that this requirement does not absolve the other principal officers from their responsibilities. That is to say, the superintendent may require bonds from any or all of the assistants or clerks employed in the mint, and these bonds will be security for the performance of the duties of their respective positions. If they should be intrusted with coin or bullion, they will be responsible upon their bonds for the custody and safe-keeping of such coin or bullion. The superintendent may intrust to one clerk one duty, and to another clerk another duty, giving to one clerk the custody of coin and to another the custody of bullion, and may require of each a bond as security for the safety of such coin or bullion, or a bond may be required from an assistant or clerk for the faithful performance of any other duty; and a failure on the part of any such assistant or clerk to perform the duty intrusted to him will furnish a sufficient ground for a proceeding on his bond to indemnify his superior officer or the United States for any loss that may be sustained by reason of such failure of duty.

In this case the defendant Cole, who is described here as the cashier in the mint, appears to have been required to give a bond for the faithful performance of his duties, and he did give a bond under that statute. The condition of the bond was that he should perform, execute, and discharge all the duties of his position according to the laws of the United States and the regulations of the Treasury Department made in conformity therewith, and, in case he failed to perform such duties according to law and the regulations, he and his surety would be liable for any act, omission, or negligence that might result therefrom. I think, therefore, that that bond is good, under the statute, and that a recovery may be had on it, if the defendant Cole has failed to perform any duty intrusted to him, and a loss has been caused thereby; that, notwithstanding the general provisions relating to the primary responsibility of the superintendent, the assayer, the melter and refiner, and the coiner, duties may have been devolved on the defendant Cole, as an assistant or clerk, for which a legal bond might have been required. Manifestly, the superintendent cannot be considered as holding in his personal custody all of the coin or bullion of the mint; and the same may be said of the assayer, and the melter and refiner, and the coiner. The law therefore very properly provides for bonds from these subordinates, and I am of the opinion that a recovery can be had on the bond here in suit, and upon the facts stated in this complaint.

The suit decided yesterday (130 Fed. 614) was against Cole personally. There was a demurrer interposed to that complaint. The complaint charged an official responsibility on the part of Cole in describing him as an officer of the mint, but the court held that the allegation that he was an officer of the mint might be deemed as sur-

plusage, and it might be considered that he was charged with a personal responsibility. The demurrer was overruled, and an answer was filed, wherein the defendant alleged that he was not only not officially responsible, but that he was not personally responsible, for the reason that the money was placed in the custody of the superintendent, the chief clerk, and himself, and that the chief clerk, while acting as superintendent, took the money. The suit in that case was originally based upon the theory that it was an official custody that Cole had of the money, and that under that official responsibility he was an insurer of the safety of the money. The answer to that contention was that he was not an official custodian, and he was not an insurer, because, at most, it was only a personal responsibility that had been imposed upon him, and that a personal responsibility had not been incurred; that there had been no personal default, because the personal default had been on the part of another person who had been intrusted with the money; that is to say, there were three persons—the superintendent, the chief clerk, and the defendant himself—who had the keys to the vault where the money was deposited. That was a personal responsibility imposed upon himself and the chief clerk, and an official as well as a personal responsibility imposed upon the superintendent. The superintendent had personally intrusted the custody and safe-keeping of this money to these two persons under his employment, as assistants or clerks. The answer to the complaint in that case was that there was no personal responsibility upon the part of Cole, because it was alleged that Dimmick, the chief clerk and acting superintendent, took the money. In the opinion of the court, the facts alleged would be a defense to the action against Cole alone, and the demurrer to the answer was overruled. In the present case that defense is not available to the defendants in a demurrer to the complaint. Treating as surplusage the allegations of the complaint and the recitals in the bond that the defendant Cole was an officer of the mint, as may be done, a liability is charged in the complaint against the defendant Cole upon the conditions of the bond, and a recovery may be had on the obligations therein provided.

It may be that the defendants in this case will set up in their answer the same defense that was set up in the other case, and allege facts tending to show that there was no responsibility of any character on the part of Cole under this statute or upon the bond. I do not now say what will be the effect of such a defense in this case. That will be determined hereafter, when it is made. But for the present it is sufficient to say that this complaint is good, and states a cause of action without uncertainty or ambiguity. The demurrer is therefore overruled, with 30 days to answer.

DODGE & OLCOTT v. UNITED STATES (two cases).

LUEDERS v. SAME.

(Circuit Court, S. D. New York. October 6, 1891.)

Nos. 46, 92, 389.

1. CUSTOMS DUTIES—"MEDICINAL PREPARATIONS" DEFINED.

The expression "medicinal preparations," as used in the tariff act, means such articles as are of use, or believed by the prescriber or user fairly and honestly to be of use, in curing or alleviating, or palliating or preventing, some disease or affection of the human frame.

2. SAME—ORANGE-FLOWER WATER—ROSE WATER—MEDICINAL PREPARATIONS—UNENUMERATED ARTICLES.

Orange-flower water and rose water, which are articles used to some extent medicinally, but chiefly for other purposes not mentioned in any enumerations of the tariff, are dutiable as "medicinal preparations" under Tariff Act March 3, 1883, c. 121, Schedule A (22 Stat. 494), and not according to the provisions of sections 2499 and 2513, Rev. St., as amended by section 6 of said act (22 Stat. 489, 491, 523), relating to articles not "enumerated" in said act.

3. SAME—RULE OF CLASSIFICATION—CHIEF USE—UNENUMERATED ARTICLES.

In order to remove an imported article from the operation of a tariff provision for merchandise not "enumerated," it is not necessary to show that there is an enumeration of the article according to its chief use. It is enough if there is an enumeration describing any minor use.

Applications to Review Decisions of the Board of General Appraisers.

The decisions under review affirmed the assessment of duty by the collector of customs at the port of New York on merchandize imported by Dodge & Olcott and George Lueders. Note In re Dodge, G. A. 102 (T. D. 10,411). Compare Smith v. United States, 93 Fed. 194, 35 C. C. A. 265. The merchandise consisted of orange-flower water and rose water, and was classified under tariff act of March 3, 1883, c. 121, Schedule A, par. 93 (22 Stat. 494), relating to "preparations: all medicinal preparations known as * * * waters. * * * not specially enumerated or provided for." The importers contended that the merchandise was not "enumerated," within the meaning of sections 2499 and 2513, Rev. St., as amended by section 6 of said act (22 Stat. 489, 491, 523), providing, respectively, that "nonenumerated articles similar * * * to articles on the free list * * * shall be free," and that a duty of 20 per cent. ad valorem shall be assessed on "all articles manufactured, in whole or in part, not herein enumerated or provided for." It was claimed that under the first of these provisions the articles were free of duty by similitude to the oil of "neroli, or orange flower," enumerated in the free list of said act (22 Stat. 516), or, if not free, then dutiable at the rate provided in the second of said provisions.

Everit Brown, for importers.

J. T. Van Rensselaer, Asst. U. S. Atty.

LACOMBE, Circuit Judge (after stating the facts as above). The elaborate argument which has been made as to the construction of paragraph 93 has satisfied me that I was in error in the construction which I put upon it at the former trial, and that the plain intent of

¶1. Interpretation of commercial and trade terms in tariff laws, see note to Dennison Mfg. Co. v. United States, 18 C. C. A. 545.

that paragraph was to cover only preparations of the kind enumerated therein, which are medicinal. As to the precise meaning of the word "medicinal," for the purposes of this particular case I will assume—without undertaking to say what may or what may not be the conclusion which the court will arrive at when it becomes necessary, if it does hereafter, to determine the precise meaning of that, I will assume—that it confines the noun with which it is coupled to something which is of use, or believed by the prescriber or user fairly and honestly to be of use, in curing or alleviating, or palliating or preventing, some disease or affection of the human frame.

There is a conflict of testimony in this case as to whether or not these particular articles possess such qualities; but there is evidence, and evidence from the class of experts to which we would naturally turn, to the effect that they have a certain medicinal effect. It is very true that by far the largest use of these articles is not for such medicinal purposes. It is true that in many decisions the rule has been followed that an article is to be classified for duty according to its predominant use. In all those cases, however, so far as I recollect them and so far as they have been cited here, the question arose upon an apparent double enumeration of an article in the tariff, as to where it should be placed, and that question was determined by the predominant use. Thus in the hat material cases (*Hartranft v. Langfeld*, 125 U. S. 128, 8 Sup. Ct. 732, 31 L. Ed. 672, and *Robertson v. Edelhoff*, 132 U. S. 614, 10 Sup. Ct. 186, 33 L. Ed. 477. Note *Meyer v. Cadwalader*, 89 Fed. 963, 32 C. C. A. 456, reviewing authorities), it was a question whether the article should be classified as included in the enumeration "manufactures of silk," or in that of "hat materials"; in the philosophical instruments case (*Robertson v. Oelschlaeger*, 137 U. S. 436, 11 Sup. Ct. 148, 34 L. Ed. 744), whether they were to be classified as "philosophical instruments," or as "manufactures of metal"; in the balloon case (*Vanacker v. Spalding* [C. C.] 24 Fed. 88, *Vanacker v. Seeberger* [C. C.] 40 Fed. 57), whether they should be classified as "toys," or as "articles of india rubber"; in the Jumbo cigar case (*D'Estrinoz v. Gerker* [C. C.] 43 Fed. 285), whether they should be classed as "cigars," or as "manufactures of tobacco"; and in the celery case (*Clay v. Magone* [C. C.] 40 Fed. 230), whether they should be classed as "garden seeds," or "aromatic seeds," or "medicinal seeds," each and all of which phrases were separate enumerations in the tariff itself. I do not find in these decisions authority for the proposition that where an article is enumerated, either specially or generally, only once in the enumerating paragraphs of the tariff, it is to be held to be a nonenumerated article simply because it is used comparatively little for the purposes described in the enumerating clause; and sections 2499 and 2513 apply only to nonenumerated articles.

As to the two cases cited upon the argument, I find that in *Hartranft v. Sheppard*, 125 U. S. 337, 8 Sup. Ct. 920, 31 L. Ed. 763, the imported goods were not enumerated, because they were not manufactures of cotton, nor were they goods, wares, or merchandise made of silk, or of which silk was the component of chief value. Therefore there was no question of conflicting enumerations. It was clearly a nonenumerated

article. And in *Worthington v. Robbins*, 139 U. S. 337, 11 Sup. Ct. 581, 36 L. Ed. 181, the court lays stress upon the fact that in the form and condition in which the article was imported it "could not be used for any of the purposes mentioned in the supposed enumerating clause, nor for any purposes whatever of practical use to which it is adapted or ever applied." It was practically held a raw material, and therefore, as raw material, it would not properly come under the designation of watch materials, which were only suitable for watches when further advanced in manufacture.

I am of the opinion, therefore, that the predominant use to which this article is put should not control to take it from the single enumeration which it has in the tariff, and thus turn an enumerated into a non-enumerated article, in order to give scope to the application of sections 2499 and 2513. For these reasons I shall affirm the conclusion which the Board of Appraisers reached.

A stay of 10 days is granted to the counsel for importers.

ERIC P. SWENSON & SONS v. COLVIN.

(Circuit Court, D. Connecticut. June 10, 1904.)

No. 535.

1. CONTRACT—ACTION FOR BREACH—JOINING INCONSISTENT CAUSES OF ACTION.

A plaintiff cannot maintain an action to recover damages for breach of a written contract, and also for breach of prior oral representations with respect to the subject-matter of the contract, and made as an inducement thereto.

At Law. On demurrer to complaint.

George E. Beers, for plaintiffs.

Robinson & Robinson, for defendant.

PLATT, District Judge. Section 3 of the complaint sets up prior oral representations, to the effect that the machines mentioned in the contract would be adequate for the business which plaintiffs wished to do. Such representations are plainly merged in the written contract, both in law and by the express terms of the contract itself.

The construction of the contract is not in question. The complaint should begin by setting forth the contract, followed by such breaches thereof as the plaintiffs believe that they can sustain by proof. I see no harm in paragraph 9, except that the word "inadequate" in the fourth line must be stricken out. Plaintiffs may insert in lieu thereof the word "defective," if they see fit. That principle should be adopted throughout the complaint. In other words, having eliminated prior oral representations, let them then cut out all references thereto when framing the breaches of the contract.

If plaintiffs prefer to amend the complaint into an action for deceit, based upon the misrepresentations, and claiming the damages flowing from such deceit, they can do that; but in such case they must surrender all claim under the contract, for it is worse than in-

consistent, it is inherently impossible, to charge that they were cheated into making an unconscionable bargain, and in the same breath try to recover damages for a breach of the bad bargain, plus the results of the broken promises which led them into making the bargain.

From the time of the Refrigerator Case, 63 Conn. 563, 29 Atl. 76, 25 L. R. A. 856, it has been the rule of the state court that two or more causes of action, arising out of the same transaction, may be stated in one count when not "separable from each other by some distinct line of demarcation"; and Form 91 of the practice book is cited as an illustration, which was a suit on a breach of contract to print a book, followed by conversion of the plates; and so *Maisenbacker v. Concordia, &c.*, 71 Conn. 377, 42 Atl. 67, 71 Am. St. Rep. 213, was for breach of contract followed by an assault. I am not aware of any rule, however, which permits the placing in one or in more counts causes of action which are of such a nature that relief upon the one absolutely negatives the possibility of relief upon the other.

To discuss the refrigerator case and its ilk would be very much like painting the lily or gilding refined gold. In such a matter as this I must endeavor, in my humble way, to seek the truth of the case, and to act, so far as in me lies, in such a manner as to promote, under the law as I read it, fair dealing between the parties.

In this situation the story of the deceit would, it is true, include the making of the contract, but the remedy would be afforded for the deceit. In the suit for breach of the contract the story of the deceit must disappear; it would be swallowed by the bargain made with open eyes. At the trial only one case should appear, and under the pleadings I conceive it to be my duty to bring about that result.

The demurrer is sustained, with costs, and the plaintiffs are permitted to reconstruct their pleadings within 30 days, in accordance with the suggestions above outlined.

IN RE GINSBURG.

(District Court, E. D. Pennsylvania. June 10, 1904.)

No. 1,876.

1. BANKRUPTCY—OPPOSITION TO DISCHARGE—ENTRY OF APPEARANCE.

Under general order in bankruptcy No. 32 (89 Fed. xiii), requiring creditors opposing a discharge to enter an appearance on the return day fixed by the order to show cause and to file a specification of their objections within 10 days thereafter, a creditor has no right to enter an appearance after return day, and should not be allowed to do so except for good cause shown in excuse of the delay.

2. DELAY—SPECIFICATION OF OBJECTIONS—SUFFICIENCY.

A specification of objections to the discharge of a bankrupt on the ground that he, with fraudulent intent to conceal his true financial condition, failed to keep books of account, is sufficient if made in the language of the act, but specifications on the ground of his transfer or concealment of property or the making of a false oath must set out the facts relied on.

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 712.

In Bankruptcy. On exceptions to specification of objections to discharge.

Furth & Singer and Alex. J. Brian, for bankrupt.
Conard & Middleton, for objecting creditors.

HOLLAND, District Judge. On April 13, 1904, Hyman Ginsburg presented a petition to this court asking that he be discharged, and thereupon the court made an order, returnable May 4th, upon all creditors and other persons in interest to appear and show cause, if any they have, why the prayer of the petitioner should not be granted. There was no appearance on the day when the creditors were required to show cause, and none thereafter until May 13th, when an appearance was entered, and specifications in opposition to the bankrupt's discharge filed as follows:

"(1) That Hyman Ginsburg, bankrupt, with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, failed to keep books of account or records from which his true condition might be ascertained. (2) That the said Hyman Ginsburg, within four months immediately preceding the filing of the petition, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, portions of his property, with intent to hinder, delay, and defraud his creditors. (3) That the said Hyman Ginsburg concealed, while a bankrupt, from his trustee, property belonging to the estate of bankrupt. (4) That the said Hyman Ginsburg has made a false oath and account in and to the amount of his assets while under examination before the referee."

On May 19th a motion was filed to dismiss these exceptions for the reason that no appearance was filed by the creditor, as required by general order 32 (89 Fed. xiii), and, second, because the specifications are vague, general and indefinite. General order No. 32 provides that:

"A creditor opposing the application of a bankrupt for his discharge, or for the conformation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge."

It is evident from the language of this general order that it was intended the appearance of objecting creditors, or other persons interested, should be entered on the day upon which they were required to show cause, as upon that day the court passes upon the right of the petitioner to be discharged, and will enter such a decree if no objecting creditor appears. Collier on Bankruptcy (4th Ed.) p. 161, says:

"On the call of the case on the return day, if no appearance is entered or appearance filed, and the statutory facts as to time, publication, and mailing, etc., appear, a discharge follows. The judge does not, as a rule, investigate further."

In this case there is no reason whatever assigned for the delay in entering an appearance for the creditors, except the oral explanation that the attorneys understood it to be the practice of this court to permit appearances to be entered any time before the 10 days mentioned in the general order for the filing of specifications expire. It is obvious that the language of the general order requires that the

appearance should be entered on the return day, and a failure to do so precludes objecting creditors from filing exceptions to a discharge thereafter, even though they be filed within the 10 days. The order was made to be observed. It is true, however, that heretofore in this district the appearance for objecting creditors has not been uniformly filed or entered on the day required by the order, but has frequently been allowed within 10 days thereafter. The court is not inclined to dismiss these exceptions for this reason in view of the possibility of the exceptants being misled by this general practice.

Coming to the second ground for exception, we find that the second, third, and fourth specifications or objections must be dismissed for the reason that they are fatally defective in failing to specify what property was transferred, removed, destroyed, and canceled, or wherein the said Ginsburg made a false oath as to the amount of his assets while under examination before the referee. As to the first specification, alleging that the bankrupt, with fraudulent intent, etc., in contemplation of bankruptcy, failed to keep books of account or records from which his true condition might be ascertained, we think this is sufficient. This is charged in the language of the act, and states all that is required in setting it forth. No further particulars could be given. *In re Patterson* (D. C.) 121 Fed. 921.

The appearance of the attorney for objecting creditor allowed *nunc pro tunc*; the demurrer to the first specification overruled, and sustained as to the second, third, and fourth.

In re STEIN.

(District Court, E. D. Pennsylvania. May 23, 1904.)

No. 1,824.

1. BANKRUPTCY—EXEMPTIONS—TIME AND MANNER OF CLAIMING.

While the right of a bankrupt to his exemption depends on the state law by which it is primarily given, the time and manner of obtaining it in the court of bankruptcy are regulated by Bankr. Act, July 1, 1898, and where the claim is made in his schedule as provided in section 7a, cl. 8, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], it must be regarded as effective and in time; the fact that, prior to the filing of his schedule by an involuntary bankrupt, his property had been sold by a receiver by order of the court, will not deprive him of the right to claim his exemption from the proceeds, notwithstanding the state law may require the claim and selection to be made out of the property before sale.

In Bankruptcy. On certificate from referee.

Charles S. Wagoner and Charles A. Chase, for bankrupt.

Henry N. Wessel and Alfred Aarons, for trustee.

J. B. McPHERSON, District Judge. The following report of the referee (Richard S. Hunter, Esq.) states the facts upon which the question for decision arises:

"It is admitted in this case that immediately upon the filing of the petition in bankruptcy a receiver was appointed, and the property of the bankrupt estate was immediately thereafter sold by the receiver and converted into cash.

The bankrupt's schedules were subsequently filed, claiming the exemption in cash, as it was then in the hands of the receiver.

"It was in evidence that the bankrupt and her husband were in the sales-room an hour before the receiver's sale began, and looked at a catalogue of the sale.

"The trustee asks that the bankrupt shall be held to have forfeited her claim to exemption because she did not make the claim in specie under the receiver's appraisalment, and before the receiver's sale. In support of his contention the trustee cites the case of *Hammer v. Freese*, 19 Pa. 255, and *Haskin's Estate*, 6 Am. Bankr. Rep. 485, 109 Fed. 789, in which Judge McPherson, applying the act of 1849 (P. L. 533) to proceedings in bankruptcy, has decided that a bankrupt must claim his exemption in his schedule, as provided by law, in specie, and, upon failure to do so, cannot thereafter claim the proceeds of a trustee's sale in cash.

"These decisions have become familiar law in practice under the bankrupt act in Pennsylvania, but they do not appear to the referee to apply to the present case. They were announced in cases where the schedules in bankruptcy had been filed, and the bankrupt had failed to claim his exemption in specie in the schedules. The decision was, in effect, that this duty was clearly imposed upon the bankrupt by section 7a, par. 8, of the act, providing that the bankrupt should prepare and make oath to and file in court a schedule of his property, with a claim for such exemption as he may be entitled to. This claim is stated in section 6 to be the exemptions which are prescribed by the state law, and the trustee has ingeniously maintained that, under the act of 1849, before any sale made under proper authority of law, the debtor must claim his exemption in specie, or be thereafter debarred, and that by analogy he must make this claim before the receiver's sale in bankruptcy.

"But the act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]) must be read together, and, considering the sixth and seventh sections, it becomes evident that the duty of the bankrupt with regard to his claim for exemption is to set forth the claim in specie in his schedule. To require him to do so immediately upon the appointment of a receiver would be a great hardship. An involuntary bankrupt often at this time has no counsel. He has had not time to go over his property and set down its values. He has no means of knowing what the receiver's appraisalment is. And if it should be held that by a failure to claim in specie at that time he had lost his right to claim his exemption, such exemption would be forfeited in a majority of instances in all properties managed by receivers. Of these, there is a large and increasing number, and the tendency is to allow the receiver to sell, not merely perishable goods, but all goods of the bankrupt estate, in order to stop the running of expenses.

"The bankruptcy act with regard to exemptions always follows the state law, but it follows that law in the method and under the limitations laid down in the act of Congress, and with due regard to reasonable and natural conditions. The filing of the bankrupt's schedule calls his attention at once to his claim for exemption. Appraisers are appointed under the act at a meeting at which he is present. Their valuation of his property is before him for examination. If he considers it too high, he may ask for its reformation. So the trustee, on the other hand, if the appraisalment, in his view, is too low, so as to enable the bankrupt to obtain an unfair advantage, may move on his side to have the appraisalment reformed. Thus, before the trustee's sale takes place, the rights both of the creditors and of the bankrupt are safeguarded, and it is the fault of the latter if he has not made a proper claim for exemption. None of these safeguards exists in the practice under receivers' sales, and the extension of the necessity of a choice in specie to a bankrupt before such a sale is harsh and inequitable.

"In the only case, so far as is known to the referee, in which this matter has come before our courts (In re *Le Vay*, 11 Am. Bankr. Rep. 114), Judge Archbald sustained a bankrupt's claim to the cash proceeds of a receiver's sale in the broadest terms. 'But while it is, no doubt, true,' says Judge Archbald, 'that the right of the bankrupt to his exemption depends on the state law by which it is primarily given, the analogies derived from the practice upon execution process are not to be carried too far. The time and manner

of obtaining it in this court are necessarily regulated by the bankruptcy act, and it is there provided that the bankrupt shall claim in his schedules his exemptions to which he is entitled (section 7a [8]), and that they are to be set apart to him by the trustee, who is to report to the court the items and estimated value thereof (section 47a [11]). [30 Stat. 557 (U. S. Comp. St. 1901, p. 3439).] Where this course has been pursued, it must be regarded as effective and in time. The mere fact that meanwhile goods which he might otherwise have claimed have been sold by a receiver under the direction of the court, because of their perishable character, will not deprive him of the right to come in upon the proceeds. The sale of goods as perishable is for the benefit of all concerned; the money realized therefrom standing in place of the property itself, against which the parties interested may assert their rights the same as if the sale had not taken place.'

"This ruling is entirely in accord with Judge McPherson's decisions in this district, and is directly in point in the present case.

"The bankrupt's claim of \$300 in cash from the proceeds of the receiver's sale as her exemption is sustained."

I have no intention of qualifying the previous decisions of this court (Re Haskin, 6 Am. Bankr. Rep. 485, 109 Fed. 789; Re Manning, 7 Am. Bankr. Rep. 571, 112 Fed. 948), but the present situation is not the same as was there considered. The point now in controversy has already been decided by Judge Archbald, for whose opinion I have the highest respect, and I follow his ruling without hesitation.

The order of the referee is approved.

In re SCHERZER.

(District Court, N. D. Iowa, W. D. June 7, 1904.)

No. 621

1. BANKRUPTCY—PREFERENTIAL TRANSFER OF PROPERTY—DEPOSIT IN BANK.

The deposit of money in bank by an insolvent within four months prior to his bankruptcy, on open account, subject to check, does not constitute a transfer of property amounting to a preference, under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], although the bank may be at the time a creditor; and, under section 68a, the bank has the right to apply the balance in such account as a set-off on its claim.

2. SAME—APPLICATION OF DEPOSIT TO DEBT DUE BANK.

The application by a bank of the amount standing to the credit of a depositor in his general account, subject to check on a note of the depositor, although within four months prior to his bankruptcy, and while he was insolvent, does not constitute a preference which must be surrendered, under Bankr. Act July 1, 1898, § 57g, as amended (Act Feb. 5, 1903, c. 487, 32 Stat. 799 [U. S. Comp. St. Supp. 1903, p. 415]), as a condition to the proving of a claim against the estate.

In Bankruptcy. On petition for review of orders of referee sustaining objections of trustee to claim of First National Bank of Melvin, and rejecting such claim.

Hunter & McCallum, for First Nat. Bank.

John R. Carter, for trustee.

REED, District Judge. A creditors' petition was filed against the bankrupt January 14, 1904, and he was adjudged bankrupt thereon

February 25th following. The First National Bank of Melvin, Iowa, filed a claim against the bankrupt estate, based upon a promissory note of the bankrupt for \$1,134, dated August 28, 1903, on which is indorsed a payment of \$180 November 25, 1903. The referee finds that, at the time the bankruptcy petition was filed, a balance of \$176.43 stood to the credit of the bankrupt upon the books of the bank. The bank claims the right to apply this as an offset upon its note, and to have the balance of the note allowed as a claim against the bankrupt estate, under section 68a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]). The trustee objects to this, and to the allowance of the claim in any sum, because the payment of \$180 indorsed upon the note November 25, 1903, amounts to a preference, and has not been surrendered by the bank. The referee sustained these objections, and refused to allow the claim, upon the grounds that the payment of \$180 November 25, 1903, was a preference, and had not been surrendered by the bank, and that to allow the \$176.43 as an offset would also be a preference, and that both are forbidden by section 60 of the bankruptcy act (30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]). Neither the claim, the objections thereto, nor the testimony, is certified up by the referee.

As to the item of \$176.43, it is plain that the bank is entitled to have this amount applied as an offset upon its note against the bankrupt, in the absence of collusion between them, and to have the balance of the note allowed as a claim against the bankrupt estate, under the recent decision of the Supreme Court in *New York National Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, providing it has not otherwise received a preference which, under section 57g of the bankruptcy act as amended (Act Feb. 5, 1903, c. 487, 32 Stat. 799 [U. S. Comp. St. Supp. 1903, p. 415]), will prevent the allowance of such claim.

As to item of \$180, the findings of the referee do not show how this was paid. If this amount was also on deposit with the bank, and was applied by it at that date (November 25, 1903) upon its note against the bankrupt, this of itself would not constitute a preference. If it was a payment made by the bankrupt from funds other than what he had on deposit in the bank, or by his check upon funds so on deposit, then whether or not it would be a preference would depend upon the circumstances of such payment. As the referee has made no finding in regard to this, and the testimony is not before the court (if there was any upon this point), the order of the referee rejecting the claim will be reversed, and the matter referred back to him, with directions to take the testimony and ascertain the facts in regard to this payment of \$180, if issue was made in regard thereto. If it be found to be a preference actually made within four months prior to the filing of the petition in bankruptcy, when the bankrupt was insolvent, that the bank then had reasonable cause to believe that the bankrupt was insolvent, and that it was intended by such payment to give it a preference, then the claim of the bank should not be allowed, unless it shall surrender such preference. Bankr. Act, § 57g, as amended. If it shall be found not to be a preference, or that the

bank had no reasonable cause to believe at the time it was made that a preference was thereby intended; or if it did have, and shall surrender such preference, then the item of \$176.43 should be allowed as an offset upon the note of the bank, and the balance of the note, after such allowance, allowed as a claim against the bankrupt estate. It is ordered accordingly.

D. E. LOEWE & CO. v. LAWLOR et al.

(Circuit Court, D. Connecticut. June 9, 1904.)

No. 538.

1. ABATEMENT—PENDENCY OF ACTION IN STATE COURT—IDENTITY.

The pendency of a suit in a state court cannot be pleaded in abatement of an action in a Circuit Court of the United States to recover treble damages under section 7 of the anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), since the state court is without jurisdiction to enforce the remedy given by said section, and therefore the same case cannot be depending in both courts.

2. ATTACHMENT—GROUNDS FOR DISSOLUTION—PRIOR ATTACHMENT IN STATE COURT.

Where the state statute provides for successive attachments of the same property, a prior attachment in a state court affords no ground for the discharge of an attachment in a federal court.

At Law. On demurrer to plea in abatement, setting up *lis pendens* in state court, and on motion to vacate attachments.

Davenport & Banks, for plaintiff.

Bristol, Stoddard, Beach & Fisher, De Forest & Klein, and Howard W. Taylor, for defendants.

PLATT, District Judge. It appears to be conceded that when suits are pending between the same parties for the same cause of action, and demanding the same relief, in the state and federal courts, which have concurrent jurisdiction in the same territory, and the federal jurisdiction is based upon diversity of citizenship, a plea in abatement alleging the pendency of one will be futile as against the other, upon the authority of *Gordon v. Guilfoil*, 99 U. S. 168, 25 L. Ed. 383, and many cases in line therewith in the lower courts.

The point is made in argument upon the plea herein that when diversity of citizenship is absent the reason for the rule departs.

To maintain in the case at bar that the state and federal courts are "in a sense" foreign to each other would require careful and conscientious study. The step from foreign relations to hostility is so easy to be taken, and the desire of the federal authority to promote and insure friendship and tranquillity by all honorable means is so great, that an unnecessary assertion of the inherent distinctions at-

¶ 1. Pendency of action in state or federal court as ground for abatement of action in the other, see note to *Bunker Hill & Sullivan Mining & Concentrating Co. v. Shoshone Min. Co.*, 47 C. C. A. 205.

taching to its source of power should be declared only in the last instance.

Fortunately, the case in hand does not, from the court's point of view, demand such exhaustive examination. In the Sherman act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) the Congress has established a new method of obtaining redress in a matter relating to interstate trade, over which its jurisdiction is plenary. It has directed the parties to the Circuit Court for the vindication of their rights.

Before sustaining the defendants' plea, it is obviously necessary to accept their preliminary contention that the state court can, in the trial of the cause therein pending, invoke section 7 of the anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), and under its authority assess treble damages. It is not believed that such power exists in the state court. Congress was dealing with a delicate problem when it gave us the Sherman act, and it would seem to have been the thought that since a subject was up over which the federal jurisdiction was absolute it would be well to intrust its exploitation to the federal judiciary. The care exercised is plainly exhibited when equitable relief was provided for in section 4 (26 Stat. 209 [U. S. Comp. St. 1901, p. 3201]), since such relief is further hedged about by the discretionary power afforded to the Attorney General.

The conclusion is easily reached. The same case is not depending in both courts. *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666.

Having gone to this point, it is unnecessary to take up in detail the question of attachments. The rule of comity cannot be invoked unless the situation here will lead to conflict with the state court. No trouble about the res can arise. The attachment liens will be governed by the rules applicable to successive attachments under the state statutes, which furnish the rule of action for this court, since no federal statute governs the matter.

The demurrer to the plea in abatement is sustained, and the motion to vacate attachments is denied, at defendants' costs in each event.

THE MAURICE et al.

(District Court, E. D. Pennsylvania. May 21, 1904.)

No. 22.

1. ADMIRALTY—COSTS.

Where a libel for collision is dismissed at libelant's costs, the libeled vessel being held without fault on a trial, it is entirely proper for the court to allow the respondent to tax all costs necessarily or properly incurred, including those incident to the bringing in of a new party under admiralty rule 59.

In Admiralty. On appeal from clerk's taxation of costs.

Horace L. Cheyney, for libelant.

Willard M. Harris, for the Maurice.

HOLLAND, District Judge. James Stricker filed a libel against the tug Maurice for damages caused by a collision on the Schuylkill river. Upon the petition of the owners of the Maurice, the city of Philadelphia was made a party defendant, under admiralty rule No. 59. This case came on for final hearing in this court, and an opinion was filed on March 4, 1904, dismissing the libel at the cost of the libelant. Bills of costs for both the tug Maurice and the city of Philadelphia were taxed by the clerk against the libelant in this case, and from this taxation an appeal was taken to the District Court; alleging that the respondents can only recover from the libelant costs incurred in defense of the libel, and not those incurred by them on the petition against the city of Philadelphia.

The costs in admiralty cases are entirely under the control of the court, and it is evident that no system of rules can be laid down in a matter so purely in the discretion of the court. The general rule is that the costs follow the decree, but circumstances of equity or hardship or oppression or of negligence induced the court to depart from that rule in a great variety of cases. Where a libel is filed, and the respondent is compelled to defend, he is entitled to avail himself of every defense the law allows him, and whatever costs may be incurred in his attempt to exonerate himself from damage, when he is successful, and the circumstances of the case show that he is entirely faultless, are chargeable to the party putting him to that expense; and it seems to the court entirely legitimate to include all costs, whether it be for the purpose of establishing his own faultlessness, or in showing that a third party, under rule 59, was to blame for the damage to the libelant.

The tug Maurice in this case is entirely exonerated from any fault whatever, and the judge, on final hearing, found that the barge, under the command of the libelant in this case, was to blame for the collision, and should therefore pay the costs.

The libelant's appeal from the taxation of costs by the clerk is dismissed.

VULCAN DETINNING CO. v. AMERICAN CAN CO. et al

(Circuit Court, D. New Jersey. February 29, 1904.)

1. REMOVAL OF CAUSES—SEPARATE CONTROVERSY.

A bill which seeks to enjoin the principal defendants from practicing a secret process alleged to be owned by complainant, and to have been learned by such defendants through a breach of trust, and to restrain another defendant from assisting them in carrying out their unlawful purposes by using knowledge obtained while an employé of complainant as to the construction of machinery for practicing the process, does not present a separate controversy between complainant and the latter defendant, which gives him the right of removal on the ground of diversity of citizenship, under the removal act of 1875 (Act March 3, 1875, c. 137, § 2, 18 Stat. 470), as amended 1887-88 (Act March 3, 1887, c. 373, § 1,

¶ 1. Separable controversy as ground for removal of cause to federal court. see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155.

24 Stat. 552; Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 509]), where complainant and the other defendants are citizens of the same state.

On Motion to Remand to State Court.

Robert H. McCarter and Henry Wollman, for complainant.
Thomas M. Day, Jr., for defendants.

KIRKPATRICK, District Judge. The Vulcan Detinning Company filed its bill in chancery in New Jersey, alleging itself the owner of a valuable secret process for detinning scrap, and setting forth that one Assman had been by them intrusted with said secret, and, in violation of the trust so reposed in him, had divulged to the American Can Company, which he caused to be incorporated, the said secret process, and that the said American Can Company have erected plants for the purpose of operating under said process the secret which they had fraudulently obtained. The bill further alleges that the complainants acquired their knowledge of the said secret process, and their exclusive right to operate under it, from the Vulcan Western Company, a company which operated a plant for detinning by means of said secret process at Streator, in the state of Illinois, and that one Egbert, who is made a defendant, was an employé of said Vulcan Western Company, and, as such, learned said secret process now owned by the complainant; that said Egbert remained in the employ of the complainant after it acquired the Streator plant of said Vulcan Western Company, and the right to use said secret process, and that while in the complainant's employ the said Egbert obtained information concerning the details of the construction of complainant's plant, and the changes made by them from time to time in the better adapting their machinery to do the work required to be done to perfect said secret process of detinning scrap; that the said Egbert is now employed by the said American Can Company, and, with the knowledge so obtained by him while in the complainant's employ, is aiding and assisting the American Can Company not only to construct and equip their said plants with the complainant's new and improved machinery, but to operate the same according to the complainant's improved methods. The bill prays that the American Can Company may be enjoined from using complainant's secret process in their said detinning plants, and the said Egbert from rendering them further service therein, and that he be required to keep secret and within his own knowledge the information obtained concerning the means employed in the operation of the complainant's plants, and concerning any and all improvements which they have made respecting the machinery employed therein. The complainant and all the defendants, except the defendant Egbert, who resides in the state of Illinois, are citizens and residents of the state of New Jersey; and an order was made removing the cause to this court upon the ground that there was a separate controversy between Egbert and the complainant within the meaning of the second section of the act of 1875 (Act March 3, 1875, c. 137, 18 Stat. 470), as amended 1887-88 (Act March 3, 1887, c. 373, § 1, 24 Stat. 552; Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 509]). The motion is now made for a remand, be-

cause no such separate controversy exists. The second section of the act above referred to is as follows:

"When in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states and which can be fully determined between them, then either one or more of the defendants actually interested in such controversy may remove such suit in the Circuit Court of the United States for the proper district."

The statute has received judicial interpretation, and a distinction has been pointed out between the word "controversy" and the words "separate controversy," as used in the act, and a separable cause of action; and it has been held that there may be separate remedies against several parties for the same cause of action, and yet only one subject-matter involved. *Gudger v. Western N. C. R. R. Co.* (C. C.) 21 Fed. 81. So, too, the controversy in a suit is the one actually presented by the pleadings, and not what it might have been. The cause of action is the subject-matter of the controversy. *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528. If, then, we examine the complainant's bill to seek the subject-matter of the controversy, we will find that its object is to restrain Assman and the American Can Company, who are the principal defendants, from making use of the complainant's secret process for detinning scrap, which had been confided to Assman, and to prevent other defendants, who are mere instruments, from acting in concert with and aiding them to carry out their alleged unlawful purposes, and to enjoin the defendant Egbert from instructing the defendant the American Can Company how to construct, erect, and utilize the special improved machinery and methods of the complainant, peculiarly and particularly adapted to the advantageous working of their special process, knowledge of which Egbert obtained while in the complainant's employ, and likewise to enjoin the American Can Company from erecting such machinery in accordance with Egbert's knowledge so obtained. The injury from which the complainant seeks relief is caused by the joint tortious acts of both of the defendants, and he therefore has one cause of action against both. Egbert gives to the American Can Company the information which he has received in confidence from the complainant in regard to the improved methods of constructing, setting up, and operating the machinery used in making effective the operation of the secret process; and the American Can Company acts upon this information, and so injures the complainant's business. The complainant has his remedy against any and all wrongdoers. Separate defenses may exist which may defeat a joint recovery, but the complainant cannot be prevented from prosecuting his suit to a final determination in his own way. *Louisville & Nashville R. R. Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63. The case at bar is analogous to that of *Starin et al. v. New York*, 115 U. S. 248, 6 Sup. Ct. 28, 29 L. Ed. 388, and is governed by the rule therein laid down, and that of the cases cited, *Putnam v. Ingraham*, 114 U. S. 57, 5 Sup. Ct. 746, 29 L. Ed. 65; *Pirie v. Tvedt*, 115 U. S. 45, 5 Sup. Ct. 1161, 29 L. Ed. 331.

Let a rule be entered remanding the cause.

JONES v. DIMES et al.

(District Court, D. Delaware. April 14, 1904.)

1. PRELIMINARY INJUNCTION—EX PARTE APPLICATION—GROUNDS—DISCRETION OF COURT.

The granting of a preliminary injunction rests in the sound discretion of the court to be exercised in view of the circumstances of the particular case, including elements of hardship or other special features, and, while ordinarily such an injunction will not be granted on ex parte affidavits unless in a clear case, it is otherwise where the object for which it is sought is merely the maintenance of the status quo or the preservation of a fund in controversy pendente lite, and the merits of the case are left in doubt by the ex parte affidavits.

(Syllabus by the Court.)

In Equity.

Robert H. Richards, for complainant.

Robert C. White, for defendant Emma E. Dimes.

BRADFORD, District Judge. Frank M. Jones, as Trustee of William E. Dimes, a bankrupt, has filed his bill against Emma E. Dimes and the First National Bank of Wilmington, setting forth in substance, among other things, that the bankrupt, within four months before the filing of the petition in bankruptcy and while he was insolvent, transferred and delivered to his wife, the said Emma E. Dimes, sundry checks belonging to him for various sums of money, amounting in the aggregate to \$1,611.25, all of which checks were deposited by her to her own credit in the First National Bank of Wilmington and were collected by the bank; that at the time of the transfer and delivery of the checks to her she was a creditor of her husband in a sum unknown to the complainant; that the effect of the transfer and delivery of the checks, if sustained, would be to enable her as a creditor of her husband to obtain a greater percentage of her debt or claim than any other creditor of the same class would obtain; that she had at the time of such transfer and delivery reasonable cause to believe that it was intended thereby to give a preference to her as a creditor; and that of the \$1,611.25 representing the total amount of the checks deposited as above stated a sum of more than \$1,000 still remains on deposit in the bank to her personal account, subject to her check or draft. The bill prays, among other things, that the bank be decreed to pay to the complainant so much of the said sum of \$1,611.25 as may now remain on deposit to the personal credit of Mrs. Dimes, and that a preliminary injunction issue restraining her from drawing or causing to be drawn by check, draft or otherwise any moneys deposited as aforesaid in the bank, and restraining the bank from paying to any person or persons any of such moneys upon any check or draft drawn or caused to be drawn by her or in any other manner, and also that a restraining order issue. On the filing of the bill a restraining order was granted as prayed, and the case is now before the court on a motion for a preliminary injunction. The First National Bank of Wilmington, although duly served, has neither answered nor appeared. Mrs. Dimes has made answer. Numerous affidavits on each side have been filed and the motion fully argued by

counsel. A careful consideration of all the papers in the case in connection with the argument has raised a grave question, by no means free from doubt, whether the complainant is not entitled to the relief he prays. A preliminary injunction ordinarily will not be granted on ex parte affidavits unless in a clear case. This is a salutary rule. It necessarily admits, however, of certain recognized exceptions. The granting of a preliminary injunction rests in the sound discretion of the court, and the proper exercise of that discretion requires that the circumstances of the particular case, including elements of hardship or other special features, should be duly considered and weighed. If the preliminary injunction now sought be denied on account of the doubt as to the ultimate determination of right, the case, so far as it relates to the moneys now on deposit in the bank to the credit of Mrs. Dimes, practically would be decided adversely to the complainant on mere ex parte affidavits; for it fairly may be assumed that unless restrained she will draw, and the bank will pay, such moneys. If this be done, there would be serious danger, if not certainty, that this suit, so far as those moneys are concerned, would prove fruitless, whatever may be the ultimate determination of right as between the parties. On the other hand, if a preliminary injunction now be awarded as prayed, the existing status will be preserved, and the only detriment or inconvenience which could result to Mrs. Dimes would be the suspension for a limited time of her ability to use moneys in bank belonging to her, should it appear on final hearing that she is entitled to the same. No satisfactory conclusion as to the rights of the parties can be reached until the case shall be heard after the taking of the evidence on both sides in due course, involving the examination, cross-examination and re-examination of witnesses. Such procedure is, in my judgment, necessary to a full disclosure of the facts on which this case must ultimately be decided. The object for which the preliminary injunction is sought is the preservation of a fund in controversy *pendente lite*—merely the maintenance of the *status quo*. The propriety of awarding a preliminary injunction as prayed is, under the circumstances, clear on both principle and authority. Let an interlocutory decree be prepared accordingly.

EDWARD THOMPSON CO. V. AMERICAN LAWBOOK CO.

(Circuit Court, S. D. New York. June 30, 1904.)

No. 7,951.

1. COPYRIGHT—INFRINGEMENT—USE OF CITATIONS FROM LAWBOOK.

A copyright of a law encyclopædia is not infringed by a subsequent work of like character because the author of the second work, in its preparation, used lists of cases bearing on different subjects copied from the copyrighted work, and, after examining the authorities cited, used such citations as he considered applicable in support of his own original text.

In Equity. Suit for infringement of copyright. On final hearing. Walter Large and Frank P. Pritchard, for complainant. Edmund Wetmore and Augustus T. Gurlitz, for defendant.

PLATT, District Judge. I am satisfied that the case before me on final proofs cannot be distinguished from the case before the trial court on affidavits. Indeed, when the preliminary injunction was issued, Judge Lacombe saw that such result was inevitable, and for that reason very properly put the cause in such position that an authoritative decision upon an interesting point of law might be reached at an early day, thus concluding the whole matter.

Like a certain disembodied spirit, familiar to every reader, but with added strenuosity, this affair will not down at anybody's bidding.

The only real attempt at contention now comes up over "words and phrases," but that was in issue on the circuit, and clearly did much to induce the injunction relief. The silence of the Court of Appeals in respect thereto would indicate to the observing mind that the point was thought to be immaterial. Whatever the event, the present trier feels that it is his duty to follow the views of the powers, so far as he can interpret them; but beyond that, when he comes to the case in hand, he is glad to find that his own view of the right and of the wrong of the controversy coincides with theirs. True it is that progress in the very important department of work in discussion would be seriously, almost hopelessly, retarded, if the contrary rule prevailed. Nor does it strike the mind of this court that the complainant's piracy was the moving cause of the decision in the Court of Appeals. The main issue was decided, and the piracy argument was added as clenching the contention. If at this date it has evaporated from the case, it is none the less true that the great issue was fully decided contrary to the complainant's views.

The briefs which were handed up at the hearing have this peculiarity: It is very apparent that they are the ones used on the appeal, with such emendations and additions as to the counsel seemed appropriate. Perception of that fact aids in cementing the conclusion above noted that the present case is quite what it was when argued upon the affidavits. For example, on page 42 of complainant's brief, I find, verbatim et literatim, the argument quoted in 122 Fed., at page 924, 59 C. C. A. 148, 62 L. R. A. 607. The answer given by the Court of Appeals was that the case stated was not the case made by the proofs. That answer remains good even now. If the briefs used on appeal could have been copyrighted, and fresh counsel were now pressing the matter before me, the later gentlemen might have been charged with "unfair use." Scanning the proofs with all the favor which complainant can suggest, the citations of words and phrases and definitions were only used by the defendant as guides to the decisions, and for that purpose a very limited number were used, since the larger portion were lawfully gathered from other sources. In other ways the fountains of information were the same to each party; the only distinction noted on the record being that the defendant paid for its excursion into outsiders' preserves, while the complainant insists that it had a right to browse in other people's pastures, and is defending in another court the charge that such actions were wrong.

Let the bill be dismissed, with costs.

ALLEN et al. v. FIELD.

(Circuit Court of Appeals, Second Circuit. April 21, 1904.)

No. 109.

1. CONTRACTS—ACTION FOR BREACH—EFFECT OF ASSIGNMENT.

Defendants contracted for the purchase of the greater part of the product of plaintiff's distillery for 15 seasons, to be delivered in bond at a stipulated price per gallon. The practical construction placed upon the contract by both parties was that it was not assignable by either party without the consent of the other. Defendants having made an assignment, plaintiff refused to accept the assignee as a substitute, except with the understanding that defendants would still be bound, while defendants insisted on such acceptance. Plaintiff subsequently agreed to, and did, deliver to the assignee, as requested by defendants, but with a statement to them that he did not waive his right to hold them if the assignee should make default. The contract was treated as in force by both parties for several months thereafter, and until both the assignee and defendants refused to accept further deliveries or to pay therefor. *Held*, on the evidence, that there had been no breach by plaintiff which justified such refusal, and that plaintiff was entitled to recover damages from defendants for their breach.

2. SAME—BREACH—MEASURE OF DAMAGES.

On the repudiation of such contract by defendants without legal right, after it had been in effect for one or two seasons, plaintiff was not bound to continue to operate his distillery during the remainder of the term and to market the product, for the purpose, if possible, of reducing the damages resulting to him from defendants' breach, but was entitled to sue for the breach at once, the measure of his damages being the difference between the contract price and the cost of manufacture.

3. SAME—EVIDENCE OF COST OF PERFORMANCE.

Evidence of the average cost of manufacturing and the average price of the grain used during a series of years was competent as furnishing a basis on which the jury might estimate the probable cost during the remainder of the term.

4. SAME—CONSTRUCTION—DAMAGES RECOVERABLE FOR BREACH.

A contract by which plaintiff agreed to manufacture for defendants, and defendants to buy, stated quantities of whiskey, not less than 3,000 barrels each season, for a term of 15 years, at a stipulated price per gallon, provided that, if the price of corn in the Chicago market should be more than 45 cents per bushel on the first Tuesday in October in any year, plaintiff should not be obligated to manufacture during that season, but that, if he should manufacture to exceed 500 barrels, defendants should have the right, at their option, to demand the usual quantity and up to 5,000 barrels at the agreed price. *Held*, that such provision did not render the contract unilateral, but was one for the mutual protection of the parties in a contingency which might arise, and the fact that it became operative in one season, after defendants had refused to further perform, did not affect plaintiff's right to recover damages on account of the breach for subsequent seasons, and that the effect of such provision on the amount of damages which would result to plaintiff from the breach during the remainder of the term was properly left to the determination of the jury.

5. SAME—DAMAGES RECOVERABLE FOR BREACH—SALE OF PRODUCT TO BE MANUFACTURED.

Where plaintiff, who was the owner of a distillery, on the refusal of defendants to further perform a contract by which they agreed to take and pay for the entire product of his distillery for a term of years, except-

¶ 5. Contracts for sale of things to be produced or manufactured, see note to *Star Brewery Co. v. Horst*, 58 C. C. A. 363.

ing a certain number of barrels each year, brought suit for breach of the contract, to recover as damages the profit he would have made during the remainder of the term, defendants were entitled to show that plaintiff continued to operate his distillery after the breach, and the profits he actually made thereby up to the time of trial, and to have the same set off against his estimated profits under the contract.

6. **SAME—EXPERT TESTIMONY.**

In such case defendants were also entitled to a reasonable deduction for the less time engaged and the release from the trouble, risk, and responsibility attending the full execution of the contract, and upon the question as to the amount of such deduction the testimony of experts familiar with the business in the locality where plaintiffs' distillery was situated was admissible, if properly limited to the particular matters as to which the witnesses had experience.

7. **SAME.**

The contract containing a provision that the whiskey was to be delivered to defendants in plaintiff's warehouse, and that storage should be paid thereon at a stipulated price per month until it was withdrawn, and it being shown that whiskey was customarily left in the warehouse for some years, and that there was a profit in its storage, plaintiff was entitled to recover damages on account of the loss of storage, which was an item presumably taken into consideration by the parties when the contract was made.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause is brought here by writ of error from a judgment of the United States Circuit Court for the Southern District of New York, entered upon a verdict by the jury in favor of plaintiff for \$50,000 damages for breach of contract. The plaintiff in the court below has died since the commencement of the action, and his estate is represented on this appeal by his executors.

Levy Mayer, for plaintiffs in error.

William Lindsay, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. Prior to the commencement of this action, plaintiff was a distiller of whiskey in Kentucky. The defendants are wholesale dealers in whiskey at New York. The negotiations between the parties herein appear from the record to have been opened by a letter from defendants to plaintiff, stating that, as they had sold their Louisville distilleries to the Kentucky Distilleries & Warehouse Company, and must have goods to substitute for those whiskeys, which they no longer handled, if they could make some arrangement with him to control the output of his house, under an arrangement extending over a term of years, and providing for the restriction of the production within what they would consider proper limits, and at a price which would make it an object for them to go into such a transaction, the matter might be considered. On April 12, 1899, the parties entered into a written contract whereby plaintiff undertook to manufacture and deliver to defendants certain quantities of whiskey, under certain conditions, for 15 distilling seasons. The material portions of said agreement are as follows:

"First: * * * This agreement, and all of its parts and provisions, shall run in favor of and be obligatory upon each of the parties hereto and their respective successors, legal representatives and assigns.

"Second: The term 'distilling season,' as hereinafter used, shall be held to mean the period of time between October 1st of one year and June 1st of the following year, and this contract shall continue to be in full force and effect for and during a period of fifteen (15) distilling seasons, the first of said fifteen (15) distilling seasons beginning on or after October 1st, 1899.

"Third: The second party [plaintiff] hereby agrees to manufacture for and sell and deliver to the first party [defendants], and the first party hereby agrees to purchase from the second party three thousand (3,000) barrels of whiskey during each of said five (5) consecutive distilling seasons, the first of said seasons to begin on or after October 1st, 1899, but the first party shall have and is hereby given the exclusive right and option to purchase from the second party, and in that event the second party shall manufacture and sell and deliver to the first party not to exceed five thousand (5,000) barrels of whiskey during one or more of said five (5) distilling seasons.

"Fourth: The second party hereby agrees to manufacture for and sell and deliver to the first party, and the first party hereby agrees to purchase from the second party three thousand five hundred (3,500) barrels of whiskey during each of the remaining ten (10) distilling seasons, the first of said seasons to begin on or after October 1st, 1904, but the first party shall have and is hereby given the exclusive right and option to purchase from the second party, and in that event the second party shall manufacture and sell and deliver to the first party not to exceed five thousand (5,000) barrels of whiskey during any one or more of said remaining ten (10) distilling seasons.

"Fifth: The price at which during each and all of said distilling seasons the second party hereby agrees to manufacture, sell and deliver and the first party hereby agrees to purchase said whiskey shall be and is hereby fixed at Thirty (30) cents per proof gallon in bond, original gauges, provided the bona fide market price of cash corn be not more than forty-five cents per bushel, Chicago Board of Trade, on the first Tuesday in October, in such respective distilling seasons. If, on the other hand, said market price is, on the date and place aforesaid, in any such respective distilling seasons, more than forty-five (45) cents per bushel, the second party shall not be obligated to manufacture, sell and deliver to the first party hereunder any whiskey during such distilling season, but if the second party shall, during such distilling season, manufacture whiskey in excess of five hundred (500) barrels, then the second party shall be obligated to manufacture, sell and deliver to the first party during such distilling season at the price of thirty (30) cents per proof gallon the aforesaid respective amount of whiskey during such distilling season, up to five thousand (5,000) barrels of whiskey at the option of the first party as aforesaid. Said whiskey shall be paid for upon the delivery of warehouse receipts, on or after the first day of the month, succeeding the month of its entry into bond.

"Sixth: During any of said distilling seasons the second party shall have the right to manufacture for the use of the second party not to exceed five hundred (500) barrels of whiskey during any of said distilling seasons in excess of the respective quantities hereinbefore specified, and if the second party shall manufacture more than five hundred (500) barrels of whiskey during any of said distilling seasons in excess of the respective quantities hereinbefore specified, then and in that event, for every barrel of whiskey so manufactured in excess by the second party, the second party shall and hereby agrees to pay the first party Five Dollars (\$5). It is expressly understood and agreed, however, that no part or parcel of said five hundred (500) barrels of whiskey which the second party is hereby permitted to manufacture for his own use during any of said distilling seasons shall be directly or indirectly sold or disposed of by the second party to any distillery or wholesale liquor dealer in the United States. * * *

"Ninth: The second party further agrees that for all the whiskeys agreed by him to be manufactured for and sold to the first party hereunder, the second party will issue to the first party the second party's usual and regular warehouse receipts in five (5) barrel certificates, * * * and that the rate of

storage for said whiskey shall be five (5) cents per barrel per month, from the date of the warehouse receipts. * * *

"Eleventh: It is further expressly understood and agreed that for the purpose of enabling the first party to ascertain and determine whether the second party has complied with the terms and conditions hereof, the first party shall have and is hereby given the right and privilege at any time to examine and inspect any and all of the internal revenue books which are or shall be kept by the second party in the operation of the second party's distillery.

"Twelfth: It is further expressly understood and agreed that all of the whiskey which the second party has hereby agreed to manufacture for and sell to the first party shall be manufactured by the second party in the distillery plant now owned by the second party and known as J. W. M. Field Distillery, near Owensboro, Daviess County, Kentucky, or in such other distillery as in case of fire or accident may by the second party be erected or constructed or procured in lieu of it as a substitute for the distillery plant so as aforesaid now owned by the second party. * * *

"It is expressly understood and agreed that during the term of this contract, the second party shall not and will not, directly or indirectly, manufacture or sell or deliver any whiskey except as hereinbefore otherwise provided, except that he may sell as much whiskey, of the manufacture of others, as he sees proper."

The defendants, in making this agreement, were acting on behalf of the Kentucky Distilleries & Warehouse Company, known as the "Whiskey Trust," but this fact was not communicated to the plaintiff. The circumstances leading up to the rescission of the contract and the controversies in relation thereto appear from the correspondence between the parties. Shortly after the execution of the agreement, plaintiff wrote defendants, stating that he purposed to incorporate his distillery, and that he would like to convey said contract to the new corporation, stating that it would be essential, of course, that the defendants should consent to the transfer. The defendants assented to said arrangement, and a proposed agreement was forwarded by plaintiff to defendants, which provided that the defendants should carry out the contract with the new corporation, and that the plaintiff should be bound to the fulfillment of said contract by said corporation. Upon receipt of said contract the defendants replied as follows:

"October 28, 1899.

"Field: Our counsel will draw a contract embodying the assent to your transfer to the company. In such contract we will also specify 'that the assent is given by the Kentucky Distilleries & Warehouse Company, to whom the contract of April 12, 1899, above referred to has heretofore been assigned by Paris, Allen & Co.'"

And plaintiff's reply was as follows:

"Would suggest that P., A. & Co. guarantee the faithful performance of Kentucky Company obligations, same as I guarantee for J. W. M. Field, Incorporated."

Shortly afterwards the Kentucky Company forwarded to plaintiff a contract signed by it, which provided that the plaintiff should be bound for the performance of the contract by the Field corporation, but made no provision that the defendants should guaranty the fulfillment of the contract by the Kentucky Company. Plaintiff demurred to this, and on November 20, 1899, wrote that, so long as the defendants had gotten out of the contract, he expected them to guaranty the fulfillment of the contract by the Kentucky Company. To this letter defendants made no reply. On December 2, 1899, the Kentucky Company wrote to plain-

tiff requesting him, as it had assumed the contract between him and defendants, to invoice the whiskey to said company, and make drafts on it for amounts due, and attach drafts in accordance with the original contract. The plaintiff made no reply to this letter, and sent the whiskey and drafts to the defendants. Defendants objected to this course, and requested plaintiff thereafter to make drafts to the company, as the contracts had been turned over to it, and it had assumed the same. On December 28, 1899, the plaintiff wrote the following letter:

"Your favor of the 14th inst. received. As my contract is with you, I do not want to have any dealings in connection with the Kentucky Distilleries & Warehouse Co., but if you direct me I will make drafts on that company as suggested in your letter, on condition that by doing so I am not to be considered as in any way releasing you from the contract between you and me. and am willing to make drafts on that company instead of you, simply as a matter of convenience to you and for your accommodation. I will continue to charge the whiskey to you each month and whenever that company fails to pay any draft I will immediately draw on you. If this proposition meets with your approval advise me and I will make the drafts as you direct. You will remember that I wanted to transfer the contract to a corporation formed by my sons and myself to operate the distillery and you said that arrangement would suit you provided I would guarantee that the corporation would perform the contract, and I told you I would. After that and before we accomplished anything you suggested you had transferred the contract to the Distilling Co., and I wrote you that I was willing provided you would guarantee that that corporation should carry out the contract with my corporation, as I had agreed to guarantee for mine, but you have never answered my letter on that subject, and I should be glad if you would do so, as the change should be made if we are to make it at all."

To this letter defendants made no reply, and the next shipment of whiskey was made to the defendants, who paid the same, but they wrote the plaintiff stating that, as their interest in the contract had been transferred to the Kentucky Company, they would not honor any further drafts. On January 13, 1900, plaintiff wrote defendants, repeating his claim that he did not propose to accept the Kentucky Company in lieu of defendants, unless the defendants would guaranty the performance of the contract, and on January 18, 1900, wrote the defendants as follows:

"I will have about 700 barrels of January whiskey in a few days, and if you want it made so as to turn over to Kentucky Company I will do so by your saying you want me to do so and it shall in no way prejudice or in any way invalidate our contract, and that you will agree if not protected by the Kentucky Company, all drafts in fulfillment of our contract in full your firm will carry it out to the letter. Then I will draw drafts and make receipts to them.

* * *

Thereafter the parties, by letter and telegrams, continued to dispute about the question of the assignability of the contract and guaranty of performance by defendants, the defendants stating, *inter alia*, that the Kentucky Company was complaining of the nonfulfillment of the contract, and plaintiff stating that he would continue to forward the whiskey to the defendants. On March 28, 1900, the attorney for the Kentucky Company wrote plaintiff the following letter:

"The contract of April 12, 1899, between P., A. & Co. and yourself, and the correspondence has been submitted to me as counsel for Kentucky Company. You have frequently been advised by P., A. & Co. and the Kentucky Company that the April 12, 1899, contract was properly and legally assigned to the Kentucky Company, which is, and since April 12, 1899, the date of the assignment of the April 12, 1899, contract to the Kentucky Company, has been entitled to

have you perform the contract according to its provisions. I am of the opinion and have so given it to the Kentucky Company, that P., A. & Co. have a right to assign the contract. The contract by its very language is expressly made to run in favor of and be obligatory upon the assigns of the parties. The Kentucky Company, being the assignee of the contract and being entitled to have you perform its provisions, has demanded of you frequently that you make such performance, and thus far you have failed and refused to comply with such request.

"If you persist in such failure and refusal on your part you will necessitate other and different action on the part of the Kentucky Company, which will be compelled to regard your action as a complete and final violation of the contract on your part and will then undertake to hold you liable for damages for non-compliance.

"You seem to think that you are entitled to have P., A. & Co., guarantee the Kentucky Company. P., A. & Co. having a right to assign the contract, did assign it, and the Kentucky Company is entitled to demand strict compliance on your part with its provisions. As to whether or not P., A. & Co. would be liable in case the Kentucky Company violated the agreement is a question with which the Kentucky Company is not concerned and which is not now pertinent to this discussion.

"You are already in substantial default, but before advising the company to take final action I send you these lines, to which I invite reply by early mail."

On April 2, 1900, plaintiff wrote to defendants the following letter:

"I enclose you a copy of a letter this day written to Levy Mayer, General Counsel of Kentucky Distilleries & Warehouse Company by my attorneys, Walker & Slack, in relation to my contract with you. I cannot agree to release you from your old obligation assumed in your contract with me, and do not consider that you have the right to be released without my consent. On December 28, 1899, I wrote you, offering to make drafts upon the Kentucky Distilleries & Warehouse Company for each month's production, on condition that I should continue to charge you with the goods and credit you by the payments made by the Warehouse Company, and the further consideration that if that Company should fail to pay at any time, I should make draft upon you. That I was willing to do that for your convenience and accommodation, as you had stated that you did not want the trouble of having to make the entries on your books. I am still willing to do as I then proposed, but am not willing to do anything that will release you from your contract with me. * * * It seems to me that if you construe the contract to mean that you have the right to make a transfer without my consent, and thus release yourself, you are wrong in your construction, and if you do not intend to thus be released, then there is no reasonable objection to your agreeing to remain bound.

"I much prefer settling this matter without litigation, and hope you may see your way clear to an amicable adjustment.

"Please let me know your final conclusion."

The letter enclosed was as follows:

"We do not think the word 'assigns' as used in the contract can properly be construed to mean that either party has the right to substitute another in its place, or make any transfer without the consent of the other party to the contract. To construe it otherwise would be to construe that whenever P., A. & Co. should find it unprofitable, or undesirable, all that they need do would be to make a transfer and tell Field to look to the transferee, and if the transferee should become insolvent, Field would be without any enforceable contract.

"If Field would recognize the Kentucky Company by collecting from it, he would be construed as consenting to the transfer.

"To summarize the question, Field insists that P., A. & Co. have no right to make any transfer or to relieve themselves from their obligations assumed under their contract, without his consent, and that he will not consent or do any act that will be construed into a consent except they first consent to re-

main bound. If P., A. & Co. do not intend to be released from their obligations, then all they need do is to agree to remain bound, as required by Field, in his letter of December 28, 1899.

"We make this suggestion after a partial examination of the authorities, though we think the question is elementary. If P., A. & Co. do not desire to relieve themselves of this contract there is no substantial question involved justifying litigation."

Thereafter plaintiff offered to compromise in order to avoid litigation, and defendants refused, threatening plaintiff that he was in danger of putting himself in default. On June 23, 1900, plaintiff wrote as follows:

"I certainly have never desired any litigation, and do not now desire it, and am glad to hear you take the same view. In order to avoid all controversy, I am willing to deliver the whiskey to Kentucky Distilleries & Warehouse Co. and accept payment from it so long as it shall continue to receive and pay for same as stipulated in my contract with you, but will do this without waiving, or intending in any way to waive the right to demand that you shall take and pay for the whiskey until the termination of the contract, if at any time the Kentucky Distilleries & Warehouse Company shall in future make default. So as directed by you, I will make draft on that Company within next ten days for the remainder of the past season's crop with warehouse receipts attached unless in the meantime you shall notify me, after receiving this, not to do so.

"I assure you that all I want is to do nothing that will be considered a waiver of my contract; and as you do not consider that I will waive it with you by delivering the whiskey to Kentucky Distilleries & Warehouse Company under your direction, I am, of course, willing to do it."

Defendants replied as follows:

"We consider that your conduct throughout this whole transaction has made it impossible for us to treat with you upon any basis.

"We cannot give you directions as to what you should do with the Kentucky Company. These are questions which must be settled between you and that Company. After conference with our counsel, we do not intend by any action of ours to revive any of your rights against us which may have been affected by your treatment of the transaction. You have by your attitude placed us on the defensive. You have threatened to sue us and we in turn must keep ourselves in a position, therefore, where in the event you carry out that threat we may take advantage of any technicalities of the situation."

On July 2, 1900, plaintiff sent draft, with warehouse receipts, for 2,200 barrels to the Kentucky Company, which it refused to receive. On July 5, 1900, plaintiff telegraphed the Kentucky Company asking for an explanation of the refusal. The Kentucky Company replied as follows:

"The papers are incorrect; were returned to the bank with explanation to the bank to that effect. We wish to state that in refusing to accept your draft for the above reason we do not waive our rights to refuse acceptance of any future drafts for any other cause which may exist in our favor under our contract with you."

Plaintiff continued to request an explanation from the Kentucky Company and the defendants as to the refusal of the Kentucky Company to pay the draft, and for an explanation wherein the papers were incorrect. On July 12, 1900, the Kentucky Company wrote plaintiff as follows:

"The presentation of your draft was the first notice we had of your intention to carry out your contract. In returning your draft, for the reason that the papers were incorrect, we at once notified you that there were possible

objections to accepting any draft which you might present for whiskey deliverable under the contract. We have been informed that the owners of your receipts have on several occasions failed to obtain whiskey represented by such receipts. Before accepting and paying for the warehouse receipts we must insist that an agent of this Company go through your warehouse for the purpose of verifying the receipt.

"This can be easily done. In addition, our executive committee is of the opinion that you should give this Company a bond with good and sufficient surety to secure us against any mistake or error in regard to the whiskey covered by the warehouse receipts. Further, we must have an inspection of each day's run by experts of this Company. We therefore request that you will permit our representative to take samples for each day's inspection of the whiskey deliverable to us under our contract for submission to this office for approval."

The subsequent correspondence between the parties is immaterial, except to show that the Kentucky Company, taking advantage of trivial and technical mistakes not going in any way to the root of the contract, insisted upon the conditions as to bonds and inspection, which were unauthorized by the contract. The correspondence, however, shows that after July 2, 1900, the date of the tender of whiskey and warehouse receipts to the Kentucky Company under the contract, it continued to negotiate with the plaintiff, and assumed the existence of the contract during July and August, and on September 25, 1900, it sent to plaintiff a bond to be signed by him, for \$100,000, against default in the performance of said contract. In said bond the Kentucky Company inserted, *inter alia*, the following statement:

"Whereas, said contract and all the right, title and interest of said Paris, Allen & Co. therein, thereto and thereunder have heretofore been assigned and transferred by said Paris, Allen & Co. to Kentucky Distilleries & Warehouse Co., a corporation of New Jersey, and said corporation accepts such assignment and transfer but desires an instrument of indemnity and protection and agrees to become the party of the first part to said contract in the place and stead of said Paris, Allen & Co., and which assignment is hereby consented to by said Field; and

"Whereas, said Kentucky Distilleries & Warehouse Co. is ready to carry out the terms and conditions of said contract upon its part to be carried out and performed, provided said Field makes no default in the performance of any terms and provisions in said contract contained by him to be performed, and provided, further, that this instrument is executed and delivered to said Kentucky Distilleries & Warehouse Co."

To this letter plaintiff made no reply. In October and November, 1900, plaintiff and the Kentucky Company had some correspondence in regard to the mistakes in the earlier invoices, but no further material reference was made to the contract, and plaintiff notified the defendants that he would make the whiskey as agreed for them during the season of 1900 and 1901, and each month forwarded the whiskey and drew on defendants for the amounts due under the contract, but defendants failed to pay therefor, and the plaintiff, having originally, in February, 1901, brought an action to recover damages for the whiskey manufactured under said contract which defendants had refused to receive, abandoned said action, and on October 14, 1901, brought this action, in which, *inter alia*, it is alleged as follows:

"Fifth. The plaintiff says that on or about the 12th day of February, 1901, and on divers occasions before that time, the said defendants refused to receive or to accept the warehouse receipts tendered, or in any way to perform their contract for the purchase of said whiskey, and notified the plaintiff that

they were no longer bound by said contract, and intended no longer to execute and perform the same, or any part thereof, during the remainder of the 15 distilling seasons, and they permanently abandoned said contract and refused to perform the same, or to permit him to perform the stipulations he had undertaken to perform, and they denied, and still deny, that they are bound to perform, and avow that they do not intend further to perform or permit this plaintiff to perform said contract, and openly claim that the same is no longer in force, and no longer valid or enforceable against them."

This allegation is admitted by the fifth paragraph of defendants' answer, in which defendants state, *inter alia*, that on divers occasions before February 12, 1901, they refused to receive or accept the warehouse receipts tendered by plaintiff, and that on said date they claimed, and still claim, that said contract is no longer in force or valid or enforceable against them, because of plaintiff's breach thereof, and that by reason of such breach they refused to be further bound by said contract.

As bearing upon the effect of plaintiff's offer to fulfill the contract with defendants' assignee, the Kentucky Company, the following letter from defendants to plaintiff, dated November 8, 1899, is important:

"Would it make any difference to you if you waited a little later in the season and ran later in the spring? There would be no objection on our part or that of the Kentucky Distilleries & Warehouse Co. to June goods. We would not want any made in July however. If you can just as well arrange in this way—delaying your starting as late as possible and then running full capacity, making your last drawing late in June, it would suit our arrangements very much better. Furthermore, it would have a good effect on everybody in your neighborhood who is proposing to make whiskey."

Thus the defendants requested such an extension of the distilling season as would permit deliveries in July.

The original contract was made without the knowledge of the plaintiff that it was really for the benefit of the Kentucky Company. In fact, the first letter from the defendants stated that they had sold out their distilleries to the Kentucky Company and wished to substitute plaintiff's whiskey in their own business. It appeared from the evidence that in 1900 the Kentucky Company was reported to be in failing circumstances, and the president of the company testified that, in order to save the credit of the company, he had indorsed for it gratuitously; that "he stood to lose at the time," but by reason of his pride in the success of the company he made said indorsements. The court correctly charged the jury on the question whether the plaintiff or defendants first repudiated the contract, and stated that, if the plaintiff was the first to repudiate it, he could not recover unless such repudiation was subsequently waived. The court further charged the jury that the defendants had the right to assign said contract, and were not thereby released from liability, and that it was the duty of plaintiff to make deliveries to the Kentucky Company under said contract, unless released by the acts of defendants. The court then reviewed the correspondence between the parties, and the evidence as to the insolvency of the Kentucky Company, and the claim of the plaintiff that the conduct of defendants showed that it was their obvious purpose to procure a release of the liability under said contract, and the claim of defendants that they declined to be bound by the contract because of the breaches on the part of the plaintiff already referred to, and that, having once declined

to carry it out, the Kentucky Company refused to revive it except upon the furnishing of a bond by plaintiff. The charge of the court on this branch of the case was quite full, and much of it was excepted to by defendants, but these exceptions need not be discussed, because the evidence is all in writing, and, in our opinion, warranted instructions less favorable to defendants than what were actually given. The evidence abundantly justified the conclusion that defendants made the assignment, not in good faith, but for the purpose of securing a release from their liability under the original agreement, and sought to trick the plaintiff into some act or omission which might be availed of as a plausible excuse for defendants' own delinquency, and that the endeavors of plaintiff to reach a fair understanding of the situation were not evidence of such a repudiation on his part as would justify the defendants in rescinding the contract.

The practical construction put upon the contract by both parties was that the contract was not assignable by either party without the consent of the other party. The plaintiff so stated in his original letter. The defendants accepted said statement, and put the same practical interpretation upon the contract by refusing to accept the plaintiff's proposed agreement to assign, and substituting one prepared by their counsel. By defendants' proposed contract it was provided, *inter alia*, that the Field corporation should agree to perform the said contract with the Kentucky Company "the same as though said contract of April 12, 1899, had been made by and between" the Kentucky Company and the Field corporation, and it specifically provided for a guaranty by the plaintiff of performance of the contract by the Field corporation. When the plaintiff insisted that he was entitled to a similar guaranty, no reply was made to his letter, but the defendants wrote afterwards, giving further instructions as to the way in which they, the defendants, wished the contract to be carried out. Subsequently, when plaintiff shipped whiskey to them and drew on them therefor, they refused to honor any further drafts, as their interest in the contract had been transferred to the Kentucky Company; and, when they transferred the shipments of whiskey to the Kentucky Company, they explained their conduct on the ground that the contract had been turned over to the Kentucky Company, who had assumed the same and would pay for the whiskey. Plaintiff offered to make shipments to the Kentucky Company as requested by defendants, on condition that by so doing he was not to be considered as in any way releasing defendants from their contract. But the defendants made no reply to this letter. The only suggestion made by plaintiff was that, if defendants did not intend to take advantage of assignment to the Kentucky Company in order to secure a release from their obligation, there was no reasonable objection to their stating that they agreed to remain bound by the contract. The letter of counsel for plaintiff takes the same ground, while the letter from counsel for defendants, referring to the question as to whether the defendants would be liable by reason of plaintiff's dealings with the Kentucky Company, disposes of the question by saying that it is one "with which the Kentucky Company is not concerned, and which is not now pertinent to this discussion." The subsequent correspondence does not show a situation in any way more favorable to defendants, and need not be discussed.

Prior to the close of the distilling season, as extended to July, 1900, the plaintiff offered to fulfill the contract with the Kentucky Company, and on July 2d duly tendered the whiskey to the Kentucky Company, in accordance with the contract. Up to that time the defendants had not elected to treat the contract as broken. They continued to treat the contract as existing for several months thereafter, and, while they were making technical objections, they were still negotiating with plaintiff and assuming the existence of the contract. In these circumstances the court would have been justified in instructing the jury to render a verdict for the plaintiff on the ground that defendants had expressly and specifically repudiated the contract, when there had been no breach on the part of the plaintiff which entitled them to do so.

Various errors were assigned to the charge of the court and its refusal to charge upon the question of damages. These will be considered in the order in which they were discussed in defendants' brief.

The first point is stated as follows:

"Defendants were entitled to an instruction to the effect that no damages, or, at most, only nominal damages, might be recovered against them, because, under the agreement, defendants were entitled not only to the services, but the exclusive output of plaintiff's distillery, etc. Upon defendants' breach, plaintiff was obligated to employ his services and plant to minimize defendants' damages. Therefore, in mitigation of damages, defendants are entitled to be credited with all revenues which might be obtained by plaintiff in the operation of said plant during the term of the agreement. These revenues could only be ascertained at the expiration of the agreement."

These questions are raised by exceptions to the refusal of the court to charge as follows:

"That if the jury believe from the evidence that the plaintiff, Field, on or after October 14, 1901, received, or could by reasonable efforts have received, contracts for the purchase of all or a part of his crops about or thereafter to be manufactured by him for or during any part of 13 distilling seasons then ensuing, at prices equal to or in excess of the cost of the manufacture of the same, it was his duty to make such contracts in order to reduce his losses, and, consequently, the damages he claims in this case."

Also, by the exception to the admission of evidence showing the cost of the manufacture of whiskey during the seasons of 1899-1900, and 1900-1901, and the average cost or profit of warehousing such whiskey, and of the high and low price of cash corn on the Chicago Board of Trade for the months of October, from 1873 to 1901, both inclusive, said latter evidence having been offered in connection with the probable cost of future crops of whiskey.

The general rule is that an unqualified refusal, without legal excuse, to further perform a continuing executory contract, authorizes the injured party to sue at once for any damage he has suffered from the breach. *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; *Marks v. Van Eeghen*, 88 Fed. 853, 30 C. C. A. 208; *Masterton v. The Mayor*, 7 Hill, 61, 42 Am. Dec. 38; *Devlin v. The Mayor*, 63 N. Y. 25; *In re Stern*, 116 Fed. 604, 54 C. C. A. 60; *Hochster v. De La Tour*, 2 El. & Bl. 678. The measure of damages in such a case is the difference between the contract price and the cost of manufacture. *Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 271, 7 Sup. Ct. 875, 30 L. Ed. 967.

"Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken, and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about." *Anvil Mining Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814.

The defendants do not controvert the doctrine laid down in these cases, but seek to distinguish the case at bar, on the ground that it involved the breach of an exclusive output contract; and they contend that in such a case it is the duty of the manufacturer, in order to minimize the damage, to devote his entire capacity to the manufacture of the article contracted for for others, if a demand exists for the article. Counsel for defendants says in his brief as follows:

"Plaintiff was bound to continue to operate said distillery and employ his services in the future years in the same general manner as he would have been obligated to employ them had the agreement been in the course of performance. * * * If the plaintiff in the present case could have sold the output of his distillery in the market at a price above the cost of production, then he sustains no greater damage than the difference between market price and the price at which defendants contracted to take the whiskey, and no greater damages should have been awarded him. As we have already pointed out, the plaintiff not only could have sold the output of his distillery in the market at a price above the cost of production, but at a price considerably above the price at which Paris, Allen & Co. contracted to take the whiskey."

A preliminary objection to this contention is found in the evidence that this agreement was not one for the manufacture and sale of the entire output of plaintiff's factory. It was expressly provided that, if the price of corn on the first Tuesday of October should exceed 45 cents per bushel, the plaintiff would not be obligated to manufacture and deliver the defendants any whiskey; but that, if he should manufacture in excess of 500 barrels in such season, he would then be obliged to manufacture an agreed amount for defendants. Furthermore, it was provided that the plaintiff should have the right to manufacture for his own use not to exceed 500 barrels of whiskey, during any of said distilling seasons, in excess of the quantities to be manufactured for the defendants, and that he might further manufacture whiskey in excess of said 500 barrels by a payment of \$5 a barrel to the defendants. The only limitation upon such manufactures and sales by the plaintiff in excess of the amount contracted to be manufactured and sold to defendants was that said whiskey should not be sold to any distillery or wholesale liquor dealer in the United States. But we are not aware of any rule of law which would have obliged this plaintiff, whether his contract was for an exclusive output or otherwise, to risk his capital in, and devote the capacity of his factory during a period of years to, the manufacture of whiskey in order to attempt to minimize the damages for which the defendants are liable by reason of their breach of the contract. No federal case has been called to our attention which supports any such view, or which indicates that a different rule of law is to be applied in the case of a breach of a contract for an exclusive output, as distinguished from other contracts to manufacture. The two federal cases

cited by counsel for defendants are *Warren v. Stoddart*, 105 U. S. 224, 26 L. Ed. 1117, and *Wicker v. Hoppock*, 6 Wall. 94, 18 L. Ed. 752. These cases do not support his contention. In *Wicker v. Hoppock* the court stated that where a party was entitled to the benefits of a contract, and could save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it was his duty to do so, but refused to apply the rule in said case, because the contract was one which provided for a payment, as distinguished from one of indemnity, and held that, in the former, a recovery might be had as soon as there was a breach of the contract, and that the measure of damages was the full amount agreed to be paid. In *Warren v. Stoddart* the court found that there had been no breach of contract, and held that no damages were recoverable by the defendant, who claimed that said contract had been broken, and who sought to set off damages which he had unlawfully aggravated; and held that, even if he had been entitled to recover, he could not wantonly and unlawfully aggravate the damages. *Kincaid v. Price* (Colo. App.) 70 Pac. 153, and *Frazier v. Clark*, 88 Ky. 260, 10 S. W. 806, 11 S. W. 83, were chiefly pressed on the argument in support of the exclusive output contention. In *Kincaid v. Price*, decided by the Court of Appeals of Colorado September 8, 1902, it is not clear that the fact that the contract was for an exclusive output had any bearing on the decision of the court that the measure of damages was the difference between the market value and the contract price. The court, relying on some statements of text-writers and early decisions of courts not of last resort, held that the above rule was the general rule for measuring damages in actions for breach of such executory contracts. In *Frazier v. Clark* it appeared that the plaintiffs, after breach of the contract, continued to operate their mill until it was sold, "making as much or more profit than would have been made if the contract had not been violated by the defendant." Of the 13 cases cited in support of the alleged distinction, the foregoing are the only ones which involved the element of an exclusive output. In five of the other cases the proof showed a tender of other goods or employment to the plaintiff after the breach, and an opportunity to make use of the mill, or wagon, or ship for the services of which the contract had provided. In *Dunn v. Daly*, 78 Cal. 640, 21 Pac. 377, the plaintiff himself broke the contract. In *Peck & Co. v. Kansas City Metal Roofing & C. Co.* (Mo. App.) 70 S. W. 169, the court applied the rule of master and servant to an advertising contract. The cases of *Everson v. Powers*, 69 N. Y. 527, 42 Am. Rep. 319; *Bassett v. French* (Com. Pl.) 31 N. Y. Supp. 667; *Mt. Hope Cemetery Association v. Weidenmann*, 139 Ill. 67, 28 N. E. 834; and *Sommer v. Conhaim et al.* (Sup.) 54 N. Y. Supp. 146—are all personal service cases, and, even if analogous to the case at bar, do not support defendants' contention.

The rule of damages in personal service cases is laid down in *Pierce v. Tenn. Coal, Iron & R. R. Co.*, 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591, where the court says:

"But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract; and to recover all that he would have received in the future, as well as in the past, if the contract had been kept. In so

doing he would simply recover the value of the contract to him at the time of the breach, including all the damages, past or future, resulting from the total breach of the contract. * * * In assessing the plaintiff's damages, deduction should, of course, be made of any sum that the plaintiff might have earned in the past or might earn in the future, as well as the amount of any loss that the defendant had sustained by the loss of the plaintiff's services without the defendant's fault."

The general rule in the case of a manufacturer or vendor is restated and applied by the United States Supreme Court in *Roehm v. Horst*, 178 U. S. 1, 21, 20 Sup. Ct. 780, 788, 44 L. Ed. 953:

"If a vendor is to manufacture goods, and during the process of manufacture the contract is repudiated, he is not bound to complete the manufacture, and estimate his damages by the difference between the market price and the contract price, but the measure of damage is the difference between the contract price and the cost of performance. *Hinckley v. Pittsburgh Company*, 121 U. S. 264 [7 Sup. Ct. 875, 30 L. Ed. 967]. Even if in such cases the manufacturer actually obtains his profits before the time fixed for performance, and recovers on a basis of cost which might have been increased or diminished by subsequent events, the party who broke the contract before the time for complete performance cannot complain, for he took the risk involved in such anticipation."

The evidence as to the cost of producing the two prior crops of whiskey, and of the price of corn in preceding years, furnished a basis on which the jury might reasonably determine the probable cost of future crops of whiskey.

"The jury, in assessing the damages, would be justified in looking to all that had happened or was likely to happen to increase or mitigate the loss of the plaintiff down to the day of trial." *Hochster v. De La Tour*, *supra*.

"It should be borne in mind that the difficulty of making proof springs, like the plaintiff's right to recover damages, out of the wrongful act of the respondents, who should not be suffered to reap advantage from their own wrong by requiring that kind of proof which their wrongful action has rendered it impossible or difficult for the plaintiff to obtain." *Lincoln v. Orthwein*, 120 Fed. 880, 57 C. C. A. 540.

In *Anvil Co. v. Humble*, *supra*, plaintiffs contracted to remove all of the ore in one of the shafts of defendant's mine. Defendant refused to permit plaintiffs to complete their contract. The same objection was made there as is here made—that the future profits were uncertain. The Supreme Court held that testimony as to the cost of mining each ton of ore, and as to the amount of ore on hand when the work was stopped, was admissible to show the profit which plaintiffs would have made, and said as follows:

"It is true that the cost of mining the remaining ore might differ from that of mining the ore which had already been taken out. But still, proof of the cost of taking out that which had been mined, and of the condition of the mine as it was left, furnished a basis upon which a reasonable estimate could be made as to the cost of extracting the remaining ore."

Wakeman v. Wheeler & Wilson Mfg. Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676.

We conclude, therefore, that the foregoing exceptions are not well founded.

In connection with said evidence as to the price of corn, defendants further contend that, as plaintiff was under no obligation to manufacture in any year if the price of corn exceeded 45 cents on the Chicago

Board of Trade on the first Tuesday of October in said year, the agreement was not mutually binding, and hence there can be no recovery for years subsequent to October, 1901. This question is raised by the refusal of the court to charge that, if the jury should find that the price of corn in October, 1901, was more than 45 cents, the contract to manufacture was optional with the plaintiff, and he could not recover any damages by reason of defendants' refusal to receive and pay for any whiskey thereafter to be delivered by plaintiff, and to its charge as follows:

"If you believe from the evidence that the plaintiff would have taken advantage of that provision of the contract in the years 1901 and 1902, when the price of corn was in excess of 45 cents per bushel, as appears by the proofs, and would not have manufactured whiskey during those years, then you ought not to allow plaintiff any damage for those years, or for any other years in which you believe from the evidence that he would not have manufactured any whiskey for the use of defendants. * * * The question of the future price of corn as bearing on the plaintiff's damages is of prime importance. It is for you to say, from all the evidence and circumstances what the probabilities are with respect to the continuance of the price of corn at the rate of 45 cents per bushel, and whether in view of all the facts, it was probable that plaintiff would have manufactured whiskey at a profit in succeeding years, and in years when the price of corn exceeded the sum stated."

And counsel for defendants argues that the jury were thus left to conjecture whether the price of corn would exceed 45 cents, and, if so, whether plaintiff would have continued to manufacture, and, if so, whether he would have met a loss or made a gain, and that the future prices were to be determined by the past prices of corn. Counsel for defendants have referred us to a line of authorities which hold that, where a contract is unilateral by reason of the absence of any obligation on the part of one of the parties to perform, it cannot be enforced, and only nominal damages can be recovered for the breach by the other party. We are not disposed to question the correctness of this proposition, but we think the case at bar does not fall within the rule thus stated. It is well settled that a contract for a sale, which leaves it practically optional with one of the parties as to the fulfillment of the agreement to manufacture or to purchase, the price to be paid, or as to other material portions of the contract, will be held to be void, and no damages can be recovered for its breach. *Troy Laundry Machine Co. v. Dolph*, 138 U. S. 617, 11 Sup. Ct. 412, 34 L. Ed. 1083; *American Cotton Oil Co. v. Kirk*, 68 Fed. 791, 15 C. C. A. 540; *Crane v. C. Crane & Co.*, 105 Fed. 869, 45 C. C. A. 96. In the *Dolph Case*, on which much stress is laid by counsel for defendants, the court held that damages could not be recovered for the breach of indefinite provisions in respect to an option in favor of one party as to a matter merely incidental and subordinate to the main contract. But in the case at bar the contract provided for the exercise of options by either party as to the performance of the main agreement for manufacture, upon sufficient and mutual considerations. The option reserved by the plaintiff was not one which necessarily, or within the contemplation of the parties, extended during the whole of the term of the contract, but was a provision for the mutual protection of the parties as to said main obligation in case the price of corn should be 45 cents per bushel in any season or seasons during the term of said contract. It did not give to plaintiff a right arbitrarily to terminate the contract, but only on certain conditions, which might

never arise. *Anvil Co. v. Humble*, supra. By the contract the plaintiff was absolutely bound to manufacture and deliver the exclusive output of his factory, with certain exceptions already noted, during each year of the term of the lease. The proviso which relieved him from this obligation when the price of corn should exceed 45 cents was one which also virtually contained a penalty for such failure to manufacture for defendants, in that it denied him the privilege of manufacturing any whiskey during such season, except 500 barrels for his own use, unless he should also manufacture and deliver to the defendants at the contract price, and at their option, 5,000 barrels during such season. The contract, therefore, was one binding upon the plaintiff, when the price of corn was 45 cents, either to manufacture as agreed, or to practically close his entire plant. In view of these mutual stipulations relating to said qualified option, and which served as a consideration passing to and from each of the parties, we think the obligation was a mutual one, and that the question of the right of recovery was properly left to the jury under the instructions of the court as given above.

The contract contained a provision that, in case of fire or accident which might prevent plaintiff from manufacturing in any one season, he should be excused for such failure. It is not claimed that this provision made the contract unilateral. And if the contract had contained an agreement that, in case of a strike, the entire failure of the corn crop, or the death of the plaintiff, in any year, the manufacturer should be relieved from the obligation of fulfilling the contract during the year when such casualty happened, it could not reasonably be claimed that such agreement constituted a defense against all claims for damages suffered during a period of years by reason of the default of the other party. And yet the charge requested by defendants as above was to the effect that, if the price of corn at the time when they, the defendants, broke the contract, happened to be more than 45 cents per bushel, the plaintiff could not thereafter recover any damage by reason of defendants' breach. The object sought, in case of a breach of contract, is to secure to the party just compensation for his damages suffered by reason thereof. It would be a travesty upon justice to apply the rule contended for by defendants, and thus enable them to escape all liability, because of the possibility that plaintiff might at some time have the right to exercise said option, and elect so to do at the penalty of closing his plant.

The next exception is to the exclusion by the court of evidence that whiskey was manufactured by the plaintiff during the season of 1901 and 1902, and of the price at which said whiskey was sold. It was stipulated that such evidence, if admitted, would show that the prices received by plaintiff were largely in excess of the contract price. Counsel for plaintiff argues that, as defendants had no further interest in plaintiff's business after the repudiation of the contract, it was immaterial whether or not he continued thereafter to manufacture. We have already discussed this contention. But while, in the absence of evidence as to plaintiff's actual loss, the rule of damages is as stated above, yet, as the first consideration is to ascertain actual damages where possible, if evidence is available of manufacture and sale after such breach, such evidence should go to the jury, in order to enable them the more nearly to approximate plaintiff's actual damages. *Diamond Co. v. San An-*

tonio R. R. Co. (Tex. Civ. App.) 33 S. W. 987; *Hochster v. De La Tour*, supra; *Wakeman v. Wheeler & Wilson Mfg. Co.*, supra. Especially is this so, in view of the admission of evidence as to the value or profit to plaintiff derivable from storage. If the jury were at liberty to award plaintiff damages for storage during the years succeeding the breach, they were bound to deduct therefrom such amounts as plaintiff actually received for his warehouse and factory during said season of 1901-1902. The exclusion of said evidence was clearly error. The ruling was directly contrary to the views expressed by the Supreme Court in *Hinckley v. Steel Co.*, supra, where the court said as follows:

"The Circuit Court finds that it would have cost the plaintiff \$50 per ton to have manufactured and delivered the rails called for by the contract, according to its terms; that the profits of the plaintiff, if the conduct of the defendant had not prevented it from fulfilling the contract, would have been \$8 per ton on each of the 6,000 tons, being \$48,000; and that the plaintiff manufactured and sold to other persons 4,000 tons of rails from the materials purchased by it with which to perform the contract with the defendant, and received for such rails \$54.60 per ton, and made a profit of \$1.60 per ton on the 4,000 tons, being a profit, in all, of \$6,400. Deducting this \$6,400 from the \$48,000 leaves \$41,600, for which amount the judgment was finally entered."

Error is also assigned to the refusal of the court to permit expert witnesses to answer the following question:

"Taking a contract for the sale of the product of a distillery, the contract being dated April 12, 1899, covering five distilling seasons for an annual output of 3,000 barrels, and the next ten distilling seasons for an annual output of 3,500 barrels, the distillery being located in Owensboro, Kentucky, and its total capacity being about 3,000 barrels, and the total value of the distillery and property being about \$35,000, and the contract price of its output being 30 cents per proof gallon; supposing that two seasons of that contract has elapsed, and that thirteen seasons were still to elapse, at the time when the contract was rescinded or canceled or terminated, what, in your opinion, would be a reasonable deduction for the less time engaged, and for release from care, trouble, risk, and responsibility attending a full execution of the contract; what proportion of the profit which the contract would have yielded, if any, to the manufacturer?"

The exclusion of this evidence is now sought to be justified on the ground that the witnesses were not qualified to testify as experts, and that, in any event, the jury were the sole judges of what deductions were to be made. The witnesses duly qualified as experts, and no objection was made at the trial on the ground that they were not thus qualified. That the defendants were entitled to such deductions is settled by the authorities. *Hinckley v. Steel Co.*, supra; *Masterton v. The Mayor*, supra; *United States v. Speed*, 8 Wall. 77, 19 L. Ed. 449. And the court charged the jury to this effect, as appears from the following excerpt from the charge:

"If the jury believe from the evidence that the said defendants committed a breach of said agreement of April 12, 1899, then in estimating the damages, if any, sustained by plaintiff by reason of such breach after October 14, 1901, the jury should make a reasonable deduction for the less time engaged, and for release from care, trouble, risk, and responsibility attending a full execution of said agreement by the plaintiff."

The general rule is well settled that, where a subject is one involving special knowledge upon subjects as to which the jury are not as well able to judge for themselves as one familiar with such matters, the

testimony is properly admitted to aid them in reaching their conclusion. *Transportation Line v. Hope*, 95 U. S. 297, 24 L. Ed. 477; *L. S. & M. S. R. R. Co. v. B. & O. & C. R. R.*, 149 Ill. 272, 37 N. E. 91; *Campbell v. Mayor (C. C.)* 81 Fed. 182. In *Herring v. Gage*, 12 Fed. Cas. 44, Judge Wallace said:

"By further exceptions the defendants insist that the master's findings as to the actual savings realized by the defendants by the use of this device is not sustained by the evidence. This finding is based in part upon the testimony of various experts who were familiar with the practical working of the device in other mills, and who were permitted to state the quantity of flour lost when the device was not used, thus estimating the saving realized under their observations, and basing upon that their opinion of the saving ordinarily gained by the use of the device. The conditions under which the device was used differed in the different instances observed by the witnesses. It is contended that this testimony is not entitled to consideration. To this I cannot agree."

In the case at bar it would be difficult, if not impossible, for a jury in the city of New York to determine with any degree of accuracy what would be a reasonable deduction for time and release from risk and responsibility attending the execution of a contract for the manufacture of whiskey during a period of years in a distillery in Kentucky, without some testimony from those familiar with such business. The determination would involve, *inter alia*, questions of wear and tear, of insurance, of cost of maintenance and care of the property, and the testimony of experts on those subjects was competent and material. The particular question, however, was too comprehensive; it was not calculated to elicit the experience of the witness, from which the jury might have drawn its own conclusions, but called for a general conclusion of the witness upon all the elements involved. In other words, it sought to substitute the witness for the jury as assessor of the damage, and objection to it was properly sustained.

Error is further assigned to the admission of evidence as to the cost of storage of whiskey, and the profit per year on such storage, and exception is taken to the refusal of the court to charge that the plaintiff was not entitled to recover damages for loss of expected profits by reason of the storage of whiskey which might have been manufactured under said agreement. This question as to the allowance of damages for lost profits on storage is not free from doubt. In view, however, of the distinct provision in the contract for payment of storage, we think it was competent to show the usual custom as to storage in such cases, as indicating the profit which was in the minds of the parties when the contract was entered into, especially in view of the testimony of one of the defendants:

"The profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into." *Howard v. Stillwell & Bierce Mfg. Co.*, 139 U. S. 199, 206, 11 Sup. Ct. 500, 503, 35 L. Ed. 147.

Cincinnati Gas Co. v. Western Siemens Co., 152 U. S. 200, 14 Sup. Ct. 523, 38 L. Ed. 411.

It was conceded that the universal custom of the whiskey trade is to keep Kentucky whiskey in the warehouse for several years, and that there is a profit in such business. One of the defendants testified that the business of warehousing whiskey is a very safe source of revenue to the distiller, and that, even if the distiller were to sell his product at cost, he could still count upon the average of three or four years' storage of the whiskey before it leaves his hands. The charge of the court on this point was as follows:

"It is claimed that the sum of five cents per barrel for storage monthly which the defendants agreed to pay, would have been a strong inducement to continue such manufacture, especially as it is the custom of the trade to allow barrels of whiskey to remain in storage for two or three years after manufacture. This is an item of testimony which you should consider; in connection, however, with the fact that it does not appear how long the whiskey would have remained in storage if the contract had been performed. Its disposition was absolutely in the control of the defendants after the delivery of the warehouse receipts to them. The warehouse receipts were constructive deliveries of whiskey, and are transferable by indorsement. And it follows that whiskey which remains on storage, and which has been delivered in the manner stated, may be removed from storage whenever the owner desires its removal. You should consider these circumstances in making your calculations to ascertain plaintiff's gain and profit, provided you conclude he has sustained damage."

We think this charge was justified by the evidence, and was sufficiently favorable to defendants.

The judgment is reversed, and the case remanded for a new trial.

McKNIGHT et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1904.)

No. 1,036.

1. INDIANS—ACTION BY UNITED STATES TO PROTECT RIGHTS—CATTLE ISSUED FOR STOCKRAISING PURPOSES.

Under the act of Congress ratifying agreements made with Indian tribes in Montana, including the Blackfeet, which provide, *inter alia*, for the issuance of cattle to such Indians for stockraising purposes, and that all such cattle and their increase shall bear the brand of the Indian Department, and shall not be sold, exchanged, or slaughtered, except by consent of the agent in charge, an Indian to whom such cattle are issued acquires only a conditional ownership for the purposes stated in the act, and it is the right and duty of the United States to protect such ownership, for which purpose it may maintain an action in a federal court in behalf of an Indian from whom cattle so issued have been unlawfully taken; and such right is not affected by the fact that an Indian in whose behalf such an action is brought is a woman who is married to a white man, and has thereby become a citizen of the United States, but who remains on the reservation with her tribe—it being expressly provided by Act Aug. 9, 1888, c. 818, 25 Stat. 392, 1 Supp. Rev. St. p. 608, that such marriage and citizenship shall not "impair or in any way affect the right or title of such married woman to any tribal property or interest therein."

2. UNITED STATES—ACTION BY—EFFECT OF STATE STATUTES.

The right of the United States to maintain an action in respect to a governmental matter cannot be affected by a state enactment requiring a notice to be given or demand made as a condition precedent to suit.

3. SHERIFFS—LEVY OF ATTACHMENT—SEIZING PROPERTY OF THIRD PERSON.

A sheriff is not protected in levying an attachment against a man on cattle owned by his Indian wife residing on a reservation, which cattle she could not lawfully dispose of, except with the consent of the Indian agent, and which, as required by law, bore the brand of the Indian Department, as well as her own brand, which was different from that of her husband; and it is immaterial that they were in the possession of the husband, or with cattle owned by him—the brands being sufficient to put him on inquiry as to the ownership.

4. CONFUSION OF GOODS—APPLICATION OF DOCTRINE—CATTLE.

The doctrine of confusion of goods has no application to cattle or horses, or other property of similar nature, that can be readily identified.

5. CONVERSION—EVIDENCE OF OWNERSHIP—DECLARATIONS OF PERSON IN POSSESSION.

In an action against a sheriff and an attaching creditor for conversion of property of the debtor's wife by its seizure and sale under the attachment, declarations of the husband to the creditor that the property was in his possession and that he was the owner are not admissible to prove his ownership as against plaintiff, especially where such declarations were made prior to the suit, and were therefore not a part of the *res gestæ*.

6. SAME—ACTION BY UNITED STATES.

In an action by the United States, as guardian of an Indian woman, for the conversion by defendant of cattle issued to her by the government for stockraising purposes, and which she had no power to dispose of, declarations by her as to the ownership of the cattle are inadmissible against the plaintiff.

7. SAME—DECLARATIONS OF OFFICER IN MAKING LEVY.

Declarations of an officer, in making a levy, going to show his knowledge that the property levied on was owned by a third person, or that he was put on inquiry as to such ownership, are admissible in an action in behalf of such third person for the conversion.

8. TRIAL—SEPARATION OF JURY—ADMONITION.

The failure of the court, on the separation of the jury for a noon recess during a trial, to admonish them against conversing about the case or forming an opinion thereon, as required by a statutory provision, is not a material error, where the admonition had been given on their previous separations during the same trial.

9. SAME—REMARKS OF COURT TO JURY—HARMLESS ERROR.

Remarks of the court in its charge to the jury with respect to the conduct of the case by counsel *held*, while improper, not to have constituted prejudicial error.

In Error to the District Court of the United States for the District of Montana.

McConnell & McConnell, for plaintiffs in error.

Carl Rasch, U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This action was brought by the United States, as guardian of Josephine Hall, an Indian woman, for the conversion by the defendants to the action of 34 head of cattle, alleged

to have been owned, held, and possessed by this Indian, subject to the control of the government, and of the value of \$1,125. The answer of the defendants put in issue the averments of the complaint, and also alleged in defense that the defendant Taylor is, and was at the times in question, the duly elected, qualified, and acting sheriff of the county of Teton, state of Montana; that on the 25th day of September, 1901, one John Hall was, and from thenceforth until November 9, 1901, remained, the sole owner of the cattle mentioned in the complaint; that thereafter, to wit, on the 25th day of September, 1901, an action was commenced by the defendant McKnight against John Hall in the district court of the Eleventh judicial district of the state of Montana, in and for the county of Teton, to recover the sum of \$603.72, with interest thereon at the rate of 1 per cent. per month from May 8, 1900, with attorney's fees and costs of suit, according to the terms of a certain promissory note of said Hall; that process was duly issued and served upon Hall in that action, and on September 25, 1901, a writ of attachment was regularly issued therein in due form, which writ of attachment was placed in the hands of the defendant Taylor, as sheriff of the county, with instructions to levy the same upon the cattle mentioned in the complaint, which was accordingly done; that on the 25th day of October, 1901, judgment was duly entered in the action of McKnight against John Hall for the sum of \$762.65, upon which execution was duly issued in due form, under which the cattle in question were sold for the sum of \$1,247 on November 12, 1901; and that John Hall was the owner of and in possession of the cattle at the time of the levy. These averments of the answer were put in issue by the replication filed by the plaintiff. The case came on for trial before the court with a jury, and resulted in a verdict and judgment for the plaintiff, and is brought here by the defendants below on writ of error.

The first, and principal, contention on the part of the plaintiffs in error is that the court below was without jurisdiction of the subject-matter of the action, "for the reason that Josephine Hall is a citizen of the United States, and this action is between citizens of the same state, and the amount involved does not exceed \$2,000, and the United States is not a proper party plaintiff in this action." The case shows that some years prior to the transactions in question Josephine Hall married John Hall, who was a white man and a citizen of the United States. Josephine Hall was a member of the Blackfeet tribe of Indians, and as a matter of fact lived upon its reservation and received from the government, through its agent there, issues of cattle and other things, like the other Indians of the tribe. John Hall entered upon a piece of public land, situated across a creek that separated such public land from the Indian reservation, and entered that piece of land as a homestead, and claimed his residence thereon, which was but a short distance from the house in which his Indian wife actually lived, and where he visited her, as she also did him, occasionally.

The act of Congress of February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various

reservations, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes" (24 Stat. 388, c. 119, 1 Supp. Rev. St. pp. 534, 536), provided in its sixth section as follows:

"Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The first and second sections of Act Aug. 9, 1888, c. 818, 25 Stat. 392, 1 Supp. Rev. St. p. 608, entitled "An act in relation to marriage between white men and Indian women," are as follows:

"Be it enacted," etc., "that no white man, not otherwise a member of any tribe of Indians, who may hereafter marry an Indian woman, member of any Indian tribe in the United States, or any of its territories except the five civilized tribes in the Indian Territory, shall by such marriage hereafter acquire any right to any tribal property, privilege, or interest whatever to which any member of such tribe is entitled.

"Sec. 2. That every Indian woman, member of any such tribe of Indians, who may hereafter be married to any citizen of the United States, is hereby declared to become by such marriage a citizen of the United States, with all the rights, privileges, and immunities of any such citizen, being a married woman: Provided, that nothing in this act contained shall impair or in any way affect the right or title of such married woman to any tribal property or any interest therein."

It has been held by this court, by the Circuit Court of Appeals for the Eighth Circuit, by the Supreme Court, and by other courts, that the citizenship conferred upon the allottees under and by virtue of the act of February 8, 1887, did not operate to withdraw them from the supervision, control, and protection of the government, but that such Indians still remained wards of the nation. *United States v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532; *Farrell v. United States*, 110 Fed. 942, 49 C. C. A. 183; *Eells v. Ross*, 64 Fed. 417, 12 C. C. A. 205; *United States v. Logan* (C. C.) 105 Fed. 240; *United States v. Flournoy Live Stock & Real Estate Co.* (C. C.) 69 Fed. 886; *State v. Columbia George* (Or.) 65 Pac. 604, 610. In and by its act of August 9, 1888, declaring that every Indian woman, member of a tribe, who shall thereafter be married to a citizen of the United States, shall "become by such marriage a citizen of the United States, with all the rights, privileges, and immunities of any such citizen," Congress expressly added that nothing in the act contained "shall impair or in any way affect the right or title of such married woman to any tribal property or interest therein."

By Act May 1, 1888, entitled "An act to ratify and confirm an agreement with the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians in Montana, and for other purposes," the United States, in consideration of certain cessions and relinquishments on the part of those Indians, agreed—

"To advance and expend annually for the period of ten years after the ratification of this agreement, under direction of the Secretary of the Interior, for the Indians now attached to and receiving rations at the Fort Peck agency, one hundred and sixty-five thousand dollars; for the Indians now attached to and receiving rations at the Fort Belknap agency, one hundred and fifteen thousand dollars, and for the Indians now attached to and receiving rations at the Blackfeet agency, one hundred and fifty thousand dollars, in the purchase of cows, bulls, and other stock, goods, clothing, subsistence, agricultural and mechanical implements, in providing employees, in the education of Indian children, procuring medicine and medical attendance, in the care and support of the aged, sick, and infirm, and helpless orphans of said Indians, in the erection of such new agency and school buildings, mills, and blacksmith, carpenter, and wagon shops as may be necessary, in assisting the Indians to build houses and inclose their farms, and in any other respect to promote their civilization, comfort, and improvement: Provided, that in the employment of farmers, artisans, and laborers, preference shall in all cases be given to Indians residing on the reservation who are well qualified for such positions: Provided further, that all cattle issued to said Indians for stock-raising purposes, and their progeny, shall bear the brand of the Indian Department, and shall not be sold, exchanged, or slaughtered, except by consent or order of the agent in charge, until such time as this restriction shall be removed by the Commissioner of Indian Affairs." 25 Stat. 114, c. 213, art. 3.

And article 5 of the same act is as follows:

"In order to encourage habits of industry, and reward labor, it is further understood and agreed, that in the giving out or distribution of cattle or other stock, goods, clothing, subsistence, and agricultural implements, as provided for in article 3, preference shall be given to Indians who endeavor by honest labor to support themselves, and especially to those who in good faith undertake the cultivation of the soil, or engage in pastoral pursuits, as a means of obtaining a livelihood, and the distribution of these benefits shall be made from time to time, as shall best promote the objects specified."

By article 3 of the agreement with the Indians of the Blackfeet Indian reservation in Montana, of date September 26, 1895, it was agreed:

"That in the employment of all agency and school employees, preference in all cases be given to Indians residing on the reservation, who are well qualified for such positions: and that all cattle issued to said Indians for stock-raising purposes, and their progeny, shall bear the brand of the Indian Department, and shall not be sold, exchanged, or slaughtered except by the consent of the agent in charge until such time as this restriction shall be removed by the Commissioner of Indian Affairs." Act June 10, 1896, c. 398, 29 Stat. 355.

By Act July 4, 1884, c. 180, par. 3, 23 Stat. 76, 1 Supp. Rev. St. p. 450, it was provided:

"That where Indians are in possession or control of cattle or their increase, which have been purchased by the government, such cattle shall not be sold to any person not a member of the tribe to which the owners of the cattle belong, or to any citizen of the United States, whether intermarried with the Indians or not, except with the consent, in writing, of the agent of the tribe to which the owner or possessor of the cattle belongs. And all sales made in violation of this provision shall be void, and the offending purchaser on

conviction thereof shall be fined not less than five hundred dollars, and imprisoned not less than six months."

By Act June 7, 1897, c. 3, 30 Stat. 62, 90, it is provided:

"That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time or was at the time of her death recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs or belonged at the time of her death, by blood, as any other member of the tribe, and no prior act of Congress shall be construed as to debar such child of such right."

Sections 2127 and 2138 of the Revised Statutes are as follows:

"Sec. 2127. The agent of each tribe of Indians, lawfully residing in the Indian country, is authorized to sell for the benefit of such Indians any cattle, horses, or other live stock belonging to the Indians and not required for their use and subsistence, under such regulations as shall be established by the Secretary of the Interior. But no such sale shall be made so as to interfere with the execution of any order lawfully issued by the Secretary of War, connected with the movement or subsistence of troops. * * *

"Sec. 2138. Every person who drives or removes, except by authority of an order lawfully issued by the Secretary of War, connected with the movement or subsistence of troops, any cattle, horses, or other stock from the Indian country for the purposes of trade or commerce, shall be punishable by imprisonment for not more than three years, or by a fine of not more than five thousand dollars, or both."

These agreements and statutory enactments very clearly show that cattle purchased by the government and issued to the Indians of a tribe are not theirs absolutely and unconditionally, but, as is expressly provided by law, are provided and issued for the purpose of promoting "their civilization and improvement," and to "encourage habits of industry" among them, the alienation and slaughtering of which cattle, without the consent of the government's agent in charge of the reservation, is expressly forbidden. The right and duty of the government to protect such conditional ownership of the Indians does not admit of doubt. *United States v. Flournoy Live Stock & Real Estate Company* (C. C.) 69 Fed. 886; *Id.* 71 Fed. 576; *United States v. Mullin* (D. C.) 71 Fed. 685; *United States v. Winans* (C. C.) 73 Fed. 72; *Beck v. Real Estate Co.*, 65 Fed. 30, 12 C. C. A. 497; *Truscott v. Hurlbut Land & Cattle Company*, 73 Fed. 64, 19 C. C. A. 374, and cases supra.

The act conferring citizenship, with its accompanying rights, upon Indian women who marry white citizens of the United States, expressly declares, as has been seen, that nothing in the act "shall impair or in any way affect the right or title of such married woman to any tribal property or interest therein." The marriage of Josephine Hall to John Hall did not, therefore, extend her rights in the cattle in question, which remained precisely as they were before such marriage.

It is provided by a statute of Montana that:

"If personal property attached be claimed by a third person, he shall give notice thereof to the sheriff and deliver to him an affidavit stating his claim, ownership, and a description of the property, and unless the plaintiff within ten days after receiving notice thereof give the sheriff a good and sufficient bond to indemnify him against loss or damage by reason of retaining said property, the sheriff shall deliver the same to such person." Section 906, Code Civ. Proc. Mont.

And it is insisted on the part of the plaintiffs in error that, if the cattle in question were the property of Josephine Hall, the giving of the notice and the making of the affidavit provided for by this statute "is a condition precedent to Josephine Hall's right of action against the sheriff for the conversion of this property." A sufficient answer to this suggestion is that this action is brought by the United States, and that its rights in a governmental matter are not affected by state enactments. *Pond et al. v. United States et al.*, 111 Fed. 989, 49 C. C. A. 582, and cases there cited. We need not, therefore, inquire whether or not section 906 of the Montana Code, concerning the claim and delivery of personal property, could operate to defeat an action for the conversion of such property, where no notice or demand prior to the bringing of suit is alleged or shown.

Nor did the court below err, as is contended on behalf of the plaintiffs in error, in refusing to instruct the jury that, if the cattle in question were in the possession of John Hall when they were seized, the defendant Taylor would not be liable, unless Josephine Hall had designated the cattle belonging to her, and demanded their return, with which demand the sheriff refused to comply. It appears from the evidence, as has been said, that, notwithstanding her marriage to John Hall, Josephine Hall continued to actually reside on the reservation, and received from the government its regular issues of cattle and rations, along with the other Indians of the tribe. It further appears that prior to her receipt of any cattle from the government her father gave her three head, her uncle one, and her brothers four, making eight head in all, and that in the years 1895 and 1896 eleven head were issued to her by the government, and in 1901 seven head more. Rule 360 of the Regulations of the Indian Office provides as follows:

"When cattle are issued to Indians, either for work oxen or for breeding purposes, each animal must be branded, in addition to the I. D. brand, with a private mark to indicate the person to whom it is issued. A record of such private marks must be kept in the agency office. The agent is also required to see that the increase of all issued cattle is similarly branded." Regulations of the Indian Office, 1894, p. 76.

All of the cattle issued to Josephine Hall were, in accordance with the foregoing regulations of the Indian Department, branded with the letters "I. D." (indicating "Indian Department"), and it appears that a private brand, "B. E.," signifying "Beaver Eyes" (the Indian name of Josephine Hall), was selected by the agent of the reservation for her, and also placed upon the cattle issued to her. It further appears that in the year 1897 Josephine Hall purchased from one Gardiner a brand called the "Y. G." brand, and from that time on her cattle and the increase thereof were branded with the I. D. and the Y. G. brands. John Hall, it appears, was the owner of a brand spoken of in the record as the "Reel" brand, consisting of a cross with a "T" on each end of it; and he, also, had some cattle with his brand running on the reservation. It appears from the evidence that in making the levy the deputies of the defendant sheriff entered upon the reservation and there rounded up cattle that were herding together, including the cattle of Jose-

phine Hall, as well as some of John Hall. They also levied upon 19 head at the place of one Prendergast, most of which were branded with the I. D. and Y. G. brands, which had been driven there by John Hall en route to Browning for shipment to Chicago, provided (according to John Hall's testimony) a permit could be obtained from the Indian agent at Browning consenting to the shipment of Mrs. Hall's cattle. The evidence, however, is that Mrs. Hall did not authorize her husband to sell her cattle, and did not know that he had driven any of them away, for the purpose of shipment or otherwise.

The obvious duty of an officer in executing a writ of attachment is, as held by this court in *St. Paul, etc., Railway Company v. Drake*, 44 U. S. App. 271, 276, 72 Fed. 945, 19 C. C. A. 252, to levy upon property of the defendant to the writ, and not upon the property of somebody else. He has, as was said by the Supreme Court in *Buck v. Colbath*, 3 Wall. 334, 343, 18 L. Ed. 257—

"A very large and important field for the exercise of his judgment and discretion, first, in ascertaining that the property on which he proposes to levy is the property of the person against whom the writ is directed; secondly, that it is property which by law is subject to be taken under the writ; and, thirdly, as to the quantity of such property necessary to be seized in the case in hand. In all these particulars he is bound to exercise his own judgment, and is legally responsible to any person for the consequences of any error or mistake in its exercise to his prejudice. He is so liable to plaintiff, to defendant, or to any third person whom his erroneous action in the premises may injure."

Even if it be conceded that the different brands upon these cattle were not of themselves enough to put the officer upon inquiry as to their ownership, it appears from the testimony of the deputy sheriff who made the levy that he had sufficient knowledge of a controversy to put him upon inquiry as to the ownership; his testimony upon redirect examination being:

"I was directed specifically and positively to take all the Y. G. cattle. Those were Mrs. Hall's cattle, or considered as hers in the neighborhood, from rumor."

The doctrine relating to "confusion of goods," relied on by counsel for the plaintiffs in error, has no application to cattle and horses, and things of a similar nature, that may be readily identified. The *Idaho*, 93 U. S. 575, 23 L. Ed. 978; *Clafin v. Beaver* (C. C.) 55 Fed. 576; *Carlton v. Davis*, 8 Allen (Mass.) 94; *Moore v. Bowman*, 47 N. H. 494, 502; *Capron v. Porter*, 43 Conn. 383; *Brown v. Bacon*, 63 Tex. 595; *Drake on Attachment* (7th Ed.) § 199.

In the course of the trial the defendant McKnight testified, in effect, that prior to the commencement of his action against John Hall he went to the ranch of the latter for the purpose of collecting his note, and that Hall there said to him, "I have got the cattle all rounded up and intend to ship them to Chicago from Baltic in a few days," but that he (McKnight) replied that it would be more satisfactory to him for Hall to settle the note before he shipped the cattle; that Hall said:

"All right; I will come in and square this. I will pay you this as I can get the money from Kingsbury and Davies."

An objection and motion to strike this testimony out having been made, the court said:

"Do you expect to prove that he had these cattle and owned them? If so, you must prove it by something more than John Hall's declaration."

To which counsel for the defendants responded:

"We do, and we expect to offer to prove by this witness that John Hall was the owner of the cattle whose conversion is now being sued for; that he was in possession of them, and about to ship them to Chicago, and while exercising acts of ownership and control over these very cattle he offered to mortgage them to McKnight to secure his debt to him, or, if McKnight would wait until he shipped them to Chicago, he would turn over the proceeds of the sale of them to McKnight, and stated to McKnight that the cattle were his. This offer of proof is made for the purpose of showing that the cattle belonged to John Hall, and also for the purpose of impeaching Hall as a witness. (Motion to strike [out] granted, and offer of proof denied by the court. The defendants excepted.)"

It is insisted on the part of the plaintiffs in error that such declarations of John Hall in respect to the ownership of the cattle were admissible. We do not think so. Conceding, but without holding, that the declarations of one in possession of personal property, in respect to the character of such possession, are admissible in evidence against strangers on the issue of ownership, yet an insuperable objection to the proposed declarations in the present case is that they were not made at a time when they could be properly regarded as a part of the *res gestæ*. *Mutual Life Insurance Company v. Logan*, 87 Fed. 637, 645, 31 C. C. A. 172; *Mack v. Porter*, 72 Fed. 236, 242, 18 C. C. A. 527; *Crawford v. Crawford* (Kan. Sup.) 55 Pac. 842; *Low v. Schaffer* (Or.) 33 Pac. 679; *Alexander v. Jennings*, 78 Tenn. 419; *Coxe v. Milbrath*, 110 Wis. 499, 86 N. W. 174; 1 *Greenleaf on Evidence*, § 110; *Wharton on Evidence*, § 259; 24 A. & E. *Encyc. of Law* (2d Ed.) p. 691.

It is further contended on the part of the plaintiffs in error that the court below erred in sustaining objections to questions to Josephine Hall by which it was sought to show that she had told the defendant McKnight in 1897 that the cattle issued to her by the government had been taken by people to whom she was indebted, and in sustaining like objections to a question put to the witness McKnight. The ruling of the court below was right. These cattle, like the personal property spoken of by the Supreme Court in *United States v. Rickert*, 188 U. S. 432, 443, 23 Sup. Ct. 478, 483, 47 L. Ed. 532, were purchased with the money of the government and were furnished to the Indians "to induce them to adopt the habits of civilized life. It was, in fact, the property of the United States, and was put into the hands of the Indians to be used in execution of the purpose of the government in reference to them." It is not pretended that the government ever consented to a disposition of the cattle by Josephine Hall, and it is plain that no declaration of hers could affect its right and duty to protect her.

It is also urged on behalf of the plaintiffs in error that the court below improperly permitted John Hall to give in evidence a conversation he had with the deputies of the defendant sheriff. Hall,

having testified that he had a conversation with them in respect to some of the cattle that they had levied upon and had in charge, was asked:

"What was said?"

To which he was permitted to answer, over the objection and exception of the defendants, as follows:

"A. I rode up to them. They had that little bunch of cattle and was driving them off. The undersheriff of Mr. Taylor said: 'We are coming to get the rest of them.' I said: 'What are you going to do with them?' 'Why,' he says, 'we will sell them, I reckon, when we get around to it.' There must have been twenty head of I. D. cattle in that bunch."

The record proceeds:

"Q. Did you at that time say anything about the I. D. cattle that were in the bunch? (Objected to as leading, and as incompetent, irrelevant, and immaterial. Objection overruled. Defendants excepted.) A. I said: 'What are you going to do with the I. D. cattle?' He said: 'I don't know what they are going to do with them. Our orders are to take everything with the Y. G. brand on them, even if it had the I. D. on it.'"

Even if it be conceded that this testimony was improperly admitted, it was immaterial, for it in no way tended to prove the ownership of the cattle. It may be added, however, that declarations of an officer in making a levy, in connection with the performance of his acts, are admissible. 1 Wharton on Evidence, §§ 262, 264; 1 Greenleaf on Evidence, § 108; Steamboat Company v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049.

In the cross-examination of John Hall, and of the deputy sheriff, Gaines, both of whom were witnesses for the plaintiff, the counsel for the defendants sought to show that the cattle of Josephine Hall and John Hall were intermingled, and that neither Hall nor his wife ever pointed out to the officer the cattle belonging to Mrs. Hall; the defendants contending that, under the circumstances, the officer could not become liable without being notified by or on the part of Mrs. Hall of her ownership. The record shows, on the redirect examination of John Hall, the following proceedings:

"Q. Now, you say, when you met the deputy sheriffs there on the reservation with the cattle, that they knew that they were Y. G. and I. D. cattle, and that they belonged to your wife. How do you know that? (Objected to as incompetent, irrelevant, and immaterial. Objection overruled. Exception noted.) A. One of the deputies lives right there close to me. You might say he seen the cattle right along. He knew them as well as I did; knew what the brand was."

And on the redirect and recross-examination of the witness Gaines the following proceedings:

"Redirect examination: I also knew that the Y. G.'s was hers; but, irrespective of that, I was ordered to bring all of the Y. G. cattle with the I. D. brand on.

"Recross-examination: As to whether I knew that brand was hers, it was simply hearsay, and the general talk round about there. It is general repute and hearsay. I didn't see it recorded at all.

"(Counsel for defendants moved to strike out all of the testimony of this witness as to what he heard about the Y. G. brand being Josephine Hall's, because the same is hearsay, and incompetent, and not the proper way to prove ownership of a brand. Motion denied. Defendants excepted.)"

We think the testimony was admissible, not, as a matter of course, for the purpose of proving title, but as going to show that the officer was put upon inquiry as to the true ownership of the cattle in question.

Section 1082 of the Code of Civil Procedure of Montana provides that:

"If the jury are permitted to separate either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with or suffer themselves to be addressed by any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them."

And it is contended on the part of the plaintiffs in error that by virtue of this state statute, and of the provisions of section 914 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 684], providing that the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding in like causes in the courts of record of the state within which said Circuit or District Courts are held, the court below committed reversible error in allowing the jury to separate on one occasion during the trial without giving this statutory admonition. The record shows that twice upon the first day of the trial of the case, to wit, upon taking a recess at noon, and again upon the adjournment of the court for the day, the court below did duly admonish the jury in accordance with the provisions of the state statute cited. Upon taking the noon recess on the second day of the trial, the court neglected to give the admonition, to which, however, no exception was taken by the counsel for the defendants until the re-assembling of the court at the afternoon session. Had the attention of the court been called to its omission in the matter by counsel, no doubt the admonition would have been given; and counsel's failure to note an exception at the time precludes their availing themselves of the omission, even if there were any merit in the contention; but the clear and explicit admonition given by the court below to the jury on two previous occasions was a substantial compliance with the statute, as has been frequently held. *Gleason v. Strauss*, 5 Kan. App. 80, 48 Pac. 881; *Perkins v. Ermel*, 2 Kan. 325; *Kirby v. W. U. Tel. Co. (S. D.)* 55 N. W. 759, 30 L. R. A. 612, 621, 46 Am. St. Rep. 776; *Musselman v. Pratt*, 44 Ind. 126; *People v. Coyne*, 116 Cal. 295, 48 Pac. 218; *People v. Colmere*, 23 Cal. 632.

During the trial of the cause, John Hall having testified that the papers in the attachment suit against him were served by one Link Hummell, after which the witness said something about going to a place called Dupuyer and settling the matter with McKnight, the following proceedings occurred:

"Q. Isn't it a fact that you went to Dupuyer with Link Hummell and during the night you left Dupuyer, went out where the cattle were, took possession of them again, and, instead of continuing on towards Baltic with them, you reversed the course in which you were taking them at the time of the attachment, and took them over to Slim Prendergast's place and secreted them

from the sheriff? By Mr. Rasch: Object to that as incompetent, irrelevant, and immaterial. By the Court: There is a great deal of this that is meant to create a feeling in this matter. Now, what effect would that have? By Mr. McConnell: We are attempting to show that these cattle belonged to John Hall, and that he exercised ownership and control over them. By the Court: No; you are attempting to show that this man did something wrong, and committed a theft. That's what you are."

And upon the conclusion of the instructions to the jury, to which counsel for the defendants entered a number of exceptions, as they had the undoubted right to do, these proceedings occurred:

"By the Court: There is one other thing I will state to the jury. (To Mr. McConnell) You may take an exception to this, too. I have not much patience with an attorney who comes into court and attempts to cast reproach upon some one who is here of a different race, which may be called an inferior race. There are people all over the country, that have Indian blood in their veins, that are respectable people. The present mayor of Chicago has Indian blood in his veins. Your Lieutenant Governor of Montana is a mixed-blood Indian, and his mother is a respectable woman. By Mr. McConnell: To those remarks of the court, may it please the court, we desire to enter an exception on behalf of the defendants. I have not attempted to cast any reproach upon an Indian. My criticisms were devoted exclusively to John Hall, who stated he was a white man, and your honor's remarks are highly prejudicial to the defendants' cause."

We have no means of verifying the assertion of counsel for the defendant in error that these remarks of the court were provoked by the argument of counsel for the plaintiffs in error. They were improper, and are much to be regretted. Nevertheless, as we are of the opinion that the instructions of the court properly stated to the jury the law, and covered the case presented, and as we are of the further opinion that a verdict in favor of the plaintiffs in error could not have been properly rendered in view of the evidence in the case, the improper remarks complained of could not have resulted in substantial injury.

The judgment is affirmed.

PRATT v. BOTHE.

(Circuit Court of Appeals, Sixth Circuit. June 29, 1904.)

No. 1,283.

1. BANKRUPTCY—CLAIMS OF ATTORNEYS—ALLOWANCE.

Bankr. Act July 1, 1898, c. 541, § 60d, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446], provides that if a debtor shall, directly or indirectly, in contemplation of bankruptcy, pay money or transfer property to an attorney, solicitor in equity, or proctor in admiralty, for services to be rendered, the transaction shall be examined by the court on petition of the trustee for creditors, and shall only be valid to the extent of a reasonable amount, to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate. Section 64b, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], provides for an allowance for attorney's services rendered to the bankrupt in assisting him while performing the duties imposed by the act. *Held*, that section 60d was limited to the allowance of reasonable compensation to attorneys for services rendered to the bankrupt prior to the commencement of the bankruptcy proceedings, and did not cover services rendered in resisting the creditor's petition for an adjudication of bankruptcy.

Appeal from the District Court of the United States for the Eastern District of Michigan.

This is an appeal from an order made by the District Court in a proceeding in a bankruptcy case wherein Flora B. Hawley had been adjudicated a bankrupt, which order denied a petition of the appellant praying that the trustee be directed to pay the petitioner, out of the moneys in his hands belonging to the estate of the bankrupt, the balance claimed to be due to him for services as an attorney and counselor at law rendered to the bankrupt, and for disbursements made for her while in such professional service. A schedule stating the items of the account was appended to the petition, consisting of:

| | |
|--|----------|
| Disbursements, made up of items of traveling expenses, telegrams, and the like, from February 13 to April 28, 1903, amounting to.. | \$ 35 97 |
| Charges for services rendered by Pratt to Hawley, commencing with December 6, 1902, down to and including May 14, 1903, amounting to | 765 00 |
| Services of George P. Cobb, of counsel for Hawley in the bankruptcy proceedings | 100 00 |
| And services of Henry Weber and A. R. Miller for making estimate of the value of the buildings on the real estate belonging to Hawley, and their attendance to testify as to the same..... | 50 00 |
| Making a total of | \$950 97 |
| Upon which there are credits amounting to..... | 150 00 |
| Leaving a balance due Pratt of..... | \$800 97 |

The petition for an adjudication of bankruptcy was filed January 28, 1903. It appears from the appellant's petition and proofs that the charges were incurred by the bankrupt during a period extending from somewhat less than 2 months before the petition of the creditors was filed until 3½ months thereafter.

The bankrupt had been engaged in business as a merchant at Bay City, Mich., for several years and had become embarrassed and unable to meet her obligations. On the 6th of December, 1902, she consulted the appellant, to advise her as to what course she had best pursue. Further consultations ensued, and on January 12, 1903, she paid the appellant \$50 in part payment for his services, and, to secure him for the balance of his services, gave him a mortgage on her stock of merchandise, conditioned for the payment of \$200 on the 27th day of January, 1903, and further that she would "well and truly pay or cause to be paid to the second party at maturity all such other sums in which the said first party may become indebted to said second party for his services hereafter rendered and disbursements and expenses paid, or otherwise, and also for any other indebtedness that may be incurred to other counsel employed by said second party in connection with said first party's affairs." On the same day she executed another mortgage on the same property to one Jeffery, as trustee, to secure all her creditors; the amount of her indebtedness being then estimated at \$13,000, but which eventually proved to be as much as \$15,500. Apparently both these mortgages were given upon the suggestion of the appellant. The appellant, as he claims, made an agreement with Mrs. Hawley that, in case her creditors should acquiesce in the mortgage to Jeffery, his fee should be the sum of \$250, but that, in case they instituted bankruptcy proceedings, he should have such further compensation as might be reasonable for his services and expenses. The creditors did not acquiesce in the mortgage to Jeffery, but on January 28th filed their petition for an adjudication of bankruptcy against Mrs. Hawley, as above stated; the ground thereof being that the giving of the mortgages above mentioned constituted acts of bankruptcy. The appellant and Mr. Cobb, whom he employed to assist him, defended Mrs. Hawley; and a protracted trial before a jury was had, which resulted in a finding against her. This was followed by an adjudication of bankruptcy on May 9, 1903. On June 8th the appellant filed with the referee his petition for the allowance of the claim now in controversy. It was opposed by the trustee, not, as we infer from the record before us, upon the

ground that the charges were unreasonable of themselves, but upon the ground that the claim was not, in law, allowable. The referee allowed a charge of \$37.50 for services in preparing the schedules required to be filed by the bankrupt, and certified the case to the District Judge for his instruction as to the other charges included in the claim of the petitioner. The amount of the claim for services rendered before the filing of the petition by creditors was the sum of \$241.75, and the appellant admitted that he had been paid the sum of \$150, \$90 of which was paid February 2, 1903, after the filing of the creditor's petition. The balance claimed by him on that portion of his whole claim was therefore \$91.75. The District Judge, in response to the questions certified by the referee, gave his opinion (1) that the \$37.50 for preparing the bankrupt's schedules was properly allowed; (2) that the petition should, in respect of all other charges of the appellant, be disallowed; (3) but that the balance of \$91.75 for services rendered before the filing of the petition of creditors might be allowed as an ordinary debt of the bankrupt upon the surrender of the \$150, which was, as the court held, an unlawful preference. An order to this effect having been entered, the petitioner has appealed. He has also, out of caution, brought the case up by petition for revision. As there is no controversy in respect to any question of fact upon the case as presented to us, it matters little which method of procedure is recognized. We incline to the view, however, that the case is properly before us on the appeal (*Cunningham v. German Ins. Bank*, 103 Fed. 932, 43 C. C. A. 377), and will consider and determine it upon that footing.

Frank S. Pratt, in pro. per.

Graves, Hatch, Millis & Goodenough, for appellant.

Lee E. Joslyn, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge, having made the preceding statement of the case, delivered the opinion of the court.

The contention of the appellant is that his whole claim, to the extent that it has not been paid, should be allowed as a charge upon the fund in the hands of the trustee, and should be paid before distribution to general creditors. He founds his claim upon the provision of section 60d of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446], which reads as follows:

"If a debtor shall directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be examined by the court on petition of the trustee or any creditors and shall only be valid to the extent of a reasonable amount to be determined by the court and the excess may be recovered by the trustee for the benefit of the estate."

The construction which the appellant thinks should be imposed upon this paragraph is that it validates any such payment or transfer for services to be rendered to the debtor, whether to be rendered before or after a petition in bankruptcy is filed against him, and whether or not he is adjudged a bankrupt, subject only to the determination of the court as to whether the amount paid or transferred is reasonable. For the trustee, on the other hand, it is contended that it has relation only to services which may be rendered to the debtor prior to the institution of bankruptcy proceedings against the debtor, upon which he shall have been adjudged a bankrupt. It must be admitted that the language of this provision of the act is obscure. And the

bankruptcy courts have found difficulty in settling its meaning. But the direct question of its proper interpretation has not been presented in more than a very few cases. Perhaps it was most distinctly presented and considered in the case *In re Kross* (D. C.) 96 Fed. 816, which was followed by Judge Swan in the case before us. Judge Brown, then District Judge of the Southern District of New York, there held that this provision should be construed in connection with section 64b, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], and should be limited thereby, in respect to the services rendered to the bankrupt after the filing of the petition against him, to such services as are contemplated by section 64b; that is to say, services rendered to the bankrupt in assisting him while performing the duties imposed upon him by the act. And upon this construction it was held that it was immaterial whether they had been contracted and paid for before the bankruptcy, or the compensation thereafter determined by the court, without any contract by the debtor before the petition was filed against him. In either case it would be a preferred claim, to be ascertained and fixed by the court. This would seem a plausible conclusion, were it not for the language of the paragraph, which includes services rendered not only by an attorney, but those rendered by a "solicitor in equity or a proctor in admiralty." This generalization seems to indicate that the services contemplated were such as might be required in general litigation or in the course of the debtor's business, and one cannot help greatly doubting whether Congress had in mind the purpose to include those special services which an attorney would render to the bankrupt while in the discharge of his duties, payment for which was provided by another section of the act. It would rather seem that Congress, engaged, as many signs indicate, in guarding the assets of those in contemplation of bankruptcy, to the end that they might be brought without unnecessary expenditure to the hands of the trustee for distribution to creditors, while it would not deny to the debtor the right to employ and pay for legal assistance in his affairs during that critical period, yet proposed a restraint upon that privilege by requiring that such payment should be reasonable in amount—in short, proposed to apply to the incipient stage of bankruptcy the provident economy which it sought to apply to the administration of the bankrupt estate. It may have been thought that there was the same reason for such restraint at that stage of affairs as subsequently. And it is to be observed that the transaction would not become the subject of revision unless bankruptcy ensued. It put attorneys, solicitors, and proctors in no worse position than it did some other classes of those having business with the debtor.

The bankruptcy act makes a final and sharply determined line in respect of the power of the bankrupt over his estate and the distribution of it as of the date of the filing of the petition against him. From that time his assets are in *gremio legis*, and he cannot, unless he compounds with his creditors, bind his assets. He may, of course, make new contracts and incur new obligations, but they are not chargeable to the funds which have become vested in the trustee *until they have subversed the purpose of the bankruptcy proceedings*,

when, if anything remains, he reacquires it. It would be wholly inconsistent with the scheme of the act that a debtor in contemplation of bankruptcy should be permitted to make an arrangement whereby he should have power, after his assets shall have gone into the hands of the trustee, to alter their disposition by appropriating them to the payment for services thereafter rendered to him, or, indeed, to satisfy the obligations of any executory contract. With respect to services rendered to the bankrupt in the present case after the creditor's petition was filed, it is to be observed that the compensation therefor was not due and owing at the date of the filing of the creditor's petition, and so was not a provable claim. It would be anomalous that the debtor, by preconcert with his attorney, could defeat that provision by an agreement for a benefit to accrue to the bankrupt after the proceedings should be inaugurated, and make the compensation therefor a privileged claim. By section 64b, the law provides for compensation to an attorney who assists the bankrupt in performing the duties imposed upon him. But this is done for the purpose of facilitating the proceedings, and for the benefit of the estate. It is not done in recognition of any contract obligation of the bankrupt. Many cases have been cited to us—mostly cases arising upon the last preceding act—in which the bankruptcy courts have given some countenance to the appellant's contention that the debtor may employ counsel to resist the petition of his creditors for an order adjudging him a bankrupt, and charge his assets with the payment thereof, and in one case that doctrine seems to have been quite pointedly held. In *re Comstock*, 6 Fed. Cas. 239, No. 3,074. The idea which pervades the allowance of such a charge seems to have been grounded upon a disposition to be merciful to the debtor, who, it is said, has given up all his property, and is without other means of repelling an unjust prosecution. But it is by no means a new thing—indeed, it is a situation constantly recurring—where a man, whether by his fault or his misfortune, is without means to make full defense of his property rights. It is unfortunate often, but it has never been thought that property belonging to others, or which might be adjudged to them, should be drawn upon to enable the man to make defense. Many cases are cited which more or less oppugn the doctrine of such decisions as *In re Comstock*, *supra*. It is not practicable within any reasonable limits to review and compare the cases upon this subject, and, so far as we are not concluded by positive authority, we shall deal with the questions involved on fundamental reasons. We are of opinion that section 60d relates to services to be rendered while the debtor is "in contemplation of bankruptcy," and not to services to be rendered after bankruptcy proceedings are commenced. The reasonableness of the amount paid or transferred for such services is to be determined by the court. This view would lead to the conclusion that the court, if the trustee or any creditor should require it, should have reviewed the transaction, and exercised its judgment upon the question as to what amount would be a reasonable sum to be allowed. No such request was made in this case, and, as matters stood, the question was to what extent the charges for services, and the expenses rendered in connection with them, had

been paid. If any balance was found in favor of the petitioner, that sum should have been allowed him; otherwise the petition should have been disallowed. In the case of *Randolph v. Scruggs*, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, it was held, in response to questions certified by this court, that compensation might be made to attorneys for preparing an assignment for the benefit of creditors which the debtor had made prior to the proceedings in bankruptcy, but that it would not be provable as a preferential claim. It was also held that charges for counseling the assignee in the discharge of his duties under the assignment might be allowed in so far as they were beneficial to the estate. But the right to the claim of preference was founded upon the right of the assignee to be reimbursed for expenses reasonably incurred by him on account of the assignment and the protection of the property. And this claim of the assignee inured to the attorney to whom it would ultimately go. But there are no such facts in the present record. It is not shown that any services were rendered to the assignee, or that he became obligated therefor. All the services were rendered to the debtor, and were charged to him. The bulk of the charges making up the claim of the appellant was for services rendered and expenses incurred in resisting the creditor's petition for an adjudication of bankruptcy. The act does not expressly provide for payment for such services out of the assets, and there is no ground which we can discover for thinking an implication to that effect should be recognized. But we are relieved from discussion of this subject by the opinion of the Supreme Court in *Randolph v. Scruggs*, *supra*, wherein it was certified that a claim for such a service was not allowable. Expenses incurred in the same service would stand upon the same footing, and are subject to the same disposition. The District Court recognized as valid the item of \$37.50 for making out the bankrupt's schedules, and allowed it. We are therefore not concerned with it on this appeal. Since the argument of this case the appellant has sent in a reference to a recent decision of the Supreme Court of Pennsylvania (*Furth v. Stahl*, 205 Pa. 439, 55 Atl. 29), in which that court considered the provision of the bankrupt act upon which the appellant here relies, and reached the conclusion that an agreement of this kind was valid thereunder. If, as we infer, the services for which the claim was there made were rendered before the proceedings in bankruptcy were commenced, the opinion of the court is in accord with our own conclusions. If we are wrong in our inference in respect of the fact, we could not assent to the result there reached. Upon the construction which we think should be given to section 60d, there having been no petition of the trustee or any creditor that the court should inquire into the reasonableness of the amount of the compensation agreed to be paid by the debtor, we think the claim of the petitioner for charges incurred before the commencement of the bankruptcy proceedings should have been allowed at the sum of \$241.75, less the sum of \$150 admitted to have been paid, which would leave a balance of \$91.75. This, of course, does not include the \$37.50 allowed by the judge under section 64b. As the rights of the parties are governed by the spe-

cial provision of the statute relating to the subject, no question of preference by reason of the payments arises.

The order of the court below from which this appeal was taken must be reversed, with directions to enter an order in conformity with this opinion. As each party succeeds in part, the costs of the appeal will be divided between them. The petition for review will be dismissed at the cost of the petitioner.

INGRAHAM v. NATIONAL SALT CO.

(Circuit Court of Appeals, Second Circuit. April 6, 1904.)

No. 152.

1. CORPORATIONS—VALIDITY OF CONTRACTS—IMPEACHMENT OF CERTIFICATES OF INDEBTEDNESS.

A corporation having charter power to purchase the stock of other corporations bought the stock of another corporation, and in part payment therefor issued stock of its own, both common and preferred, which was deposited in trust with the stock purchased. It also issued to the sellers, through the trust company, certificates of indebtedness, payable in semiannual installments for five years. The agreement also provided that all dividends declared on the stock of the purchasing company should be paid to the trust company and applied in payment of the certificates until their full payment, after which the stock was to be delivered and the trust terminated. *Held*, that such certificates were not ultra vires, having been issued for one of the purposes for which the corporation was organized, and in the exercise of its implied power to incur indebtedness for such purpose, and that the corporation could not assert their invalidity on the ground that they were in effect, and were intended to be, a guaranty to the holders of a fixed dividend on their stock for a term of five years.

2. CONTRACTS—LEGALITY—ANTI-TRUST LAW.

It is no objection to the enforcement of a contract, in the consideration and enforcement of which nothing illegal inheres, that it may incidentally aid one of the parties in evading or violating the anti-trust statute.

In Error to the Circuit Court of the United States for the Eastern District of New York.

See 122 Fed. 40.

Joseph A. Burr, for plaintiff in error.

H. B. Twombly, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the plaintiff in the court below, brought to review a judgment for the defendant. The assignments of error challenge the rulings of the trial judge in withdrawing the case from the consideration of the jury and directing a verdict for the defendant.

The action was brought to recover the amount of 12 obligations, termed "certificates of indebtedness," created by the defendant, and countersigned and registered by the American Trust Company, evidencing the promise of the defendant to pay to the payee or order a

specified sum of money in certain equal semiannual installments. These certificates are substitutes for 12 purchased by the plaintiff in the spring of 1901, and which he surrendered to the American Trust Company for the purposes of registry, and were received by him in exchange for those surrendered.

The answer of the defendant is a voluminous document which is rather in the nature of a bill in equity than of any pleading known to a court of law. Two defenses can be spelled out of it. The first is that the certificates (the originals) are invalid because they were made as part of an agreement which the defendant was without corporate power to make, viz., as a cover for an agreement by the defendant to guaranty dividends upon certain shares of its preferred and common capital stock, and thereby give the holders of these shares an unauthorized preference over the other stockholders of the defendant. The second defense is that they were made on an illegal consideration, viz., to effect a scheme contravening the law of the state of Ohio declaring unlawful certain combinations in restraint of trade.

The action has been before this court upon a previous writ of error which was brought by the defendant in the court below to review a judgment for the plaintiff. The court was then of the opinion that the facts established the first defense, and that, although the plaintiff was a purchaser of the certificates for value, he took them subject to any infirmities which would have invalidated them in the hands of the original holders. We are satisfied that our decision was erroneous, and are glad to have an opportunity to correct it while the consequences are yet remediable.

Succinctly stated, the certificates originated as follows: The defendant, a New Jersey corporation organized to carry on the manufacture of salt, and having power, among other things, "to purchase, hold, sell, assign, mortgage, pledge, or otherwise dispose of, shares of the capital stock * * * of any corporation of the state of New Jersey or of any other state," decided to acquire the capital stock of the United Salt Company, a corporation of Ohio. Accordingly, in 1889, the defendant made an agreement with certain shareholders of the United Salt Company whereby they were to sell their shares to the defendant, and the defendant was to pay for each of their shares $1\frac{1}{4}$ shares of its preferred stock and $1\frac{1}{4}$ shares of its common stock, and also a money consideration of \$106.25 in 10 equal semiannual installments. This money consideration was equivalent to annual dividends for five years upon each share and a quarter of preferred stock of 7 per cent. per share (\$43.75), and upon each share and a quarter of common stock of 10 per cent. per share (\$62.50). The agreement provided that all the shares to be exchanged, those of the United Salt Company as well as those of the National Salt Company, should be deposited with the American Trust Company until the money consideration should be fully paid; that in the meantime all dividends declared upon the preferred and common stock of the National Salt Company thus deposited should be paid by the defendant to the American Trust Company; that the dividends so paid should apply as payments pro tanto of the money

consideration; that the defendant should make its certificates of indebtedness for the money consideration, and the same should be issued by the American Trust Company to the stockholders of the United Salt Company, or their assignees, in the amount due to them respectively; and that when the certificates were fully paid the trust should terminate, and the deposited stock be delivered to its owners. It further provided that, in case of failure of the defendant to pay the certificates according to their terms, the American Trust Company should sell the deposited shares of the United Salt Company, apply the proceeds to the payment of the certificates, and pay any surplus to the defendant. Pursuant to the agreement, the shares to be exchanged were deposited with the trustee, and the certificates of indebtedness were made by the defendant and issued by the trustee. The agreement thus referred to consisted of several documents, some executed by the shareholders of the United Salt Company, some executed by the defendant, and some executed by the American Trust Company, and which were intended to embody together the complete agreement.

The contention of the defendant in respect to this agreement is found in that part of its answer which avers as follows:

"That, whereas said alleged agreements in writing provided for the cash payment of \$106.25 per share for each share of the capital stock of the United Salt Company, and the issuing of certificates of indebtedness to the respective holders, in accordance with their holdings, to evidence the same, said provision for cash payment was in fact a mere subterfuge, and the real agreement was that the said National Salt Company should make a guaranty of 7 per cent. upon the preferred stock and 10 per cent. upon the common stock, to the stockholders of the United Salt Company, upon the stock of the National Salt Company to be exchanged for the stock of the United Salt Company; that said guaranty extends over a period of five years, and until the sum of \$106.25 per share has been paid; that thereby the stock which would be given by the National Salt Company to the stockholders of the United Salt Company was and is given a preference over and above the stock held by any of the other stockholders of said National Salt Company; that said guaranty of said dividends by the National Salt Company upon the stock exchanged by the stockholders of the United Salt Company was without power on the part of the said National Salt Company to make, and was therefore void and of no effect."

It will be observed that it is not contended by the defendant that the agreement was made without the consent of the majority of its stockholders, or without compliance in any other respect with the requisite formal proceedings to sanction the corporate act in making it. The defense rests solely upon the theory that the agreement was *ultra vires*.

It is plain that the agreement resulted in setting apart the deposited National Salt Company stock until the certificates should be paid, and denuding it in the meantime of the right to receive any dividends which might accrue upon it, and in appropriating such dividends to the payment of the certificates. The real question in the case is whether the agreement was *ultra vires* in the sense that it could not be made without the unanimous consent of the stockholders of the defendant. The only evidence of the intention of the parties to it is found in the agreement itself. Whether it was made as a cover or "subterfuge" for some other agreement

which would have been *ultra vires* is merely an academic question. If it was not *ultra vires*, it was one which the defendant could lawfully make, and the defendant's motive in making it could not affect the legal quality of the act. The doctrine that after the shares have been distributed, and the relations of corporation and stockholders have been fixed, the corporation cannot, in the absence of authority in its charter or articles of association, create shares which carry a preferred right to dividends, or a right to a fixed payment in lieu of dividends, without the unanimous consent of its stockholders, has been asserted by the authorities, and rests upon undoubted principle. The same principle would forbid the corporation to create a new class of stockholders having rights or privileges not common to all. The reason is that to permit this would impair the existing equality among the stockholders, and subvert the vested rights which every stockholder acquires upon the purchase of his shares. But these rights are not invaded by the exercise of any power which resides in the corporation by virtue of its charter or the law of its organization, because every stockholder assents in advance to the exercise of such powers. The stockholder also assents in advance to the exercise by the corporation of all the incidental powers necessary to carry into effect the express objects of its charter or articles of association, and these include all that are reasonable and adapted to the end in view. Thus, the power to borrow money is implied as incidental to the defined powers of ordinary private business corporations; and if, in order to borrow money, the corporation finds it expedient to create preferred stock, and the issue is not in excess of the authorized capitalization of the corporation, no stockholder has reason to complain. The adjudged cases have not always recognized the force of this original consent by stockholders to the exertion of the incidental powers of the corporation. In *Kent v. Quicksilver Mining Company*, 78 N. Y. 159, the court assumed that, if the preference stock had been created as an exertion of the incidental power of borrowing money, it would have been a valid act, notwithstanding the absence of unanimous consent by the stockholders. This proposition is consistent with good sense, because the power to borrow includes the authority to mortgage the corporate property as a security, in the absence of some restriction in the charter; and the creation of preferred shares in place of common shares is no more harmful to the rights and interests of existing stockholders than is the creation of a mortgage. 2 *Redfield on Railways*, § 237; *Westchester R. Co. v. Jackson*, 77 Pa. 321. If the defendant, in order to attain one of the authorized objects of its incorporation, the purchase of the shares of another corporation, had found it expedient to agree with the vendors that the shares of common stock which they were to receive in exchange should carry 10 per cent. annual dividends for five years, to be paid out of the general dividend fund before appropriating any of it to the payment of dividends upon the rest of the common stock, we are not prepared to say that the agreement would not have been valid, as to all the stockholders of the defendant, as an exercise of one of the incidental powers to which all had

originally consented. Such a contract would have been valid if it had been an act which was directly and immediately appropriate to the exercise of the specific power granted. For much learning upon this subject, the well-known case of *Curtis v. Leavitt*, 15 N. Y. 9, may be profitably consulted.

The present agreement did not have the effect of creating any new preferred stock or guarantying dividends upon the new stock. The stock to be transferred to the new holders was the existing preferred and common stock of the corporation, and the certificates were independent negotiable securities, which might or might not be transferred with the stock. If the new holders should remain the owners of the certificates, they would become creditors as well as stockholders of the defendant; if they should choose to dispose of the certificates and retain their stock, they would be stockholders on precisely the same footing as all the other preferred and common stockholders of the corporation. If they were willing to forego dividends for a longer or shorter period, that was no concern of the other stockholders. Certainly that feature of the agreement worked the latter no harm or wrong. The defendant was expressly authorized to purchase the stock of other corporations, and, as incidental to such a purchase, it had authority to contract to pay for the stock in such mode and upon such conditions as were deemed advantageous. It did agree to pay for the purchased stock, partly in its own stock and partly in money, and to issue its obligations for the payment of the money at such times as were mutually satisfactory to the vendors and itself. It doubtless expected that the dividends which would accrue upon its stock deposited with the trustee would meet these payments, and so did the vendors; but there was no agreement to that effect. The promise contained in the certificates may have been regarded by both as substantially equivalent to such an agreement; but, assuming this to be so, so long as it was not the agreement, and could not be enforced, it is quite immaterial what were the expectations which prompted it. It not infrequently happens that the same substantial results can be effected by proper means or by means which the law will not sanction. If the present case affords an instance, it is also one where the legitimate means were used. Because the defendant was careful not to make any contract which would be obnoxious to any of the rules of the law of corporations, it seeks to evade the contract by asserting that it was intended as a substitute for one which it could not properly make. This position is without any other merit than its consistency with the conduct of the defendant in skulking behind a factitious wrong to stockholders in order to repudiate the contract while it retains the fruits.

Whether the purchase by the defendant of the shares of the United Salt Company was made to effect a combination of the two corporations in order to prevent competition in the salt trade, and, if so, whether the stockholders of the Ohio corporation were *participes criminis* or merely actuated by the motive of selling their shares advantageously, are inquiries which need not be pursued. The evidence in the present record does not throw any light upon

them, the case having been decided in the court below in favor of the defendant, upon the first defense, conformably with the views which this court had expressed. It is proper, however, to observe that it is no objection to the enforcement of a contract, in the consideration and performance of which nothing illegal inheres, that it may incidentally aid one of the parties in evading or violating a statute. *Hanover National Bank v. First National Bank*, 109 Fed. 421, 48 C. C. A. 482.

The judgment is reversed.

UNITED STATES v. PARSONS.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1904.)

No. 1,296.

1. ALIENS—ASSISTING IMMIGRATION UNDER CONTRACT—FARM LABORER.

The bringing of an alien into the United States under contract to work on a farm as a laborer, under the direction of others, is within the prohibition of Act Feb. 26, 1885, c. 164, 23 Stat. 332 [U. S. Comp. St. 1901, p. 1290], as amended, which makes it unlawful to assist in the immigration of any alien under a contract "to perform service or labor of any kind," with certain exceptions; such employment not being within any of the excepted classes.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Wm. D. Gordon, U. S. Atty., and James V. D. Willcox, Asst. U. S. Atty.

H. E. Spalding and Walker & Spalding, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This is a suit to recover a penalty of \$1,000 under the act of February 26, 1885, c. 164, 23 Stat. 332 [U. S. Comp. St. 1901, p. 1290], as amended, prohibiting the importation of aliens under contract to perform labor in the United States. To the declaration there was a plea of the general issue. The only witness examined on behalf of the government was the alien immigrant, Trembly. At the conclusion of his testimony, the court, on motion, directed a verdict for the defendant on the ground that the farm work which Trembly was hired to do does not come within the statute.

The defendant, Parsons, was a citizen of Michigan, having a farm in Oakland county; Trembly a subject of Great Britain, residing in the province of Ontario, Canada. The declaration alleges that about May 1, 1900, the defendant entered into a contract with Trembly, under which the latter agreed to migrate from Canada into the United States, and there perform service for the defendant "in and upon the farm of said defendant, in said county of Oakland." For this the defendant was to pay Trembly \$20 per month for eight months, and \$15 per month for the next succeeding four

months, and also furnish board for Trembly and his family, and a house for them to live in. It was averred that the labor and service contracted for was not work in any "new industry," but in one long established, which might be done by any citizen of the United States "skilled in the business of farming." There is the further averment that the defendant furnished Trembly \$40 to pay his transportation from Canada to Michigan, and that Trembly did migrate to Michigan in pursuance of the contract. Trembly testified that he was living in St. Thomas, Canada, in the spring of 1900. His cousin, Libbie Trembly, who was housekeeper for the defendant, was visiting in Canada, and talked to him about moving to Michigan to work on the defendant's farm. As a result, negotiations both by letter and telephone between the defendant and Trembly ensued, ending in the agreement set out in the declaration. Trembly's testimony and the defendant's letters leave the precise work to be done by Trembly undefined. It is clear it was to be labor and service on the defendant's farm; but just what labor or service, does not appear. Trembly testified that, at the time he entered into the agreement with the defendant, he was working at coopering at Ingersoll, making from \$2 to \$2.25 a day. Before that he had been farming—not all his life, but the biggest part of it. "I consider myself," said he, "a competent farmer. I am familiar with stock, and know how to take care of it. I don't know as I am much of a hand for dairy work. I have done considerable farming, though, but don't consider myself a skilled farmer, by any means. You may call me what you like. I can go on a farm and do the work the way it ought to be done."

In his first letter, dated April 6, 1900, the defendant said:

"Libbie has told me of her conversation with you about coming out here to be with us, and I am glad you think favorably of it for I am very much in favor of and with the Canadians as I have always found them good substantial men and capable. Now in reference to the wages. I have given my men during the winter with their wives from \$12.00 to \$15.00 a month and in the summer \$20.00 without children. You will have three more in your family to board than I had expected, however, on thinking it over I will give you \$200.00 cash from now until April 1, 1901, and board and rooms for yourself and family complete so that you will have no expense only your clothes. Now Libbie tells me you would like thirty dollars in advance so I sent it in this letter," etc.

In the defendant's letter of April 10, 1900, the offer of compensation was increased to the figures stated in the declaration—\$220 for 12 months—and the amount to be advanced to \$40. In this letter the defendant said:

"Come when you get your things in shape. I have a man until you come and he will help me until you come."

Sections 1 and 5 of the act of February 26, 1885, as amended, read as follows:

"Be it enacted," etc., "that from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made

previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its territories, or the District of Columbia."

"Sec. 5. That nothing in this act shall be so construed as to prevent any citizen or subject of any foreign country temporarily residing in the United States, either in private or official capacity, from engaging, under contract or otherwise, persons not residents or citizens of the United States to act as private secretaries, servants, or domestics for such foreigner temporarily residing in the United States as aforesaid; nor shall this act be so construed as to prevent any person, or persons, partnership, or corporation from engaging, under contract or agreement, skilled workmen in foreign countries to perform labor in the United States in or upon any new industry not at present established in the United States: provided, that skilled labor for that purpose can not otherwise be obtained; nor shall the provisions of this act apply to professional actors, artists, lecturers, or singers, nor to persons employed strictly as personal or domestic servants; nor to ministers of any religious denomination nor persons belonging to any recognized profession, nor professors for colleges and seminaries: provided, that nothing in this act shall be construed as prohibiting any individual from assisting any member of his family to migrate from any foreign country to the United States, for the purpose of settlement here."

23 Stat. 332, 333 [U. S. Comp. Stat. 1901, pp. 1290, 1292].

The court below took the view that, as construed by the courts, this act was intended to, and does, exclude only "the ignorant, servile, and pauper class of foreign laborers brought here under contract by which their passage money was prepaid." It was intended to shut out only "an undesirable class of people—those who obtain their living by unskilled labor, and who are of such a condition in life and with such scanty means that they could not obtain passage to this country, and are likely to become a public charge." With respect to the labor and service to be performed under the contract in question, the court said:

"I cannot bring myself to believe that the avocation of farmer, for which the defendant [alien] was employed, is within the statute. Certainly that is an employment that requires a high degree of intelligence and experience that is able to meet the different conditions under which the work of agriculture must be performed—the different crops, the different methods of tillage, and a great many other contingencies which every farmer must necessarily meet. It is a high order of industry, and is as well entitled to be called a skilled avocation as is that of a chemist. It is a vocation which has been recognized as entitled to the highest respect. For that employment this man was hired, and, while he stated that he did not call himself a skilled farmer, there are many who would make the same admission who have conducted farms for years. That is only a question of degree."

While we agree with the court below that the vocation of a farmer is one which has been recognized as entitled to the highest respect, we are unable to concur in the conclusion that the only reasonable inference to be drawn from the testimony is that Trembly was employed by the defendant to perform service "as a farmer" in the management of his farm, directing its operation, and necessarily determining those questions which require special skill, experience, and intelligence "as a farmer." Trembly had worked on a farm nearly all his life. He did not claim to be a skilled farmer, but he knew how to do farm work. He was to be paid a comparatively small amount, with board, based on what the defendant was paying his farm hands. There was no testimony as to whether the

wages to be paid Trembly were those of a farmer or of a farm laborer. Doubtless there were members of the jury whose experience, in the absence of testimony, would have thrown light on this question. If, as the court below thought, the effect of certain decisions is to limit the statute to the exclusion of only unskilled manual labor (a result we do not concede), it does not follow, in our opinion, that the fact the imported labor is to be used on a farm takes it outside the statute. The labor of a farm hand is manual, and may be as ignorant and unskilled as that of a workman on a railroad or in a mine or forest. It depends upon the kind of labor to be done. The most ignorant and servile labor ever imported into this country was for the plantations. A man imported to handle a hoe and plow is not necessarily more intelligent or desirable than one brought to handle a pick and drill, or a shovel and scraper, or a "peavy and a crosscut saw." *U. S. v. Gay*, 95 Fed. 226, 230, 37 C. C. A. 46, 50. It is as reasonable to credit a section hand with the skill and intelligence of the superintendent of construction, as a farm hand with that of a trained agriculturalist.

The statute under consideration was adopted for a wise purpose, and ought not to be whittled away by a process of judicial construction. It contains specified exceptions, and they ought not to be extended without good reason. In *U. S. v. Laws*, 163 U. S. 258, 266, 16 Sup. Ct. 998, 1001, 41 L. Ed. 151, it was held that a chemist imported to work on a sugar plantation might be regarded as belonging to "a recognized profession," within the exception of the statute. If this class is to be construed so as to cover farmers, obviously only those trained in agriculture as a science, and employed to manage a farm, should be included. Special mental as well as manual training is required to make one a member of a recognized profession.

Trembly had worked on a farm and as a cooper. Where similar employments have been before the courts, they have been held to be within the prohibition of the statute. Thus in *U. S. v. Craig* (C. C.) 28 Fed. 795, decided by Judge, now Mr. Justice, Brown, the imported alien held within the statute was employed to do service "at \$2 per day as a ship carpenter." In point of skill and intelligence, a ship carpenter will not suffer in comparison with a cooper. Again, in the case of *In re Cummings* (C. C.) 32 Fed. 75, the excluded alien was employed to do service on a farm in Kentucky "as a farm servant or dairyman." This was work on a farm, but the court held it did not come within any of the exceptions. "Manifestly," said Judge Lacombe, "it was the intention of Congress to exclude immigrants to this country under contract to perform such labor."

If the standard of labor on a farm is high, the way to keep it so is to enforce the statute, and keep out those who have to be paid in advance to come here. The desirable immigrant is the one whose own ambition prompts him to come, and who is sufficiently industrious and economical to save money of his own to bring him here.

We think the court, under proper instructions, should have left it to the jury to determine whether Trembly was employed to manage the farm as a farmer, or simply to work on the farm as a laborer under the supervision of the defendant. If he was employed and imported for the latter purpose, he came within the statute.

The judgment of the lower court is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

In re C. MOENCH & SONS CO.

(Circuit Court of Appeals, Second Circuit. April 19, 1904.)

No. 13.

1. **BANKRUPTCY—JURISDICTION OF COURT TO MAKE ADJUDICATION—POSSESSION OF PROPERTY BY RECEIVERS.**

The fact that the property of a corporation is in the possession of receivers appointed by a state court does not affect the jurisdiction of a court of bankruptcy to adjudicate such corporation a bankrupt.

2. **SAME—MANUFACTURING CORPORATION—EFFECT OF RECEIVERSHIP BEFORE FILING OF PETITION.**

The appointment of receivers for a manufacturing company, and its ceasing to do business in consequence, before the filing of a petition in bankruptcy against it, do not deprive the court of jurisdiction to make the adjudication against it as a corporation engaged principally in manufacturing pursuits.

3. **SAME—DEFENSE OF SOLVENCY.**

In involuntary proceedings in bankruptcy against a manufacturing corporation under Bankr. Act 1898, § 3a, cl. 5, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], based on its admission in writing of its inability to pay its debts, and its willingness to be adjudged a bankrupt on that ground, a creditor cannot prove its solvency as a defense.

4. **SAME—ACT OF BANKRUPTCY—POWER OF DIRECTORS TO COMMIT.**

Where, under the laws of the state, a corporation has power to make a general assignment of its property for the benefit of creditors, in the absence of a statute or by-law regulating the subject such assignment may be made by the board of directors, and, having such power, they may also make the admission in writing of the inability of the corporation to pay its debts, and of its willingness to be adjudged a bankrupt on that ground, which constitutes an act of bankruptcy under Bankr. Act 1898, § 3a, cl. 3, 30 Stat. 546 [U. S. Comp. St. 1901, § 3422], and such admission may be made the basis of a petition against it by its bona fide creditors.

5. **SAME.**

The appointment of temporary receivers for a corporation does not deprive the directors of the power to make a written admission of its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, which may be made the basis of a petition against it by creditors.

Appeal from the District Court of the United States for the Western District of New York.

For opinion below, see 123 Fed. 965. See, also, 123 Fed. 977.

This cause comes here upon appeal from a judgment of the District Court, Western District of New York, adjudicating the C. Moench & Sons Company bankrupt. The appellant, Eliot National Bank, is a creditor holding an attachment issued by a Massachusetts court, and levied upon property in that state, which attachment and levy would be wiped out if this adjudication is

sustained. The bankrupt is a New York stock corporation engaged in the business of tanning leather. On March 19, 1903, upon a petition made and verified by a majority of the directors, the New York Supreme Court appointed two persons temporary receivers of its property, books, assets, choses in action, and effects, with power to conduct the business of the corporation as a going concern until further order of the court. The receivers duly qualified, and took possession of the property. On April 4, 1903, three creditors filed an involuntary petition in bankruptcy against the corporation, on the ground of insolvency and the appointment of the receivers by the state court. On April 20, 1903, three other creditors filed a like petition, on the ground of a preference allowed, and alleging also insolvency and the receivership proceeding. No adjudication has been made in either of these proceedings. On May 5, 1903, the board of directors passed a resolution that the corporation is unable to pay its debts, and is willing to be adjudicated a bankrupt on that ground, and that the president be requested to so notify, in writing, the creditors of the corporation. Such notification was given the next day by a circular letter signed by the president and sent to the various creditors. On May 9, 1903, the petition on which adjudication has been made was filed, the act of bankruptcy charged being that within four months, to wit, on May 6, 1903, the corporation did admit, in writing, its inability to pay its debts, and its willingness to be adjudged a bankrupt on that ground. The Eliot National Bank made answer to the petition, and the issues were heard before a special master. Of the various errors assigned, it will be necessary only to deal with such as have been argued, and, in view of the careful and extended opinion filed by the District Judge (123 Fed. 965), they may be briefly disposed of.

George R. Nutter, for appellant.

Alfred B. Cruikshank, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). It is contended that the District Court did not have jurisdiction to adjudicate the corporation a bankrupt, because the res was in the possession of the state court. Many cases are cited, all of which deal with the custody of the property—a question which will probably hereafter arise in this proceeding—but none of which have any application to a decree merely adjudicating bankruptcy. We have no doubt that the District Court has jurisdiction to adjudicate any person a bankrupt who may under section 4 become one, and who has committed an act of bankruptcy, irrespective of the whereabouts of his property. Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]. Section 4b provides that any corporation "engaged principally" in manufacturing pursuits may be adjudged an involuntary bankrupt, and appellant contends that the Moench Company was not on May 9th within such category, because it had ceased doing business on March 20, 1903, the day after receivers were appointed. No case is cited in support of this proposition, and, in the absence of authority, we shall be unwilling to hold that a corporation could thus easily avoid the operation of the bankrupt act by making a general assignment, or by securing the appointment of receivers, or by ceasing to do any business, before its creditors filed a petition against it. A reasonable construction of the phrase "engaged principally" would seem to be that, whatever might be the objects of pursuit set out in the charter, the bankrupt act should apply only when the pursuits in which the company had actually engaged were principally of the kind specified.

It is next contended that it was substantial error to reject certain

evidence offered by the contestant. The only specific testimony actually offered was that, when the receivers were appointed, the liabilities of the company were \$1,114,000, and the assets \$1,248,000, as stated by the petition to the state court; and there was a further offer, without actually submitting proof, to show that, when the admission in writing was made, the assets exceeded liabilities. This was in reality an offer to prove solvency; but section 3c (30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]) provides that solvency may be proved as a defense only to proceedings instituted under section 3a, cl. 1, and it is only in proceedings under section 3a, cl. 2, and section 3a, cl. 3, that insolvency must be shown to entitle petitioner to an adjudication. In *George M. West Company v. Lea Bros. & Co.*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, the court says:

"The nonexistence of insolvency at the time of the filing of a petition for adjudication in involuntary bankruptcy, because of the acts enumerated in * * * section 3a, cl. 5, * * * does not constitute a defense to the petition."

This proceeding was instituted under section 3a, cl. 5, and testimony as to solvency was properly excluded. No witness was called, and no document was offered, to show that on May 6, 1903, the corporation was "able to pay its debts."

It is further contended that a corporation cannot commit the act of bankruptcy set forth in section 3a, cl. 5, viz., make admission in writing of inability to pay debts, and willingness to be adjudged a bankrupt on that ground; and appellant cites *In re Bates Machine Co.* (D. C.) 91 Fed. 625. All that the court decided in that case was that, under the statutes of Massachusetts, the power to make such a written admission had not been granted to the board of directors, but could be exercised by that body only when authorized by a vote of the stockholders. The capacity of a corporation to commit such an act of bankruptcy has been recognized in *In re Bates Machine Co.* (D. C.) 91 Fed. 630; *In re Rollins Gold & Silver Min. Co.* (D. C.) 102 Fed. 982; *In re L. T. Kelly Dry Goods Co.* (D. C.) 102 Fed. 747; *In re Mutual Mercantile Agency* (D. C.) 111 Fed. 152. There is nothing in the bankruptcy act to indicate that the making of a general assignment for the benefit of creditors—which is the fourth of the specified acts of bankruptcy—may not be taken to be an act of bankruptcy when it is made by a corporation, and, if the corporation can commit the one act, there seems no sound reason for holding that it could not commit the other. Where, by statute, the making of such a general assignment is forbidden to a corporation, some question might be raised as to whether the corporation could commit the fifth act; but we need not now pass upon any such question, because since the passage of the stock corporation law of 1890, and the amendments of chapter 688, p. 1824, Laws 1892, the old prohibition in this state against the making by a corporation of a general assignment for the benefit of creditors has been done away with. *Croll v. Empire State Knitting Co.*, 17 App. Div. 284, 45 N. Y. Supp. 680; *Munzinger v. United Press*, 52 App. Div. 338, 65 N. Y. Supp. 194. It would also seem to be reasonable to hold that the power to make the admission in writing could be exercised by the same officers who have the power to make a general assignment, and, in the

absence of statute or by-law regulating the subject, such power resides in the directors. *Rogers v. Pell*, 154 N. Y. 527, 49 N. E. 75. It is no doubt true that by committing either the fourth or fifth acts of bankruptcy, when three creditors stand ready at once to take advantage of it by filing a petition, the corporation achieves the object which the act forbids it to secure by its own voluntary petition, but its doing so is not such a "fraud upon the act" as to prevent the application of the plain language of the act to the facts presented. The authorities cited by appellant (*In re Independent Thread Co.* [D. C.] 113 Fed. 998; *In re Bates Machine Co.* [D. C.] 91 Fed. 625) do not apply; the "fraud" found in those cases was the creation of creditors, not bona fide, to make the application in involuntary bankruptcy which a sufficient number of bona fide existing creditors could not be found to make.

As to the proposition that the proceedings should be dismissed on any theory of collusion or estoppel, and that the appointment of temporary receivers deprived the board of directors of their power to make the written admission, we think it unnecessary to add anything to the opinion of the District Judge. In *Sigua Iron Co. v. Brown*, 171 N. Y. 494, 64 N. E. 194, cited in that opinion, the court says:

"The appointment of a temporary receiver does not dissolve a corporation, nor restrain the exercise of its corporate powers. His functions are limited to the care and preservation of the property committed to his charge. He does not represent the corporation in its individual or personal character, nor supersede it in the exercise of its corporate powers, except as to the particular property confided to him. * * * The corporation still had the right to exercise its corporate powers, except as to the matters and claims specially confided to the receiver by the court."

The decree of the District Court is affirmed.

SOUTHERN RY. CO. v. BLEVINS.

(Circuit Court of Appeals, Seventh Circuit. April 12, 1904.)

No. 1,014.

1. MASTER AND SERVANT—RAILROADS—INJURIES TO SERVANT—NEGLIGENCE OF FOREMAN.

Burns' Ann. St. Ind. 1901, § 7083, provides that every railroad corporation shall be liable in damages for personal injury suffered by any employé while in its service, the employé being in the exercise of due care and diligence, where the injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employé at the time of the injury was bound to conform and did conform. *Held*, that where the foreman of an inexperienced trackman, with knowledge that a buckled rail, when released by the removal of the bolts, was liable to spring with great force, directed such trackman to remove the last bolt holding such rail by tapping it with a wrench while standing between the rails of the track, and, on the bolt being driven out, the rail sprung inward, striking the trackman and inflicting serious injuries, the railway company was liable therefor under such section.

2. SAME—PLEADING—INSTRUCTION.

Where a complaint in an action for injuries to an inexperienced railroad trackman, caused by his being struck by the springing of a buckled rail as he released the bolts binding the same, under the direction of his foreman, alleged that plaintiff was ignorant of the danger, but that the

foreman "knew" that the removal of a rail under such circumstances might be attended with such springing of the rail, the complaint should be construed as alleging merely that the foreman should have known of such danger, and not necessarily that he had actual knowledge thereof.

3. APPEAL—EXCEPTIONS—REVIEW.

Where the record on appeal fails to show that an exception was reserved to an instruction given, an objection thereto cannot be reviewed.

In Error to the Circuit Court of the United States for the District of Indiana.

John D. Wellman, for plaintiff in error.

Henry Warrum, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge. The action was begun originally by defendant in error against plaintiff in error in the Circuit Court of Floyd County, Indiana, and was removed by the plaintiff in error, a corporation organized under the laws of the state of Virginia, into the Circuit Court of the United States for the District of Indiana, the defendant in error being a citizen of the state of Indiana. The action was to recover damages for personal injuries sustained by defendant in error, a section hand, while in the service of the plaintiff in error, and resulted in a verdict and judgment in favor of defendant in error for two thousand five hundred dollars.

The record shows that defendant in error had had no experience in the taking up or laying down of rails, having been engaged in track work but five days before the injuries were sustained. The work was done under the supervision of the section foreman, and the track foreman, who were both in attendance at the time the accident occurred.

The section gang was engaged at the time of the injuries in removing a buckle out of the track, caused by expansion of the rails. To do this it was necessary to take up and shorten one of the rails, the rail chosen being what is known as a short rail, about fifteen feet in length, connected at either end, by fish plates, with the regular thirty foot rails. Under the direction of the foreman, the spikes on the inside of the short rail were drawn, as also the spikes on the inside of the connecting thirty foot rail, for a distance of about twelve feet from the fish plate. Defendant in error was then set at work at the joint, to remove the bolts, being allowed to stand while this was being done between the rails. The nuts having been removed, all the bolts except one yielded to removal by the fingers. This one would not come out. Thereupon the foreman told defendant in error to tap it lightly with his wrench. On doing this the bolt fell out, accompanied by an inward springing of the rail of from eighteen inches to two feet, striking defendant in error about the legs and feet, and inflicting the injuries for which the action was brought.

There was evidence tending to show that among railroad men it was known that rails thus buckled were liable, the bolts being removed, to spring with great force. But plaintiff in error insists that however this may have been, or whatever may have been its liability in an action brought on that state of facts, the action below was not such an action, and was not predicated on such facts.

The complaint set forth the conditions already named; and defendant in error's ignorance of the danger lurking therein, and then averred that the foreman "knew" that the removal of a rail under such circumstances might be attended with just such dangers as occurred. The contention is, that such averment must be taken, not as one of constructive knowledge on the part of the foreman, but of actual knowledge, and that so construed, the proof fails to sustain the complaint. Further it is contended that though the averment be taken as one of constructive knowledge upon the part of the foreman, no cause of action under the Indiana statute is alleged.

We shall take up the latter contention first. The statute under which the action was brought provides:

"That every railroad or other corporation, except municipal, operating in this state, shall be liable for damages for personal injury suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence, in the following cases: * * *

Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employé at the time of the injury was bound to conform and did conform." Section 7083, Burns' Ann. St. 1901.

We are of the opinion that this statute covers a case of negligence where the person, having the right to give orders, gave an order which he knew, or from his experience ought to have known, might result in injuries to the employé; and it was on this theory of the law that the case was tried, for the court directed the jury that if the foreman knew, or by the exercise of ordinary prudence as a man of experience in his line of work ought to have known, that the order given to defendant in error would subject him to danger of just such injury as occurred to him, the plaintiff in error was liable.

We are of the opinion also that the right of action thus arising under the statute was fairly embodied in the complaint. The complaint proceeds on the general ground of negligence; not willful negligence, but negligence in its general significance. A fair interpretation of a complaint based on such negligence must assume that the knowledge imputed is not necessarily knowledge actually in mind at the time the injuries occurred, but such knowledge as ought to have been in mind when the order was given.

This disposes of all the substantial errors assigned, except the one in the instruction of the court, that the burden of proving contributory negligence was upon the defendant. An examination of the record shows that no exception to this instruction was preserved, and on this no error has been assigned.

The judgment below will be affirmed.

In re RIGGS RESTAURANT CO.

(Circuit Court of Appeals, Second Circuit. April 5, 1904.)

No. 200.

1. BANKRUPTCY—ACTS OF BANKRUPTCY—GIVING CHATTEL MORTGAGE.

The giving of a chattel mortgage is a "transfer" of property, as defined in the bankruptcy act, and, when given by an insolvent with intent to prefer the creditor to whom it is given, constitutes an act of bankruptcy, under section 3a, Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422].

2. SAME—REVIEW OF ORDER ON PETITION.

Whether or not an order permitting the amendment *nunc pro tunc* of a petition in involuntary bankruptcy after the sustaining of a demurrer to the original petition was erroneous is immaterial, and the order will not be reviewed where the original petition sufficiently charged an act of bankruptcy, and the demurrer was erroneously sustained.

Petition to Review Order of the District Court of the United States for the Southern District of New York.

This cause comes here upon petition to review an order of the District Court, Southern District of New York, sustaining demurrer to a petition by creditors praying that the Riggs Restaurant Company be adjudicated a bankrupt, with leave "to the petitioners [creditors] herein to amend the petition as of the date of the filing of the original petition."

Eugene Cohn, for petitioners.

Joseph B. Handy, for respondent.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. On September 2, 1903, the requisite number of creditors filed a petition in involuntary bankruptcy against the Riggs Restaurant Company, alleging as an act of bankruptcy that it did, within four months, namely, on May 25, 1903, while insolvent, execute and deliver a chattel mortgage upon all the goods, chattels, and furniture used in its restaurant business, to one Herman Schlosser, a creditor, with intent to prefer him over the other creditors. Demurrer was filed to this petition on the ground that it was "not alleged in the said petition that the said demurrant committed any act of bankruptcy, within the meaning of the said act, and that the acts and things which the said demurrant is alleged to have done do not constitute, and are not sufficient in law to constitute, an act of bankruptcy, and that said demurrant may not be adjudged a bankrupt for any matter or thing in the said petition alleged." After hearing argument on the demurrer, the District Judge on October 6, 1903, filed a memorandum stating merely that, in his opinion, the execution and delivery of a chattel mortgage is not a transfer of property constituting an act of bankruptcy, and adding, "Demurrer sustained, with leave to petitioners to amend the petition on payment of costs." Thereafter, upon December 2, 1903, an order was signed

¶2. Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.

and entered sustaining the demurrer, without prejudice to the filing of a new petition. It will be noted that this order does not conform to the decision, and it appears that the form was agreed to in writing by both sides. Presumably, with such consent before him, the District Judge did not deem it necessary to compare the proposed order with the memorandum he had filed two months before. On December 22, 1903, the petitioning creditors filed an amended petition. It set forth that "petitioners are, and were at all the times hereinafter mentioned, creditors." The original petition had alleged merely that they were creditors when petition was filed. It also amended the statements of their individual claims by asserting that the goods they had sold to the bankrupt were "at an agreed value." It further averred that, after the execution of the chattel mortgage, Schlosser, "within four months preceding the filing of this petition, took possession, under and by virtue of said mortgage, of the said goods and chattels," etc. Thereafter counsel for the creditors seems to have discovered that the order as entered allowed the filing of a new petition, but not of an amended one, and motion was made on December 24th for resettlement of the order in conformity with the memorandum. The motion was granted, and the order now under review was entered January 2, 1904, resettling the order of December 2, 1903, so as to give leave to amend, and providing that the amended petition filed by the petitioning creditors on December 22, 1903, be accepted by the alleged bankrupt as of the date of filing of the original petition, with leave to answer or demur to the same.

There can be no doubt that a court has power, if seasonably exercised, to resettle an order imperfectly phrased so as to conform its text to the decision it was intended to embody. The real question presented here is not whether the court had power to resettle the order of December 2d, but whether it had power to allow an amendment nunc pro tunc of the petition filed September 2d. So far as the same was amended by setting out more specifically the claims of the creditors, and the fact that they were creditors when the alleged act of bankruptcy was committed, no criticism is made. The brief concedes: "That a District Court, in a proper case, may permit the amendment of pleadings by the correction of errors or oversight, is beyond dispute." The contention is that the physical taking possession of the goods by Schlosser is the only act of bankruptcy alleged, that it was not set forth in the original petition, that more than four months had elapsed before it was actually charged against the alleged bankrupt, but that the allowance of amendment nunc pro tunc has the same effect as though a petition containing it had been filed three months before it was in fact filed. Reference is had to rule 6 (89 Fed. v), and to the decision of this court in the Matter of Sears, 117 Fed. 294, 54 C. C. A. 532. The question whether an original petition can be amended by setting out therein an act of bankruptcy not referred to in the original petition, and occurring more than four months before amendment is made, is an interesting one, but it need not be decided here. The amended petition avers that Schlosser took possession "within four months preceding the filing of this petition." The date when he took possession is nowhere

stated in the record, and it is uncertain whether the pleader intended to aver that it was in the four months preceding the filing of the amended or of the original petition. The matters sought to be argued here will come up on the hearing upon petition, and, when they do come up, their decision will not be necessary. The amendment setting out the seizing of the goods under the chattel mortgage is superfluous. The giving of the chattel mortgage was in itself an act of bankruptcy, committed within four months of the filing of the original petition, and sufficiently charged therein. The act charged is under section 3, Act July 1, 1898, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422] "a" (3): "Transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors." By section 1 (25) (30 Stat. 545 [U. S. Comp. St. 1901, p. 3420]) the word "transfer" is defined to include "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." The Supreme Court, in *Pirie v. Chicago Title Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, says of this definition: "All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another ['ownership or possession' is the language of the statute], and by which the result forbidden by the statute may be accomplished; 'a preference enabling a creditor to obtain a greater percentage of his debt than any other creditors of the same class.'" It is the settled law in this state that "a personal mortgage is more than a mere security. It is a sale of the thing mortgaged, and operates as a transfer of the whole legal title to the mortgagee, subject only to be defeated by the full performance of the condition." *Butler v. Miller*, 1 N. Y. 500.

The memorandum filed in the District Court gave no reasons for reaching its conclusion, and we are referred to no authorities holding that the giving of a chattel mortgage is not a transfer of property, within the meaning of section 3a (2); and, since the original petition avers that the mortgage was given while insolvent, and with intent to prefer, we are of the opinion that an act of bankruptcy was charged in the original petition, and find it unnecessary to discuss the effect of the amendment.

The order giving leave to amend is affirmed.

HOFFMAN v. WILSON.

(Circuit Court of Appeals, Third Circuit. May 27, 1904.)

No. 15.

1. TROVER—RIGHT TO MAINTAIN—CORRELATIVE DUTIES.

Plaintiff was evicted from a house occupied by her as a boarding house under a judgment for possession recovered by defendant, who took possession of her furniture therein. From certain of the bedrooms she had removed furniture owned by defendant and substituted her own. *Held*, that she could not maintain trover for any part of her own furniture until she had returned or offered to return that owned by defendant.

Acheson, Circuit Judge, concurs so far as relates to the articles substituted for those of defendant, but dissents as to the remainder.

In Error to the Circuit Court of the United States for the District of New Jersey.

For opinion below, see 123 Fed. 984.

C. L. Cole, for plaintiff in error.

Geo. J. Bergen, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This writ of error has brought up the record in an action of tort in which Effie C. Wilson was plaintiff and Samuel D. Hoffman and Francis A. Canfield were defendants. The plaintiff declared in trespass, and also, by separate count, in trover. It appeared, however, that the charge of trespass could not be sustained, and that a joint conversion by the two defendants could not be established. Hence the case was properly tried as one of trover merely, and as against Samuel D. Hoffman only. The chattels alleged to have been converted consisted of household goods, which were contained in a house in Atlantic City, N. J., known as "Hawthorne Inn." The plaintiff below had been put in possession of this house by a certain Mrs. Hartley under an agreement between them, the particulars of which are unimportant. An action of ejectment for its possession was then pending by Hoffman against Mrs. Hartley, in which Hoffman subsequently obtained judgment, and upon execution on that judgment Effie C. Wilson was evicted. Prior thereto she had removed five suites of Hoffman's bedroom furniture from the house, and had put other furniture in their place; and for the latter, although she had not restored the former, she was allowed to recover. But, in our opinion, these facts were, as to the whole case, conclusive against her. Trover will not lie for anything which the plaintiff has not the immediate right to possess, and one who has not only voluntarily placed her goods upon the land of another, but has also taken therefrom goods of the landowner, has no right to reclaim her own without returning his. The question is not as to whether one trespass or conversion may be set off against another. It may be conceded that this cannot be done; but the law of torts deals with duties and rights as correlates, and to us it seems clear that the return of the defendant's goods was a duty which the plaintiff was bound to dis-

charge before she could lawfully demand those which belonged to herself. In *Kimball v. Cunningham*, 4 Mass. 502, 3 Am. Dec. 230, it was said that where an exchange of chattels has been made in execution of a contract voidable for fraud, the innocent party to it cannot maintain trover for anything delivered by him while he still retains any part of the consideration he received; "for he shall not compel even the fraudulent seller to an action to recover back the property he has parted with in the exchange." We adopt this statement of the law. It was pertinent to the case in which it was made, and, a fortiori, it is applicable to this one, for the defendant below had not consented to part with anything, and had perpetrated no fraud. His goods were taken by the plaintiff without his knowledge, and no wrong whatever was committed by him. This, it is true, gave him no right to keep what belonged to her, but the duty to relinquish what could not lawfully be retained was reciprocal, and therefore the fulfillment of that duty upon her part was essential to the existence of the right, necessarily asserted by her, to immediately possess the chattels of which she alleged she was wrongfully deprived. The situation presented is simply this: The defendant in error, during her occupancy of the locus in quo under a claim of title which the judgment in ejectment determined to be invalid, took therefrom goods of the owner of the premises and placed goods of her own thereon. This proceeding cannot be otherwise regarded than as one continuous and indivisible transaction. and therefore we are of opinion not only that she was debarred from recovery with respect to the furniture which she may have intended—but without Hoffman's assent—to specifically substitute for the furniture she removed, but that the return of the latter was requisite to the maintenance of trover for any part of the chattels to which the action related.

The second specification avers that the Circuit Court erred in overruling the motion of the defendant below for binding instructions in his favor, and, as the views we have expressed sustain that specification, they completely dispose of the case, and no other of the errors assigned need be considered.

The judgment is reversed.

ACHESON, Circuit Judge (concurring in part, but dissenting in part). I concur in the view that as to the five suites of bedroom furniture the plaintiff below was not entitled to recover. Having taken away the defendant's five suites of bedroom furniture, and substituted therefor five other bedroom suites of her own, Miss Wilson (the plaintiff) is to be held to have sanctioned the use by Hoffman (the defendant) of the substituted suites of furniture until she returned his suites, or at least offered to return them. Not having done this, the plaintiff was in no position to demand possession of the bedroom suites. Therefore quoad hoc a defense was shown. But I am not able to see by what rule of law or upon what just principle the defendant could retain the other separate and distinct personal property belonging to the plaintiff against her demand merely because of her action in respect to the bedroom fur-

niture. Except that the five bedroom suites of furniture and the plaintiff's other goods were upon the Hawthorn Inn premises, there was no connection whatever between the two sets of chattels. They differed in kind, use, particular location, and value. The case cited by my learned associates to sustain their conclusion (*Kimball v. Cunningham*, 4 Mass. 502, 3 Am. Dec. 230) arose out of a contract for the exchange of chattels. There the plaintiff's action rested upon his right to rescind the contract for fraud. He failed in his action because he had retained part of the consideration he had received in the exchange. The court held that, if he elected to rescind, he must disaffirm the whole contract, returning the entire consideration he had received. I submit that the principle of the case is not applicable here, and that nothing the court there said is pertinent to the facts of the present case.

I am for reversing the judgment of the court below not only upon the assignment respecting the bedroom suites, but also upon other assignments touching the admission of evidence and the instructions as to what constituted conversion, but I would reverse, with the award of a *venire facias de novo*.

UNITED STATES v. WITHERS et al.

(Circuit Court of Appeals, Second Circuit. April 27, 1904.)

No. 173.

1. CONTRACTS—BREACH—DUTY TO PREVENT LOSS.

A bidder for furnishing supplies to the Post-Office Department, who, on the acceptance of his bid, failed to execute the contract in accordance with his guaranty, cannot be held liable for the difference between the contract price of certain articles and the price paid by the department to the public printer for such articles three months after the default, where it is shown that at the time of such default and for several weeks thereafter the articles could have been purchased in the market for less than the contract price, and especially where it does not appear that the price subsequently paid was the market price, which alone could fix the measure of damages.

2. ERROR—GROUNDS FOR REVERSAL—RIGHT TO NOMINAL DAMAGES.

A judgment for defendant entered on a verdict directed by the court will not be reversed because plaintiff may have been entitled to nominal damages, where no permanent right is affected.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a judgment of the Circuit Court, Southern District of New York, in favor of the defendants in error (who were defendants below), entered upon a verdict in their favor which was directed by the court.

Arthur M. King, for plaintiff in error.

Charles F. McCandelees, for defendants in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The defendant Withers made a bid offering to enter into a contract to furnish certain stationery sup-

plies for the Post-Office Department at prices named in the said bid. The only item as to which testimony was taken is "7,500 doz. scratch blocks or pads at 15 $\frac{1}{2}$ cents." Withers and his codefendants, Morse and St. John, guarantied that if his bid were accepted he would within 10 days enter into and duly execute a contract to furnish such supplies at the prices named, and that, in case of failure to enter into such contract, the bidder and his guarantors would forfeit and pay to the United States the sum of \$3,000. The bid was accepted somewhere about the latter part of June, 1900, and Withers was notified of such acceptance, and was requested to fill out the contract and send it back, so that it might be accepted and filed. He failed to do so, although repeatedly requested to execute it, and by the middle of July (the record does not give the exact date of notification to sign contract) the 10 days had expired, Withers was in default, and the government officers were entitled to advertise for new bids and enter into a new contract for the supplies in question. No steps were taken to effect a new contract in the usual way, and finally, about the 1st of October, the supply of pads was exhausted, and the post offices throughout the country had to be supplied. Thereupon the Post-Office Department ordered 3,333 $\frac{1}{3}$ dozen pads from the public printer at 30 $\frac{18}{1000}$ cents per dozen. This action was brought to recover the difference of price paid from the failing bidder and his guarantors.

The United States attorney quite properly decided that recovery could not be had for the penalty named (\$3,000), but only for the actual damages which had been sustained through defendants' default. The price paid the public printer was \$1,027.20, the articles at prices named in the bid would have cost \$516.67, and the government sought to recover as actual damages \$510.53. It appeared on the trial that the pads bought from the public printer were of slightly better quality than those which Withers had offered to furnish, and that \$85 fairly represented such difference in quality, whereupon the United States attorney apparently conceded that the plaintiff's claim should be reduced by that sum. It further appeared that the market price of pads such as Withers offered to furnish was 14 cents in July and August. What the market price was subsequently does not appear.

The plaintiff relies on a section of the United States Revised Statutes which reads as follows:

"Sec. 3709. All purchases and contracts for supplies or services, in any of the departments of the government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or services required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals." [U. S. Comp. St. 1901, p. 2484.]

Incidentally it may be noted that articles of stationery are not usually bought "between individuals" of the public printer, and whether the price of articles sold by him compare favorably or unfavorably with their prices in the open market, where individuals

purchase, does not appear. However this may be, the case seems to be determined by the application of the familiar principle that there can be no recovery for damages which might have been prevented by reasonable efforts on the part of the person injured. The defendants were in default in July; with reasonable diligence the Post-Office Department could have readvertised and secured a new bidder in August; even if it had not advertised, it could have obtained the pads by purchase in the open market during that month at a sum less than that at which Withers had agreed to furnish them. The most ordinary diligence to avoid disastrous results from the breach of contract would have prevented any loss at all. Moreover, since the record failed to show at what price the pads could have been bought in the open market in October, when at last they were bought there was nothing upon which the jury could have assessed any substantial damages, for the measure of damage was the difference between the contract price and the market price.

It is contended that plaintiff was at any rate entitled to recover nominal damages, and that the court erred in directing a verdict for defendants. But it is well settled that there should be no reversal when a nonsuit has been directed in a case where plaintiff could recover nominal damages only, unless some permanent right is affected, or some error of the court has crept in by which the jury has rendered an erroneous verdict, or, possibly, the recovery of costs has been affected. *Ellsler v. Brooks*, 54 N. Y. Super. Ct. 73; *Funk v. Evening Post Pub. Co.*, 76 Hun, 497, 27 N. Y. Supp. 1080; *Brantingham v. Fay*, 1 Johns. Cas. 264. In the case at bar no permanent right is affected, the jury has not been misled, no costs would have followed the recovery of nominal damages, and none were entered against the United States in the judgment under review.

The judgment is affirmed.

CAMPBELL v. NATIONAL BROADWAY BANK.

(Circuit Court of Appeals, Second Circuit. April 19, 1904.)

No. 162.

1. BANKS—DRAFTS ISSUED BY CASHIER TO INDIVIDUAL CREDITOR—IMPLIED AUTHORITY.

A bank cannot recover the amount collected on a cashier's draft issued by its cashier and made payable to his individual creditor, where it is shown that the cashier had on numerous previous occasions drawn similar drafts in payment of his own debts, and such acts had continued for a period sufficiently long to establish a settled course of business in the conduct of the bank which had been sanctioned by its officers, and was known, or should have been known, to its directors.

In Error to the Circuit Court of the United States for the Southern District of New York.

On writ of error to the United States Circuit Court for the Southern District of New York, to review a judgment in favor of the defendant in error, who was defendant below, entered upon the verdict of a jury.

George W. Wickersham, for plaintiff in error.

William J. Curtis and Francis D. Pollak, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. This action was commenced by the plaintiff, as ancillary receiver, to recover \$12,150 and interest, being the amount due on three cashier's drafts, drawn by George M. Valentine, cashier of the Middlesex County Bank, of Perth Amboy, N. J., on its New York correspondent, the National Park Bank of New York, to the order of the defendant, the National Broadway Bank. These drafts were given by Valentine in payment of his individual obligations to the said Broadway Bank.

It is argued that "the court erred in instructing the jury that if during a series of years sufficiently long, and in business transactions sufficiently numerous to make out a regular course of business in the conduct of the bank, the cashier had been accustomed to sign the checks of his bank payable to his own order, or to the order of his creditors, then the defendant was entitled to a verdict." The instructions excepted to are in accord with the decision of this court in *Gale v. Chase National Bank*, 104 Fed. 214, 43 C. C. A. 496, which cannot be distinguished, on principle, from the case at bar. In the *Gale* case a cashier's draft, given to discharge his individual debt, was under consideration, and it was decided that where it appears that the cashier had, on numerous previous occasions, drawn similar drafts to pay similar debts, and such acts had continued for a period sufficiently long to establish a settled course of business which had been sanctioned and ratified by the officers of the bank, it might be inferred by the jury that such acts were known, or should have been known, to the directors of the bank and that the cashier's acts were authorized. This, in substance, was the proposition charged in the present case and the jury were told that the burden was upon the

defendant to show that the drafts in question, which on their face were calculated to excite suspicion, were drawn in the ordinary business of the bank. The charge was as favorable to the plaintiff as the facts and the law warranted. The Gale Case was again considered by this court (108 Fed. 987, 46 C. C. A. 683), and subsequently by the Supreme Court (188 U. S. 557, 23 Sup. Ct. 372, 47 L. Ed. 594), but the law of the first decision, in so far as it relates to the questions now under consideration, has not been changed or modified. It is the law of this court to-day and we see no reason why it should not be followed. It seems to be conceded by the plaintiff that if the court adheres to its former decision it is conclusive of the principal question involved. In order to show a course of business at the Middlesex Bank which permitted the use of the cashier's checks in payment of his personal obligations, that such business was open and notorious and that the president of the bank had actual knowledge of what was being done, the defendant was permitted to prove a number of such checks previously drawn by Valentine, as cashier, to the order of a broker who represented Valentine in stock speculations. The defendant also proved that this broker, when the first cashier's draft was offered to him by Valentine, declined to receive it until assured that it was authorized; that he had a conversation with the president of the bank, informed him of the unusual character of the draft, asked if the cashier had authority to give such a draft and was informed by the president that he had. The objections of the plaintiff to this evidence, and to other evidence of similar import, are inconsistent with his theory that it was necessary to show knowledge in the directors, and the objections were properly overruled. If actual knowledge were necessary it is not perceived how it could be proved more conclusively, as to the president at least, than by showing that he knew of Valentine's acts, was informed that they were unusual and suspicious and, thereafter, declared them to be authorized and permitted them to continue. The cause was carefully tried and no error was committed of which the plaintiff has a right to complain. The judgment is affirmed with costs.

In re EDELMAN et al.

(Circuit Court of Appeals, Second Circuit. April 5, 1904.)

No. 206.

1. BANKRUPTCY—ACTS OF BANKRUPTCY—MORTGAGE.

A mortgage made by an insolvent, and recorded within four months prior to the filing of a petition in bankruptcy against him, if given with intent to prefer a creditor, constitutes an act of bankruptcy.

Appeal from the District Court of the United States for the Southern District of New York.

In Bankruptcy. This cause comes here upon appeal from an order of the District Court, Southern District of New York, adjudging the appellants bankrupts.

Moses Jaffee, for appellants.

Henry W. Eaton, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The petition charges three acts of bankruptcy: (1) The making of a mortgage of real estate in Broome street to one Joseph Liebling February 13, 1903, for the sum of \$2,000; (2) the making of a similar mortgage to one Ida Levy December 27, 1902, for the sum of \$6,000; (3) the suffering a judgment to be entered against appellants in favor of Don A. Gaylord, one of the petitioning creditors, for \$990.21, on May 1, 1903. It will be sufficient to consider one only of these acts, the mortgage to Ida Levy. Petition was filed July 9, 1903. Answer was served, and testimony upon the issues was taken before a special commissioner. The alleged bankrupts admitted the making of the mortgage, and that it was not recorded until March 12, 1903—less than four months before the petition was filed, and therefore within the time prescribed in Section 3b, Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]. They also admitted that there were prior mortgages outstanding on the premises aggregating \$48,000. They joined issue with the averments that said mortgage was given with intent to prefer, and that they were insolvent when it was made. To show an intent to prefer, a witness called by the petitioners testified to admissions made by Edelman, subsequent to the filing of the petition, that, besides the \$48,000, the firm owed over \$9,000 to various creditors; and that the mortgage to Ida Levy was given for money which had been previously loaned to the firm. The evidence was slight, but, in the absence of any testimony controverting it, and in view of the circumstance that the mortgagee did not record the mortgage until several months after its execution, it was sufficient to warrant the finding of the commissioner that the transaction was with intent to prefer. A "conditional" transfer of property "as a * * * pledge, mortgage, * * * or security" is within the provisions of section 3a (2) by the express definition of the word "transfer" which is given in section 1 (25), 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420].

As to the issue of insolvency the special commissioner reports that "the alleged bankrupts have not appeared, nor have they produced their books, papers, and accounts, nor have they submitted to an examination, nor have they given testimony as to all matters tending to establish their solvency"; and the accuracy of this statement is not questioned. Therefore, under section 3d the burden of proving their solvency at the time of the commission of the act specified in 3a (2) rested upon them. Having failed to give any proof of solvency the special commissioner correctly found that the transfer by mortgage was given while insolvent.

The order confirming report of the special commissioner and adjudicating appellants bankrupts is affirmed.

EATON & PRINCE CO. v. WADSWORTH.

(Circuit Court of Appeals, Seventh Circuit. April 12, 1904.)

No. 1,041.

1. PATENTS—INVENTION—SAFETY-BRAKE FOR ELEVATORS.

The Eaton, Prince, and Livesey patent, No. 347,778, for a safety-brake for elevators, claim 6, is void for lack of invention.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

For opinion below, see 125 Fed. 120.

Frank F. Brown, for appellant.

Thomas F. Sheridan, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. This is an appeal from a decree adjudging that there was no equity in appellant's bill for infringement of claim 6 of letters patent No. 347,778, August 24, 1886, to appellant's assignors. The claim is as follows:

"(6) In an elevator safety-brake, the combination, with an expansible ball-governor, of a trigger located relatively to the governor, substantially as shown, whereby said trigger is operated directly by contact therewith of the governor-balls, essentially as specified."

Small (No. 228,284, June 1, 1880) had shown, in an elevator safety-brake, the combination of an expansible ball-governor and a trigger that was operated by the centrifugal pull of the governor-balls through a sliding sleeve on the governor shaft. The only thought that appellant's assignors added to Small's disclosure was this: It would be an improvement to replace the continuous pull by repeated blows upon the trigger, for thus the braking-mechanism would more promptly and surely be put into action. In guarding against excessive speed of water wheels (Bahme, No. 61,381, January 22, 1867) and of steam engines (Ripp & Mueller, No. 226,553, April 13, 1880), the hammer-action of the balls of expansible ball-governors had been used to trip triggers. This sixth claim, therefore, is for the act of substituting in Small's elevator safety-brake the Ripp & Mueller hammer-action for Small's sliding sleeve as the means for actuating the trigger; and falls, we think, within the no-invention class, of which several examples from decisions of the Supreme Court were collated in *Wisconsin Compressed Air House Cleaning Co. v. American Compressed Air Cleaning Co.*, 125 Fed. 761, 60 C. C. A. 529.

Appellant's contention that the Bahme and Ripp & Mueller references are too remote we deem not well founded. Claim 6 departs from Small only with respect to the action of the ball-governor upon the trigger, and any one who desired to make the change would naturally look to the "governor" art.

The decree is affirmed.

G. W. COLE CO. v. AMERICAN CEMENT & OIL CO. et al.
(Circuit Court of Appeals, Seventh Circuit. April 12, 1904.)

No. 983.

1. TRADE-MARKS—INFRINGEMENT AND UNFAIR COMPETITION DISTINGUISHED.

Unfair competition is distinguishable from infringement of a trade-mark, in that it does not necessarily involve the question of the exclusive right of another to the use of the name, symbol, or device copied or imitated. A word may be purely generic or descriptive, and so not capable of becoming an arbitrary trade-mark, and yet there may be an unfair use of it which will constitute unfair competition.

2. SAME—INFRINGEMENT.

A trade-mark for an oil compounded from a secret formula, and used for a lubricant, rust preventer, and a polish, consisting of the words "Three in One" printed in black letters, and the picture of the figure "1" in red on a white background, upon which are superimposed in white the figure "3" and the word "in," is not infringed by a trade-mark used for a similar oil consisting of the words "Big Four" in red, and the picture of a large figure "4" in blue, superimposed upon a rectangular background in red, containing other descriptive words in blue and white letters.

3. SAME—UNFAIR COMPETITION.

The fact that a defendant which had been engaged in the manufacture and sale of oil in bottles for 20 years adopted for a new product a label wholly distinctive from those previously used is no evidence of a fraudulent intention to compete unfairly with complainant, which had placed on the market a similar article, where its prior labels were also distinctive from each other, and the new product was different in quality from any it had previously made.

4. SAME.

The law of unfair competition seeks only to restrain fraudulent practices inducing confusion of goods and deception of the public, and it cannot be used to prevent a defendant from adopting a trade-mark or label intended to attract attention and popularize its product, although it results, and is intended to result, in better enabling it to compete with complainant, where no deception or confusion of goods is caused or intended thereby.

5. SAME.

The fact that a defendant has been, and still is, a large purchaser of an article made by complainant as a jobber, does not create any trust relation between them which precludes it from placing on the market a competing article of its own manufacture.

6. SAME.

That defendant issued a circular advertising an article of its manufacture to some extent similar to one issued by complainant, and inclosed in the cartons containing its goods, does not constitute unfair competition, where defendant's circulars are not so inclosed, and are sent only to jobbers, and do not come into the hands of retail purchasers.

7. SAME.

Labels and cartons used by complainant and those subsequently adopted by defendant compared, and held not to show such similarity as to charge defendant with unfair competition.

8. SAME.

Unless a defendant adopts means calculated to injure complainant through unfair competition, the intention is immaterial; there being no ground for relief where there has been no injury.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

¶ 1. Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

In the year 1894 the firm of G. W. Cole & Co. began the manufacture of a compound oil according to a secret formula. The oil was a lubricant, rust preventer, and polish. They adopted as a trade-mark and name the designation "Three in One," cast in the form of a large figure "1" in red, upon which was superimposed in white the numeral "3" above the word "in." This cipher was later molded in the glass of the bottles containing the compound. The device was new, the product largely advertised, met with large sales, and became well known throughout the country under the name of "Three in One," identified by that name and by the distinctive device stated. The bottles were inclosed in pasteboard cartons, which bore conspicuously upon the front panel a picture of the bottle inclosed therein; the conspicuous colors being red, black, and greenish yellow upon a white background. For some time a circular had been inclosed in each carton, which consists of pictures of various articles, typewriters, skates, guns, phonographs, etc., for which the preparation is intended, accompanied with descriptive and commendatory notices. The appellant here (complainant below) was organized as a corporation, and succeeded to the business of the copartnership, taking over its assets and good will. The appellant does not sell at retail, but supplies its product to wholesalers and jobbers in the various cities in the country, who in turn furnish the article to the retailer.

The appellee the Excelsior Supply Company, of which the appellee George T. Robie is president, deals in bicycle parts and sundries in the city of Chicago. The appellee the American Cement & Oil Company, of which Mr. Robie also is president, manufactures lubricating and other oils and cement. The Excelsior Supply Company for some four or five years has acted as a jobber, and has been a customer of the appellant, purchasing at wholesale its oil, and has sold large quantities of this product, "Three in One," and still continues so to act and sell. In the year 1901 the appellees (defendants below) put upon the market a compound oil called "Big Four," claimed to be identical in color and odor with "Three in One," and put up in bottles claimed to be of the same general design and appearance, but of slightly larger size, the labels of which are claimed to be a close approximation to the appellant's label. The bottles are inclosed in pasteboard cartons, with a picture of the bottle on the outside claimed to closely simulate the carton of the appellant; the label of the appellees having a white background, and a large figure "4" in blue superimposed upon a rectangular red background, and the word "Big" in white superimposed upon the figure "4." An advertising circular was also put out by the appellees, somewhat similar in design to the advertising circular of the appellant, containing 19 different cuts, as against 17 in appellant's circular; four of the cuts in the one being identical with the cuts of the other circular, and many of the others resembling the cuts in the circular of the appellant. The Excelsior Supply Company had been in the manufacture and sale of oils of various kinds for a quarter of a century, and had during that time used different names therefor. The bottles, labels, and style of the "Big Four" product were a radical departure from anything previously used by it. The bottle used by the appellant, containing its compound, holds 3 ounces, is 5½ inches in height, 1⅞ inches in width, and 1⅞ inches in thickness, the neck being 1 inch in length, and both surfaces flat. It is of special mold, and not an ordinary stock bottle. It has blown in the glass on one edge "G. W. Cole Co." and on the other edge "Three in One." The bottle used by the appellees holds 4 ounces, is 5⅞ inches in height, 2 inches in width and 1⅞ in thickness at its broadest part, and the neck of the bottle is 1¼ inches in height, the front surface being convex. The bottle is known in the trade as a "4-ounce Blake oval bottle," and is a stock bottle manufactured by nearly every bottle factory in the country. In the autumn of 1901 the appellant began to put up a small 1-ounce package—a duplicate of its larger one, except as to size. In the winter following the appellees also put up a 1-ounce package, but without knowledge that the appellant had so done, using these small bottles simply as samples. They are not regularly sold. All of these kinds of bottles had been used by the appellees in their business for years before they had any dealings with the appellant.

A better idea of the two labels may be had by a comparison, and they are for that purpose here exhibited:

APPELLANT'S FRONT LABEL.

PIANOS. FURNITURE. WOODWORK.
"THREE IN ONE"
 REGISTERED **13** TRADE MARK
 IN
CLEANS & POLISHES
PREVENTS RUST
LUBRICATES
 MOTOR VEHICLES,
 BICYCLES,
 GUNS,
 SEWING MACHINES,
 TYPEWRITERS, ETC.
 MANUFACTURED BY
 G. W. COLE CO
 NEW YORK, U.S.A.
 PRICE 25 CENTS
 FOR CLOCKS. GOLF CLUBS. FIREARMS. REELS. PHONOGRAPHS.
 FOR MUSICAL. SURGICAL AND SCIENTIFIC. INSTRUMENTS. LOCKS. NUTS.
 FOR SKATES. TOOLS. ETC.

APPELLEES' FRONT LABEL.

BIG FOUR
 TRADE MARK REGISTERED
LUBRICATOR
4
BIG
CRUST PREVENTIVE
 Especially Adapted for
SEWING MACHINES
GUNS
BICYCLES
TYPE WRITERS
CLOCKS, FURNITURE
TOOLS
MUSICAL INSTRUMENTS
 NON-FLAMMABLE PRICE 25 CENTS
AMERICAN CEMENT OIL CO.
 CHICAGO - U.S.A.

APPELLANT'S BACK LABEL.

"LITTLE GOES FAR"
HOW TO USE
"3 in 1" Oil

TO CLEAN, rub parts with soft cloth moistened sparingly with "3 in 1."

TO POLISH (after cleaning with "3 in 1"), rub surface until dry, with a soft, clean cloth.
IT CLEANS AND POLISHES

Producing a brilliant lustre on Bicycles, Firearms, Typewriters, Sewing Machines; Pianos, Furniture, Woodwork; Enameled, Nickeled and Varished surfaces.

It Cleans and Removes all Residue in Gun Barrels after Shooting.

IT PREVENTS RUST

IN ALL CLIMATES

To prevent rusting or tarnishing of Nickel, Steel and Metallic surfaces leave on a thin coating of "3 in 1."

IT LUBRICATES

The Bearings and Mechanism of Bicycles, Firearms, Typewriters, Sewing Machines, Reels, Skates, Locks, Clocks, Phonographs, Musical and Scientific Instruments, and anything requiring oil.

GUARANTEED NOT TO GUM

NOR HARDEN
CONTAINS NO RUBBER

APPELLEES' BACK LABEL.



DIRECTIONS

FOR POLISHING.

Clean article to be polished with Big 4 and rub with a soft cloth until dry.

To Prevent Rust.

Apply a thin coat of Big 4 to Nickel, Steel or any metallic surface and it will leave a thin transparent finish, and will prevent rust in any climate.

For Lubricating.

Use sparingly of Big 4 on any and all fine machinery. **Will Not Gum** or get thick.

For Cleaning Typewriters, Guns, Etc. and Removing Rust.

Clean with Big 4, all Guns and fire arms. **Will remove residue after shooting.**

Other facts essential to be considered are stated in the opinion of the court. The bill was filed upon the double ground of trade-mark infringement and of unfair trade. The court below at the hearing dismissed the bill for want of equity; finding that the one trade-mark does not infringe the other, and, upon the contention of unfair competition, that it was not proven that any one had been deceived, or that there had been any attempt to deceive, or to simulate the goods of the complainant. The decree is brought here for review.

Frank F. Reed, for appellant.

Harrison Musgrave, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). We are to consider this case, as the bill presents it, to involve the charge both of an infringement of a trade-mark and of unfair competition in trade. The two are sometimes confounded, yet they are distinctive, and the distinction ought not to be lost sight of. A trade-mark is an arbitrary, distinctive name, symbol, or device, to indicate or authenticate the origin of the product to which it is attached. An infringement of such trade-mark consists in the use of the genuine upon substituted goods, or of an exact copy or reproduction of the genuine, or in the use of an imitation in which the difference is colorable only, and the resemblance avails to mislead so that the goods to which the spurious trade-mark is affixed are likely to be mistaken for the genuine product; and this upon the ground that the trade-mark adopted by one is the exclusive property of its proprietor, and such use of the genuine, or of such imitation of it, is an invasion of his right of property.

Unfair competition is distinguishable from the infringement of a trade-mark in this: that it does not involve necessarily the question of the exclusive right of another to the use of the name, symbol, or device. A word may be purely generic or descriptive, and so not capable of becoming an arbitrary trade-mark, and yet there may be an unfair use of such word or symbol which will constitute unfair competition. Thus a proper or geographical name is not the subject of a trade-mark, but may be so used by another unfairly, producing confusion of goods, and so come under the condemnation of unfair trade, and its use will be enjoined. The right to the use of an arbitrary name or device as indicia of origin is protected upon the ground of a legal right to its use by the person appropriating it. The doctrine of unfair competition is possibly lodged upon the theory of the protection of the public whose rights are infringed or jeopardized by the confusion of goods produced by unfair methods of trade, as well as upon the right of a complainant to enjoy the good will of a trade built up by his efforts, and sought to be taken from him by unfair methods. Whether such confusion has been or is likely to be produced by the acts charged, is a question of fact to be resolved either by evidence of actual sales of the one product for the other, of actual mistake of one for the other, of fraudulent palming off of the one for the other, or, on the other hand, failing such evidence, by comparison of the two brands to determine whether the one can be readily mistaken for the other, even by the inattentive and unobserving retail purchaser. We must therefore review this record in the two lights of alleged infringement and alleged unfair competition.

1. Is the complainant's trade-mark infringed by the one adopted by the defendant?

The distinctive characteristics of the appellant's trade-mark inhere in the name "Three in One," and the picture of the figure "1" in red, upon which are superimposed in white the figure "3" and the word "in." As we observe in *Pillsbury v. Pillsbury-Washburn Flour Mills Company*, 64 Fed. 841, 12 C. C. A. 432, "A specific article of approved excellence comes to be known by certain catchwords easily retained in memory, or by a certain picture which the eye readily recognizes." Nothing could be simpler than the catchwords of this trade-mark, "Three in One," suggestive of the theological doctrine of the Trinity. Nothing could, we think, be more apt to win attention than the simple and attractive picture of the large figure "1" in bright red, with the white figure and letters "3" "in" superimposed upon it. These would catch the eye of the most unwary and unobservant person, and indicate the article he desired. The trade-mark of the appellees consists of the words "Big Four"—the picture of a large figure "4" in blue, superimposed upon a rectangular background in red, with lettering in blue around the four sides; the name "Big Four" being in red lettering, as contradistinguished from the black lettering of the appellant. The remaining part of the label consists of letters in red and in blue in irregular curved lines, as contrasted with the black lettering upon that of the appellant's bottle. The back label upon the appellant's bottle will be seen, by comparison of the marks, to be equally distinguishable. In the latter there are no letters or figures in red, as upon the former. Taken as a whole, we perceive no similarity between these two trade-marks that, even with the slight care which the ordinary purchaser exercises, would mislead. The one is clear, imposing, attractive. The other is ornate, involved, confusing. Nor is there idem sonans in the words "Three in One" and "Big Four," tending to confuse the unwary purchaser. The one is not suggestive of the other. They are "dissimilar in sound, appearance, and suggestion." We do not overlook the fact that the ordinary purchaser at retail is without the opportunity of comparison; but we cannot comprehend that even a careless purchaser, having in mind the catchwords "Three in One," having in mind the white letter "3" superimposed upon the red figure "1," could be confused or deceived by the package bearing the catchwords "Big Four," and the figure "4" in blue superimposed upon a red rectangle, with all the other differences in the makeup of the label. It seems to us improbable, unless by some device or fraud the one is imposed upon him for the other by a designing seller, which latter act would be involved in the question of unfair competition, not in that of infringement of trade-mark. Within our ruling in *Sterling Remedy Company v. Eureka Chemical & Manufacturing Company*, 80 Fed. 105, 25 C. C. A. 314, and *Postum Cereal Company, Limited, v. American Health Food Company*, 119 Fed. 848, 56 C. C. A. 360, we are unable to consider the term "Three in One" to be infringed by the term "Big Four," or that the coloring or dress of the figure "4" in the latter is suggestive of the figures "3" and "1" in the former. In the case first cited we held the term "No-To-Bac" to be not infringed by the term "Baco-Curo," and in the latter case that the term "Grape-Nuts" is not infringed by

the term "Grain-Hearts." In each of these cases the name complained of is more nearly suggestive of the trade-mark claimed to be infringed than in the case here. The term "Big Four" is the popular name of a railway, associated in the popular mind with that road. It is wholly wanting in suggestion of "Three in One." We are constrained to the conclusion that the appellant's trade-mark is not infringed by the device complained of.

2. Have the appellees been guilty of unfair competition, resulting in confusion of goods, to the injury of the public, or to the invasion of the appellant's legal rights?

The affirmative of this proposition is asserted by the appellant, and it rests with it to prove that affirmative satisfactorily. It is asserted that unfair competition is shown in several particulars: (a) That for many years prior to the adoption of the "Big Four" label, the appellees had manufactured and marketed several kinds of oil under different brands and distinctive names, and in packages altogether distinct from the appellant's, and adopted the one in question in imitation of the appellant's. (b) That the appellees adopted the device "Big Four" expressly to compete with the product "Three in One"; that the appellees were known throughout the trade as distributors of the appellant's product "Three in One," and practically occupied some sort of trust relation to the appellant. (c) That the appellees' circular was in part, at least, copied from, and was an imitation of, the appellant's circular; that the color and the odor of the two products are the same, and the identity was so caused for the purpose of deception. (d) That the product "Big Four" at once became known as "Four in One," and so has caused confusion in goods.

(a) With respect to the first of these assertions it is sufficient to say that while the label "Big Four" is distinctive, and perhaps widely so, from the numerous labels theretofore used by the appellees during 20 years of business, the previous labels are also easily distinguishable from each other. It is the purpose of the originator of a label to produce one which is in a marked degree dissimilar from any other; one that shall catch the eye and remain in the memory of a proposing purchaser; a label that shall stand apart by itself, distinguished from and unlike any other. It must also be borne in mind that the quality of this oil, "Big Four," was of a different grade and of higher excellence than any other oil theretofore manufactured and put upon the market by the appellees. It was compounded by a secret formula known only to them. It was natural, therefore, and proper, that they should seek an entirely distinctive brand to mark that particular quality of oil. We perceive nothing in this circumstance indicating fraud, or disposition to obtain advantage of the appellant by unfair means.

(b) It is shown that the name "Big Four" was selected because the oil was contained in a four-ounce bottle, and because the name was popularly known at the West in connection with a railway. It thus identifies the particular oil by the size of the bottle containing it, and attracts attention by giving it the catch name of a popular railway. If adopted for the purpose of giving popularity to the product, and enabling the appellees to compete with the product of the appellant, that is not objectionable in morals or in law, unless, by reason of their re-

lations to the appellant, the appellees are bound to refrain from such competition. The law of unfair trade has never gone to the length of preventing fair competition in trade. The law seeks only to restrain fraudulent practices inducing confusion of goods and deception of the public. There is nothing in the relation of these parties which prohibited such competition. The Excelsior Supply Company was a customer of the appellant, buying largely of its product "Three in One." It had special terms from the appellant, as had all its large customers; but that course of business created no trust relation between them, and constitutes no objection to competition.

(c) With respect to the question of alleged identity of color and odor, we have little difficulty. Oil of the same odor had been manufactured and sold by the appellees for many years. A large number of oils have the same color. It is the ordinary color for oils of that character. The odor is caused by the oil of citronella, used to suppress the odor of the oil in its original condition. Its use is common, and had been for many years. It had been used by the appellees for the like purpose for upwards of 20 years.

Coming next to the circular: The arrangement of the folders is quite distinct. On the first page of the appellant's circular is the figure of a woman standing at a sewing machine with upraised hand pointing to a bottle of "Three in One," and the seven reasons stating the supposed excellence of that oil are printed thereon. All this is in prominent red print. No such, or any, picture appears upon the appellees' circular. On the fourth page of the appellant's circular are two parallelograms, with red ornamental border and white center, and upon the latter is printed, in large letters in red, "IT'S OIL, RIGHT." No such, or any, picture appears upon the appellees' circular. The third and fourth pages of appellant's circular contain pictures in parallelograms, irregularly distributed over the sheet, of a clock, a reel, a bicycle, a piano, and other articles and machines, with letterpress indicating the supposed excellent uses of the oil. At the right of the fourth page is a picture of the bottle "Three in One," with the labels upon it. The appellees' circular is composed of two pages, having at the right of the first page a representation of a bottle of "Big Four" oil, and a blank underneath it, with the heading, "For sale by." It then has cuts of different instruments upon which the oil can be used profitably, and with its uses specified. Three of these cuts are identical with the cuts in the appellant's circular, and were taken from its circular. Of the 19 cuts in the appellees' circular, 16 were obtained from catalogues of traders in Chicago. All these cuts were of the ordinary trade forms, and the record discloses from whom they were obtained. The witness who got up this circular testifies that he took the three from the appellant's circular, supposing that they were public property, in the same way he took the cuts from other circulars. With the exception noted, the circulars are dissimilar. The arrangement of the different cuts is decidedly different from that of the appellant. They are not in parallelograms irregularly distributed. They are not in parallelograms at all. They are placed in regular columns from the top to the bottom of the sheet; the first being placed at the left and the second at the right

of the printed matter, and so on throughout the circular. The appellant wraps its circular around the bottle in the carton. That is not done by the appellees. They use their circular simply as an advertisement, sending it to the jobbers. It is nothing that the buyer at retail receives in purchasing the package. There is little or no danger that the jobber or retailer purchasing goods in large quantities would be deceived by a false brand. He not only knows the article he wishes to purchase, but is careful to ascertain if the article shown him be the genuine. It is the casual inattentive purchaser of a single package who is subject to be deceived, and such a one could not possibly be deceived by this circular, for he does not receive it, if in any respect the circular may be said to be deceptive. If any just criticism may be indulged with respect to the copying of the three cuts of the appellant's circular, the act can have no misleading effect, or induce one to mistakenly receive the one product for the other, and ought not, therefore, to avail, standing alone, to sustain the charge of unfair competition. *Potter Drug & Chemical Corp. v. Pasfield Soap Company* (C. C.) 102 Fed. 490.

A single word with respect to the carton will suffice. A carton of the same shape and construction has been used by the appellees for 15 years. Such cartons were well known and quite common at the time the appellant adopted them. The lettering and coloring of the two cartons used respectively by the appellant and appellees were as different and distinct as the printed labels upon the bottles.

(d) Has the product "Big Four" become known as "Four in One," and has it been sold as the product "Three in One"?

If the appellees had sanctioned the use of that designation for their product, and it had become so known, or if without their sanction their product had come to be so designated, we might be inclined to say that the use of the numerals should cease, that confusion might not result. But has it in fact so become known? We have given to the evidence on this point a careful scrutiny to ascertain if there be any just foundation for the charge. The evidence of the appellant upon this branch of the case rests upon the testimony of a single witness, a young man of 21 years of age, in the service of one dealing in hardware specialties, who sold the product of the appellant, but not that of the appellees. About two hours before giving his testimony, he was ordered to, and did, meet Mr. George W. Cole, president of the appellant, upon a street corner in the city of Chicago, and was directed by him to go to certain places and ask for "Four in One" oil, and, if they offered anything else, not to take it. He states that he went to Rothschild's and asked for a bottle of "Four in One" oil, and was given a bottle wrapped in a package, which he did not examine; that it was given to him by a female clerk; that it was wrapped up by her; and that, if he had examined it, he could not have told what it was. That he went to the Excelsior Supply Company and asked for a half a dozen large and half a dozen small bottles of "Four in One," and was given the goods with a bill for them which distinctly stated it was "Big Four" oil. He also stated that he had heard a female clerk at The Fair talk about "Four in One" oil about a month before his examination; that in June there were six women selling goods in that department, but at

the time of his examination there were only two, the force being decreased in number because of the discontinuance of a lamp demonstration that was being had there in June. The witness went with Mr. Robie, one of the appellees, to the department of The Fair where such goods were sold, and where he had heard the expression "Four in One." On his return he testified that the woman whom he had heard speak of "Four in One" oil was not there. At this point he was asked if, on the occasion of his visit to The Fair in company with Mr. Robie, he inquired if they had "Four in One" oil, and he said reluctantly—desiring first to have the advice of counsel for appellant whether he should answer—that he had so done at the request of Mr. Robie, and the saleswoman replied "No." With respect to the package he obtained at Rothschild's—the red package, as it is called—it is very different from the packages of the appellees here complained of. With respect to the transaction of this witness at the Excelsior Supply Company, two clerks of that company, testifying the day after the transaction, stated that the witness for the appellant called and asked for "Four in One" oil, and they told him they had no such thing, but had "Big Four," if that was what he wanted, to which he replied, "That is all right," and the witness wrapped up the bundle, and he paid for it, received the bill, and walked away. We deem this evidence on the part of the appellant wholly insufficient to base thereon a finding of unfair trade, or to prove that the product of the appellees has come to be generally known as "Four in One." It is remarkable, if it was a fact that the product had come to be generally so known, that no dealer in it and no purchaser of it could be found to so testify, and that we should be asked to base a finding of unfair trade in that respect upon the above-recited testimony of the young man who was employed for the occasion. We think the appellant has wholly failed to make out a case showing even a probability of confusion of goods by reason of the particular designation of the two labels. There is not an atom of evidence that any person has ever been deceived. There is, as we have stated in considering the first branch of this case, upon the face of these labels no probability that any one exercising the care that even an inattentive purchaser gives to his purchases would be deceived. This court has been at all times zealous in respect of the use of trademarks and labels, to restrain competitors from all unfairness in competition producing confusion of goods; but we are not disposed to carry the principles of the law so far that one trader may have a monopoly of all numerals, or be enabled to throttle the trade of all competitors.

Some evidence has been given by the appellant—quite inconclusive, as we think—indicating an intention on the part of the appellees in getting up this label "Big Four," and in prosecuting the business of the sale of that product, to enter into competition with them by selling it at a less price to the jobber, inducing them to substitute their product for that of the appellant, with the expectation of larger gains, and of imitating as closely as they safely could the appellant's labels and packages. We do not deem it necessary to consider this evidence, for, as we think, if the appellees ever designed to obtain an unfair advantage of the appellant, they have, as stated in *Kann v. Diamond Steel Company*, 32 C. C. A. 324, 89 Fed. 706, "never used any means calculated

to accomplish it, and they adopted those admirably suited to defeat it. Their intention therefore becomes immaterial." An intention to injure, if no injury be done, constitutes no ground for relief. *Hopkins on Unfair Trade*, § 76; *Centaur Company v. Marshall*, 38 C. C. A. 413, 97 Fed. 785; *Postum Cereal Company, Ltd., v. American Health Food Company*, 56 C. C. A. 360, 119 Fed. 848, 852.

We cannot better conclude this opinion than to use the language of Mr. Justice Brewer in *Lorillard Co. v. Peper*, 30 C. C. A. 496, 86 Fed. 956, 960:

"The difference is such that the eye will take it in at a moment's glance. Summing it all up, while there are certain minor points of resemblance which have been forcibly urged upon our attention by the counsel for plaintiff, yet, looking at the two packages with their labels—taking the tout ensemble—it appears to us clear that they are so essentially different that no one of ordinary intelligence, desiring to buy the one kind of tobacco, would be misled into buying the package of the other."

The case of *Coats v. Merrick Thread Company*, 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847, is also instructive upon this question.

The decree will be affirmed.

LEVY v. HARRIS.

(Circuit Court of Appeals, Third Circuit. June 8, 1904.)

No. 42.

1. PATENTS—INFRINGEMENT—CLAIMS FOR COMBINATION.

In a claim of a patent for a combination, all the elements which the patentee has specified must be regarded as material, and infringement cannot be found in a device in which one of such elements is omitted, unless an equivalent part is employed.

2. SAME—OMISSION OF PARTS—QUILL-GRINDING MACHINE.

The Levy patent, No. 664,564, for a machine for grinding quills of feathers, claim 1, includes as an element of the combination a spring, the ends of which bear on the suspended journal bearings of the presser-roll, and also "means for adjusting the tension of the said spring." *Held*, that such claim is not infringed by a machine which employs an equivalent spring, although of different form, but has no means for adjusting the tension of such spring.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 124 Fed. 69.

Horace Pettit, for appellant.

Walter C. Pusey and Joshua Pusey, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

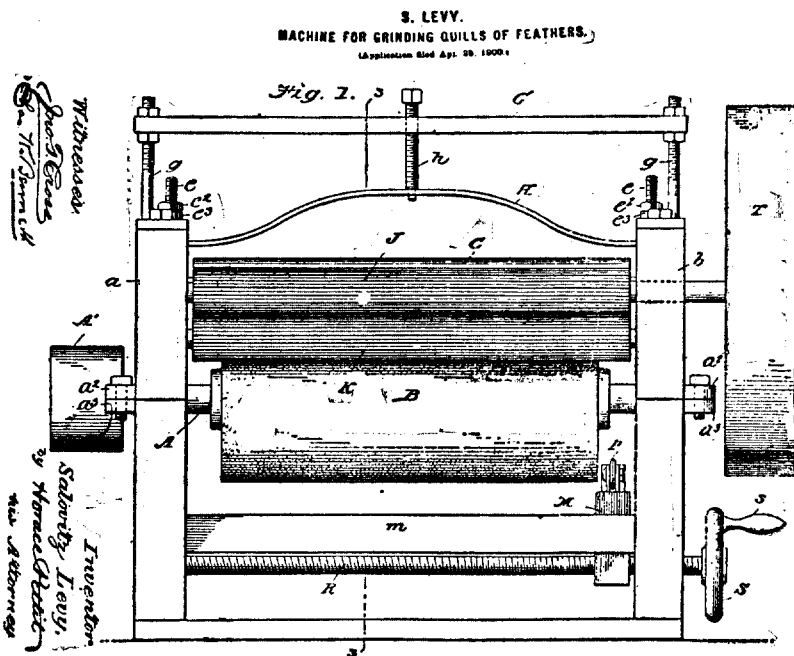
GRAY, Circuit Judge. This is an appeal from the decree of the court below, in a suit in equity brought by the appellant, who was the complainant below, against appellee, defendant below, for infringement of letters patent No. 664,564, issued December 25, 1900,

to the appellant, for an improvement in a machine for grinding quills of feathers. The specifications of the patent state the object of the invention, and the details of the construction, so far as we are here concerned with the same, as follows:

"My invention relates to certain improvements in machines for grinding the quills of feathers; and the principal object of the same is to provide a machine which is simple in construction and which will rapidly grind the ribs of the quill of the feathers and remove all pith from the same, leaving only the bone portion of stems with the web or vanes running from each edge, thus rendering the said quill of the feathers soft and pliable and capable of withstanding considerable bending without the liability of breaking.

The invention consists in the construction and arrangement of the various parts, such as will be hereinafter fully set forth, and particularly pointed out in the claims made hereto.

In the accompanying drawings, Fig. 1 is a front view of a machine constructed in accordance with my invention. Fig. 2 is a side elevation of the



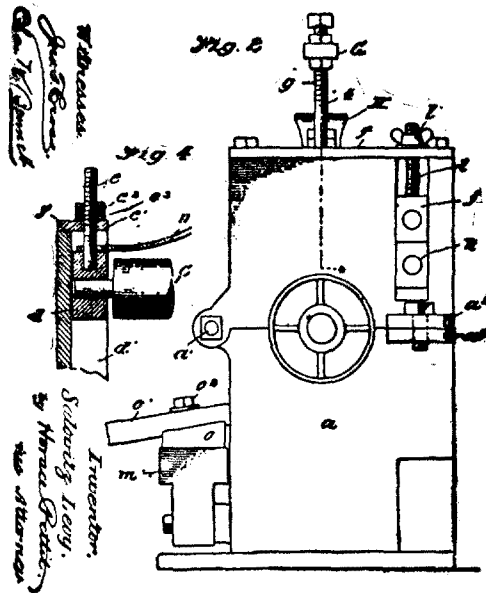
same. Fig. 3 is a central sectional elevation taken about on the line 3, 3, of Fig. 1, and Fig. 4 is a detail sectional view illustrating the yielding bearing of the presser-roll.

In carrying out my invention I provide a supporting-frame comprising the two side walls, a, b, connected at their lower ends to the base-plate, c. Each of the side walls, a, b, is made in two sections and hinged together at a', b', at their rear edges and having provided on their sides, near the forward edges, the projecting lugs, a², a³, which are bolted together in the manner illustrated in Figs. 1 and 2.

Located about centrally in the side walls of the frame are bearings for the reception of the main driving-shaft, A, upon which is mounted the grinding-

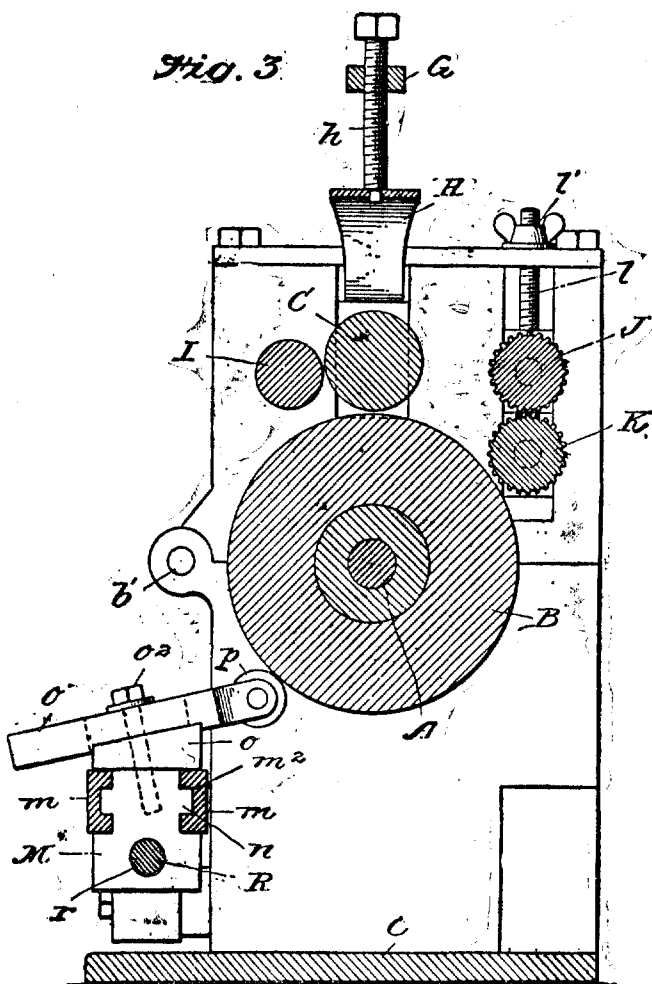
roll, B, which is centrally located between the two frames. On the projecting end of driving-shaft, A, I provide a driving-pulley, A', which is connected by a suitable belt with the power-shaft.

Directly above the grinding-roll, B, is mounted a pressing-roll, C, which is of much smaller diameter than the roller, B, and is mounted in the adjustable journal-boxes, d, which are suspended in recesses, d', formed in the side walls of the frame. These boxes, d, are supported in a suspended position and adjusted by means of the threaded bolt, e, which enters a threaded aperture in the upper end of each box and passes through an opening, e', formed in the top plate, f, of the frame. The lock-nuts, e², e³, are provided above the plate, f, for supporting and adjusting the bolt, e. In each of the side frames of the machine I provide the vertical bolts, g, which support on their upper ends a crossbar, G, the said bolts, g, carrying jam-nuts for supporting and locking the crossbar. In the center of the said crossbar I provide a threaded opening adapted for the reception of the screw, h, which is provided with a shouldered lower end which fits into an aperture provided in the spring, H. The spring, H, is bowed, as illustrated, and bears at each end upon the journal-boxes, d, of the presser-roll, C, for the purpose of keeping the said presser-roll in constant contact with the grinding roll, or, in other words, for the purpose of



keeping the quill during the operation of the machine in close contact with the grinding-roll, while at the same time allowing the said presser-roll to yield upwardly. Each end of the spring, H, is provided with an elongated opening through which the bolts, e, pass. The tension of the spring, H, may be increased or diminished by adjusting the screw, h, carried by the bar, G. * * *

In the operation of my machine the feathers are guided by the operator between the feed-rolls, J, K, which are driven rather slowly by means of the driving-pulley, T, carried by the shaft of the upper roller, J. This operation crimps or crushes the thick quill of the feather as it passes between the corrugated rolls and feeds the said quill between the grinding-roll, B, and the yielding-mounted presser-roll, C, the said presser-roll tending to keep the



(No Model.)

MACHINE FOR GRINDING QUILLS OF FEATHERS

S. LEVY.

Application filed Apr. 28, 1900.

2 Sheets—Sheet 2

quill in close contact with the grinding-roll, which revolves very rapidly and grinds off the underside of the quill, removing everything, including the pith, with the exception of the bone which carries the web or vane of the feather."

Two claims are set forth in the patent, with the first of which only we have to do. It is as follows:

"(1) In a quill-grinding machine, the combination with the supporting frame, of a grinding-roll journaled in said frame, a presser-roll, C, bearings for said presser-roll suspended in the machine-frame so as to be capable of moving upwardly, means for adjusting said suspended bearings so as to regulate the distance between the presser-roll and the grinding-roll, a spring, H, adapted to bear at each end on the suspended journal-bearings, means for adjusting the tension of the said spring, and a pair of feeding and crushing rolls arranged in front of the grinding and presser rolls located so as to hold the quills while the grinding-roll is operating to remove the pithy material from the bone of the quill, substantially as described."

The validity of the patent in suit is not here in question. It was sustained by the learned judge of the court below, who, upon the first hearing, held that defendant's machine infringed the first claim of the patent. Upon a rehearing, however, the court was of opinion that defendant's machine did not infringe the patent in suit, for the reason that it did not have means for adjusting the tension of the spring referred to in claim 1, above quoted. The court below, in its opinion delivered after the rehearing, says:

"The patent claims as one of the elements in the combination, 'means for adjusting the tension of the said spring.' The specification shows that the particular means described by the inventor was the screw, h: 'The tension of the spring, H, may be increased or diminished by adjusting the screw, h, carried by the bar, G.' Neither this screw nor any equivalent device is to be found in the defendant's machine, but the tension of the springs is adjusted therein by the same means that is used for regulating the distance between the two rollers, namely, by the bolts, e. The defendants have therefore omitted entirely one element of the plaintiff's combination, and accordingly cannot be held to infringe. I think this position is sound, and is supported by the following authorities: *Water Meter Co. v. Desper*, 101 U. S. 332 [25 L. Ed. 1024]; *Wright v. Yuengling*, 155 U. S. 47 [15 Sup. Ct. 1, 39 L. Ed. 64]; *Pittsburg Meter Co. v. Supply Co.* (C. C. A., 3d Circuit) 109 Fed. 644 [48 C. C. A. 580]. As was said in the last-cited case: 'Nothing in the law of patents is better settled than the rule that a claim for a combination is not infringed, if any one of the described or specified elements is omitted without the substitution of any equivalent thereof.'"

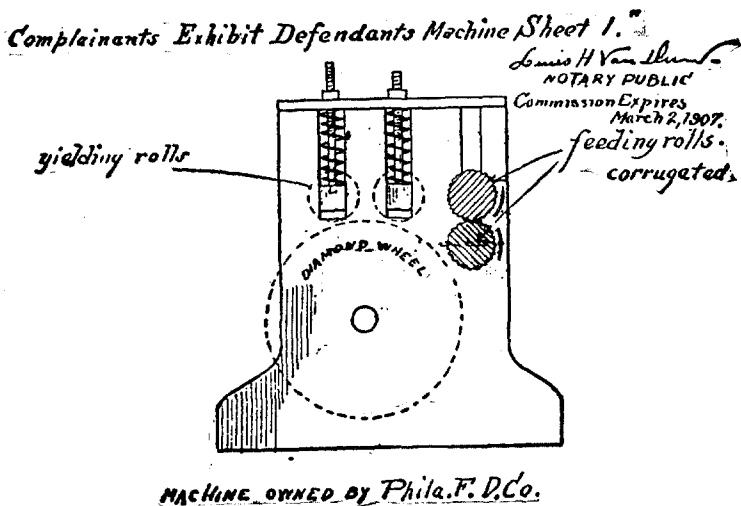
We agree with what the learned judge has here said, and think that the complainant below is bound by the limitations imposed by his own language, as used in the first claim of the patent in suit. As said by Mr. Justice Bradley, in delivering the opinion of the Supreme Court, in *Water Meter Co. v. Desper*, *supra*:

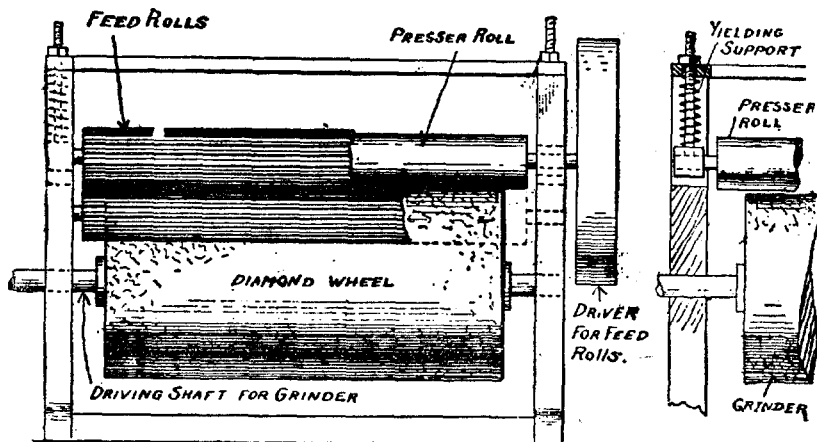
"It may be observed, before concluding this opinion, that the courts of this country cannot always indulge the same latitude which is exercised by English judges in determining what parts of a machine are or are not material. Our law requires the patentee to specify particularly what he claims to be new, and if he claims a combination of certain elements or parts, we cannot declare that any one of these elements is immaterial. The patentee makes them all material by the restricted form of his claim. We can only decide whether any part omitted by an alleged infringer is supplied by some other device or instrumentality which is its equivalent."

A careful consideration of the device of the patent in suit, convinces us that the element described in the combination of claim 1, to wit, "a spring, H, adapted to bear at each end on the suspended journal bearings; means for adjusting the tension of said spring," was not only made material by its inclusion in the claim and specifications, but is in fact, a material element of the combination constituting the invention claimed. An inspection of the drawings and models submitted to the court, makes it perfectly manifest that the plate spring, H, the ends of which press upon the journal bearings on either side of the presser-roll in connection with the means for adjusting its pressure, furnished by the screw, h, furnishes a not unimportant part of the machine described in the patent. It must be borne in mind that the journal bearings, holding the ends of the shaft of the presser-roll, may be moved up or down by means of the bolts,

e, and the nuts, e² and e³, as described in the specifications. This vertical movement enables the operator to regulate the distance between the presser-roll and the grinding-roll, and this regulation may be necessary by reason of the varying size of the materials to pass between the rolls. When the presser-roll has been thus raised or lowered to the distance required from the grinding-roll, it is held down, but yieldingly, by the ends of the plate spring, H. It is apparent, that if this plate spring is fixedly placed, its pressure at the ends on the journal bearings, and hence on the presser-roll, will be increased or diminished as the presser-roll is raised or lowered. It is most important, then, that there should be means for preserving just the pressure required, whether the presser-roll is raised or lowered. This can be accomplished by the means of adjustment provided in the screw, h, passing through the top bar of the frame, with its lower end resting on the middle of the arch of the plate spring, H. Thus, if the material to be treated requires that the presser-roll should be raised to a greater distance from the grinding-roll, in order to pass readily between the two, the raising of the presser-roll against the ends of the spring, H, would increase the pressure. It might, however, be desirable that the actual pressure should remain the same as before the spring is raised, and the means of adjustment supplied by the screw, h, would enable the original pressure to be maintained.

We now come to the consideration of the machine of the defendant below, alleged to infringe the patent in suit. It is admitted that the only difference between the combinations constituting the two machines, is in respect to this plate spring, H, and means for adjusting the same. By referring to the drawings of the defendant's machine, here-



*Complainant's Exhibit. Defendant's Machine Sheet 2.**Phila. Feather Duster Co.
Machine**Louis H Van Lusen*
NOTARY PUBLIC
Commission expires March 2, 1907

with reproduced, it will be seen that the journal bearings of the presser-roll may be raised or lowered in the sides of the frame by threaded bolts and nuts similar to the device for that purpose, in the patent in suit, and the distance between the presser-roll and the grinding-roll may be thus increased or diminished at will. As in the patent in suit, the journal bearings are *suspended* by the bolts referred to, but are free to be moved upwards. There is in each side of the defendant's machine, encircling the bolt, a coiled or helical spring, which furnishes a yielding pressure upon each end of the shaft of the presser-roll. It is apparent, that when the presser-roll is raised for any purpose, the compression of these coiled springs must increase the pressure upon the roll, and so conversely, when the presser-roll is lowered, so as to decrease the distance between it and the grinding-roll, the pressure of the helical spring is decreased. It follows that, in any given required position of the presser-roll, with reference to the grinding-roll, the pressure of these springs can neither be increased nor diminished. To increase the pressure, the presser-roll must be raised, thus abandoning the required position, and conversely, to decrease the pressure, the presser-roll must be lowered, which would again abandon the required position; or, if the two rolls were already so close together that no further approach could be made, no decrease in pressure could be obtained. It is thus seen that the defendant's machine lacks the means of adjusting the pressure of the spring, mentioned in claim 1 of the patent in suit, and particularly set forth by reference to letters H and h, both in the claim and specifications.

It is true, that the function of the two ends of the flat spring, in the machine of the patent in suit, is pressure upon the ends of the shaft of

the presser-roll, and it is also true, that when the presser-roll is raised, without more, this pressure is increased, and when it is lowered, it is decreased. But the essential element in this respect, of the patent in suit, i. e. means for adjusting the pressure, without either raising or lowering the presser-roll, distinguishes this combination from the defendant's device. The screw, h, passing through the transverse top bar of the frame, with its lower end on the top of the plate spring, can increase or diminish the pressure to any desired extent, no matter into what position the presser-roll is raised or lowered. In other words, in defendant's device, the raising or lowering of the presser-roll increases or diminishes the spring pressure, and there is no means for adjusting the pressure thus produced. If it be desirable to raise the presser-roll for any purpose, an increased pressure must be submitted to, for there is no means of restoring it by adjustment to its original energy. Then again, if the presser-roll in defendant's machine is at the distance required for the proper treatment of the feathers passing between them, and increased spring pressure should be desired, there is no way of obtaining it, except by raising the presser-roll, and thus destroying the desired relative distance of the two rolls from each other. On the other hand, in the machine of the patent in suit, when the presser-roll is at the desired distance from the grinding-roll, the pressure upon it may be increased or diminished without at all changing that distance.

The appellant contends that, inasmuch as the coiled springs of defendant's machine are compressed when the presser-roll is raised, and the tension of the springs thereby increased, and the opposite effect is produced when the roller is lowered, there is present in defendant's machine "a means for adjusting the tension of the springs," within the meaning of the claim. From what has been said, it seems to us clear, that this contention cannot be sustained. To support it would be doing violence to any accepted meaning of the word "adjusting." Adjustment of the tension is just as necessary after the raising or lowering of the presser-roll as before, and in defendant's machine, there is no means for such adjustment. It is not true, therefore, that in defendant's machine, a single element performs the functions of two elements specified in the first claim of complainant's patent.

We are of opinion, therefore, that this means of adjusting pressure, is a necessary element of the combination, as specified in the first claim of the patent in suit, and that the same, or any equivalent thereof, is not found in the alleged infringing machine of the defendant.

The decree of the court below is affirmed.

LONDON GUARANTEE & ACCIDENT CO., Limited, v. DOYLE et al.

(Circuit Court, E. D. Pennsylvania. May 28, 1904.)

No. 40.

1. EQUITY JURISDICTION—SUIT FOR ACCOUNTING—ADEQUATE REMEDY AT LAW.

Complainant insured defendants, who were building contractors, against liability for injuries to their employes, or to others through the negligence of their employes, the stipulated premiums being based upon a percentage of the amount paid by defendants in wages during the term of the policies. An estimate of such amount was made at the beginning, and premiums paid thereon, the contract providing that defendants should make a statement at the end of the policy period of the actual amount in accordance with which the premium should be readjusted by a rebate or additional payment. *Held*, that a bill alleging that defendants refused to make such statement, fraudulently claiming that their pay rolls were no larger than estimated, did not state a cause of action for relief in a federal court of equity for a discovery and accounting, the remedy at law being adequate, in view of Rev. St. § 724 [U. S. Comp. St. 1901, p. 583], giving the right to compulsory orders for the production of books and papers.

In Equity. On demurrer to bill.

Thomas Raeburn White, for complainant.

Bell & Rhoads, for respondents.

J. B. McPHERSON, District Judge. The brief of complainant's counsel accurately outlines the case made by the bill in the following language:

"As set forth in the bill, the plaintiff corporation is engaged in the business of insuring employers of labor against loss on account of liability incurred by them through injuries suffered by their employees, or occasioned to others by their negligence. The defendants, who are contractors and builders, were so insured by the plaintiff during the year 1902-1903, several policies being issued to them on May 28, 1902, covering the various classes of risks. It is obvious that the risk assumed by the insurer is commensurate with the number and character of the employes of the insured. The premiums, therefore, are based upon a percentage of the total amount paid out in wages by the insured during the policy period. As it is impossible to accurately determine in advance what the pay roll during any particular period will be, it is customary for the insured to submit an estimated pay roll at the beginning of the policy term, pay premiums based upon the estimate, and then for an accounting to be taken at the end. At that time, if the pay roll has proven to be less than the estimated amount, the insurer returns a stipulated portion of the premium; on the other hand, if it proves to be greater than the amount estimated, the insured pays an additional premium upon the excess. Such an agreement, with mutual covenants to pay rebates and excess premiums, as indicated, was made between the parties in this case. To further protect itself, the plaintiff required covenants, which were duly entered into by the defendants, to render written statements of the amounts of the pay rolls at the end of the year, under oath, if required, and to allow the plaintiff or its agents to inspect their books 'at all reasonable times' to satisfy itself as to the accuracy of the various estimates made.

"The policies issued for the year mentioned were accepted by the defendants, the premiums based upon the estimated pay rolls were duly paid, and the plaintiff indemnified them according to the contract.

"The bill then avers that many of the pay rolls of defendants were much greater than the amount estimated by them at the beginning of the year, and therefore a duty was imposed upon them by the contract to account for the excess; but that they falsely averred that the actual pay rolls were no

greater than the estimated amounts, declined to furnish written statements, and refused to allow the plaintiff to examine their books, although, under the contract, it was entitled to do so. It then concludes with a prayer for an accounting, for discovery, and for general relief."

The demurrer is put upon several grounds, of which one only need be considered. In my opinion, the remedy at law is complete and adequate. All that the complainant needs to know is the single fact whether the sum actually paid out by the defendants during the year exceeded the sum that was estimated when the policies were taken out. As soon as this fact is known, the complainant's case is either made out or is lost; and, if made out, the measure of damages is also established. There are no mutual or complicated accounts to unravel. There is no relation of trust, properly so called, between the parties; and the only fraud charged is the defendants' declaration that "the actual amount of said pay rolls was no greater than the estimated amount." If this is not the truth, the wrong can be fully remedied by compelling the production of the necessary books and papers in a suit at law. It is not necessary that the precise amount (if any) that is due by the defendants should be known to the complainant before the suit is begun. If the company claims enough to be on the safe side, the exact sum can be found out afterwards without doing harm to any one. The case is not distinguishable, I think, from *Safford v. Ensign Mfg. Co.*, 120 Fed. 480, 56 C. C. A. 630, recently decided by the Circuit Court of Appeals for the Fourth Circuit. Section 724 of the Revised Statutes [U. S. Comp. St. 1901, p. 583] seems to furnish all the remedy that is needed in the present case. That section reads as follows:

"In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

The demurrer is sustained, and the bill is dismissed, at the costs of the complainant.

In re HAYWARD.

(District Court, E. D. Pennsylvania. June 2, 1904.)

No. 614.

1. BANKRUPTCY—LANDLORD'S LIEN—NECESSITY OF PROVING CLAIM.

A landlord, having a lien or charge for the rent due him on the property of his tenant at the time of the latter's bankruptcy, but the amount of which was unadjudicated, in order to preserve his right to priority, must establish his claim by proof under the bankruptcy act, the same as other creditors.

In Bankruptcy. On certificate of referee concerning landlord's claim for rent.

Ira Jewell Williams, for landlord.

Alfred Aarons and Henry N. Wessel, for objecting creditors.

J. B. McPHERSON, District Judge. Sections 83, 84, and 85 of the Pennsylvania act of 1836 (P. L. 777) on the subject of executions provide as follows:

"Sec. 83. The goods and chattels being in or upon any messuage, lands or tenements, which are or shall be demised for life or years, or otherwise taken by virtue of an execution, and liable to the distress of the landlord, shall be liable for the payment of any sums of money due for rent at the time of taking such goods in execution: Provided, that such rent shall not exceed one year's rent.

"Sec. 84. After the sale by the officer, of any goods or chattels as aforesaid, he shall first pay out of the proceeds of such sale, the rent so due, and the surplus thereof, if any, he shall apply towards satisfying the judgment mentioned in such execution: Provided, that if the proceeds of the sale shall not be sufficient to pay the landlord, and the costs of the execution, the landlord shall be entitled to receive the proceeds after deducting so much for costs as he would be liable to pay in case of a sale under a distress.

"Sec. 85. Whenever any goods or chattels liable to the payment of rent as aforesaid, shall be seized in execution, the proceedings upon such execution shall not be stayed by the plaintiff therein, without the consent of the person entitled to such rent, in writing first had and obtained."

The effect of these sections, as declared by the Supreme Court of the state in Barnes' Appeal, 76 Pa. 50, is—

"To create a charge in favor of the landlord for rent, not exceeding one year's, upon the goods liable to the distress of the landlord for this rent in and upon the demised premises at the time of taking such goods in execution. After the sale, the officer is required to pay the rent first out of the proceeds and apply the surplus only to the execution. * * * Moreover, after a levy on goods liable to distress the plaintiff in the execution cannot stay proceedings without the consent of the landlord first had in writing. Thus, call the charge a lien, or by any other name, it is clear the rent of the landlord is a prior charge by law, and the sale under execution is for the benefit of the landlord."

When, therefore, an execution was levied on May 28, 1900, upon the bankrupt's personal property on the demised premises, the levy was subordinate to the landlord's claim for rent, which was fully protected by the statutory charge or lien. If a sale had taken place, the claim would no doubt have been paid, but on June 4th the bankrupt filed a voluntary petition, an adjudication thereon was duly entered, and a restraining order was issued forbidding the execution creditor to proceed with the levy. On June 5th the landlord issued a distress warrant, which was levied upon the goods, but apparently was afterwards abandoned. Assuming for the present that the distraint was lawful, although an adjudication had already been entered (*Butler v. Morgan*, 8 Watts & S. 536), it is evident that the levy gave the landlord no better right than he already had; and, moreover, as the distraint was not proceeded with according to the Pennsylvania statute concerning distress for rent, it became ineffective and may therefore be disregarded. The personal property came into the trustee's hands and was sold several months afterwards, producing the fund now in dispute. In September, 1900, the landlord served a written notice of his claim upon the trustee, but he has never made proof thereof as required by the act. In November, 1902, he applied to the referee

for an order directing the trustee to pay to him the fund in hand (which is less than the claim), and upon the final refusal of such an order, he has had the question certified to the court.

Upon these facts, Referee Mason refused the order on the ground that no lien had been obtained before the bankruptcy proceedings were begun, and that the landlord, although a creditor entitled to priority of payment, was not thereby relieved from the need of proving his claim like other creditors. Referee Amram heard some additional testimony after the death of Mr. Mason, and also refused the order, upon the ground that even if it be assumed that the oral notice of his claim, which the landlord gave to the sheriff before the petition in bankruptcy was filed, created a lien on the goods, nevertheless this was a lien obtained through legal proceedings and was avoided by section 67, cl. "f." Bankr. Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]. Having no lien, he was bound to prove his claim within a year, and his failure to do so was fatal. I think each of these positions is correct in part. The landlord certainly had a lien, or a charge of some sort, before the bankruptcy proceedings were begun, but whether it was obtained through legal proceedings need not be decided now. However it may have been obtained, it existed in fact at that time, and if it had been protected by complying with the requirements of the bankrupt act concerning proof, the landlord's priority would have continued, but from the nature of the lien it was necessary that it should be proved. It was, so to speak, a secret charge. Creditors had no implied notice of its existence, and might not know of it in fact. Its amount having never been judicially determined, there was no presumption that the sum was correct. Of such a claim mere notice to the trustee could not be sufficient proof; nothing could prove it except the formalities and the evidence required by the act. I see no reason why a claim for rent should not be subjected to examination and attack by other creditors in the same manner as a claim for merchandise or for money lent.

The decision of the referee is affirmed.

YOCUM et al. v. PARKER et al.

SAME v. KENNEDY et al.

(Circuit Court, W. D. Missouri, St. Joseph Division. March 23, 1903.)

1. WILLS—CONSTRUCTION OF DEVISE—ESTATE OF DEVISEE.

The statute of Missouri requires "all courts and others concerned in the execution of last wills to have due regard to the directions of the will, and the true intent and meaning of the testator in all matters brought before them." Rev. St. 1845, p. 1086, § 51 (Rev. St. 1899, § 4650). The will of a testator who at the time of his death was a resident of Missouri contained the following devise of the land on which he then resided: "To my beloved son, * * * my natural son, I bequeath absolutely [the described land] * * * with the express understanding and restriction, namely, that if my said son dies without legal issue, descendants of his, legitimate issue of his, said lands shall pass to [other persons named]."

Held, that it was not the intention of the testator to give the son a life estate only in case he should have legitimate children, with remainder to such children, but that, construing the will in conformity to the statutory requirement, which but emphasizes the general rule, the son, on the birth of a legitimate child, became vested with title to the land in fee simple.

Actions in Ejectment. On motions by defendants for judgment on the pleadings.

These are suits in ejectment for different parcels of land, growing out of the same title. The petitions in respect of diverse citizenship allege that "plaintiffs state that Oscar M. Yocum, one of the plaintiffs herein, is a resident and citizen of the state of Colorado, and that John W. Yocum, the other plaintiff herein, is a resident and citizen of the state of Idaho; that all of the defendants herein are residents and citizens of the state of Missouri, and reside in the county of Platte, in the state of Missouri." The premises sued for lie in Platte county, in this district, and are conceded to be of a value exceeding \$2,000 in each case. While the answers tender the general issue, except as to matters not specifically admitted, they state that George W. Yocum died in September, 1854, seised in fee of the demanded premises, leaving a last will, which was duly probated, which will contained the paragraph set out in the following opinion of the court. The defendants claim title through mesne conveyances from William Franklin Yocum, the devisee named in said fifth paragraph of the will. The answers then pleaded former suits in ejectment by plaintiffs against one of the defendants, Susan Siler, and her tenants in possession of said lands, brought in the Platte circuit court, which resulted in a judgment for the defendants, which, on appeal to the Supreme Court, was affirmed, and is reported in volume 160 of the Missouri Reports, commencing at page 281, 61 S. W. 208. The answers alleged that said paragraph of said will was construed by the Supreme Court on said appeal in favor of the fee-simple title acquired by said William Franklin Yocum, devisee under said will. The plaintiffs in their reply to said answers admitted the facts stated in the third paragraph of the answers; setting up said will of George W. Yocum, the common source of title, and admitting that the title of William Franklin Yocum came through said will, and which had passed by mesne conveyances to the defendants; admitting that said William Franklin Yocum married and died as charged in the answers, and that the plaintiffs were two of the children born of said marriage. The reply was so framed as to present to the court for its construction, and as the governing question in the case, the provision of said will as to whether or not said William Franklin Yocum, by his marriage and having children born in lawful wedlock, held the title of the land in question in fee simple. On the pleadings, therefore, the defendants move for judgment.

Vinton Pike and J. B. Shackelford, for plaintiffs.
J. W. Coburn and B. R. Vineyard, for defendants.

PHILIPS, District Judge (after stating the facts). These are actions of ejectment for the recovery of certain lands in Platte county, in this district. The defendants have filed motions for judgment on the pleadings. And as the two cases involve the same questions of law and fact, they are submitted jointly to the court.

Both parties claim title under the will of George W. Yocum, which was admitted to probate in Platte county, Mo., in 1854; and the controversy arises on the fifth paragraph of said will, which is in words and figures as follows:

"5. To my beloved son, William Franklin Yocum, my natural son, I bequeath absolutely the northeast quarter of section seven of township fifty-three and range thirty-five, the place I now reside on in Platte County, Missouri, subject forever to the reservation for my burial place, made in clause two of this will, and, further, with the express understanding and restriction, namely, that if

my said son dies without legal issue, descendants of his, legitimate issue of his, said lands shall pass to Susan Evans, wife of Joseph B. Evans; Marina Botts, wife of Thomas Botts, Eliza Botts, wife of William Botts, my nieces; to Elizabeth Frame, my sister, wife of John Frame, and to George, son of my brother Stephen Yocum, and Jane Yocum, wife of Milford Yocum, deceased, my sister, in equal parts."

The plaintiffs claim title as lineal heirs of the devisee, William Franklin Yocum; and defendants claim title under a deed of conveyance made by said William Franklin Yocum after his father's death and the birth of legitimate children.

I will not enter into discussion of the questions raised in this case respecting the doctrine of estates of entail and in perpetuity, on which has been expended such a vast wealth of legal learning by the English and American courts, and to which the Supreme Court of this state, in *Yocum v. Siler*, 160 Mo. 281, 61 S. W. 208, discussing said provision of said will, and the respective counsel in this case in their briefs, have made such valuable contributions, much of which, however, is more academic than useful. Looking to the trend of legislation on this subject in this state, beginning in 1825, touching estates tail, and the state statute respecting the rule to be observed in the construction of wills, and guided by plain, common, practical sense, we are to answer the question, what did the testator intend in devising this land to his natural son, William Franklin Yocum? Evidently he wanted him to have this land "absolutely," to do with as he pleased, subject to but one contingency—that of the birth of legitimate children. Recasting, by transposition, the structure of said paragraph of the will according to its evident sense, it would read thus:

"To my beloved son, William Franklin Yocum, my natural son, I bequeath [devise] absolutely, in the event he dies having legal issue, descendants, legitimate issue of his, the following lands [describing them]; but if he should die without having such issue then said lands shall pass to [the persons designated]."

When such issue was born to the son the contingency on which the absolute estate was dependent occurred, and thereupon the estate in the son became complete in fee simple. Evidently, it seems to me, the testator had no other thought respecting the lineal heirs of the son than that their coming into existence should complete and seal the absolute estate of the son. He had no purpose to create in this "beloved natural son" a mere life estate in the event of legitimate children born to him, with the remainder in such children. To hold otherwise, with all due respect, would cut to shreds, upon the sharp edge of legal technicalities, the wishes of the dead respecting the estate he desired the son, so near to his heart, to have when there should come into his life children, the offspring of lawful wedlock. Encouraging him against an example which perhaps had caused some anxiety in his own life, he made the absolute estate in the son to depend upon the birth of legitimate children. After the birth of such children, to limit the son's interests to a mere life estate would be to read out of the granting part of the devise the word "absolutely," and to import into the grant the customary apt words essential to the creation of an estate in remainder in the children.

The state statute commands "all courts and others concerned in the execution of last wills to have due regard to the directions of the will, and the true intent and meaning of the testator in all matters brought before them." Rev. St. 1845, p. 1086, § 51 (section 4650, Rev. St. Mo. 1899). Observing this direction, which is but a statutory emphasis of one of the general canons for the construction of wills, and the wholesome rule that, when the words employed by a testator in the first instance indicate a purpose in his mind to give the entire interest and benefit of the estate devised absolutely to the beneficiary, "it will not be cut down to any less estate by subsequent or ambiguous words, inferential in their intent" (*Lamb v. Eames*, L. R. 10 Eq. Cas. 266; *Clarke v. Leupp*, 88 N. Y. 228; *Small v. Field*, 102 Mo. 104, 14 S. W. 815; *Yocum v. Siler*, 160 Mo. 289, 61 S. W. 208), I hold that the law of the case is with the defendants, and the motion for judgment in favor of defendants is sustained.

MERCANTILE TRUST CO. v. UNITED STATES SHIPBUILDING CO. et al.

(Circuit Court, D. New Jersey. June 30, 1904.)

1. FORECLOSURE—INTERVENTION BY BONDHOLDER.

In a suit by a trustee to foreclose a mortgage given by a corporation to secure its bonds, all of the bonds being valid as against the corporation, a holder of a part of the bonds will not be permitted to intervene before decree for sale for the mere purpose of litigating a claim to priority over other bondholders; that being a question which can be litigated before the master on application for distribution of the proceeds of the sale.

In Equity. Suit to foreclose mortgage. On petition of Ida E. Wood to intervene as party defendant.

Clarence J. Shearn, for petitioner.

R. V. Lindabury, for James Smith, Jr., receiver.

W. W. Green, for Mercantile Trust Co., trustee.

F. W. M. Cutcheon, for New York Security & Trust Co., trustee.

W. J. Curtis, for reorganization committee.

LANNING, District Judge. This is a suit for the foreclosure of a mortgage given by the United States Shipbuilding Company to the Mercantile Trust Company as trustee. The mortgage secures bonds of the shipbuilding company of the face value of \$15,030,000. Ida E. Wood, the petitioner, seeks permission to intervene as a party defendant. By her petition she alleges that she is the owner of bonds secured by the mortgage of the face value of \$200,000, which she purchased in 1902 for \$195,000 in cash. Her claim is that a large part of the bond issue is tainted by fraudulent representations and acts of the promoters of the shipbuilding company; that some of these bonds were issued to and are still held by the promoters, or by assigns of the promoters who had notice of the alleged infirmity of the bonds; and that she, a purchaser for value and in good faith, has equities superior to the rights of these other bondholders. The foreclosure case has progressed to the point where, in the usual course of procedure, a decree

for the sale of the mortgaged premises should be made. A draft of such decree was submitted to the court with the petition.

As against the shipbuilding company, the bonds are valid, and as against it the Mercantile Trust Company, trustee, is entitled to a decree of sale. The question which the petitioner seeks to litigate relates simply to her status before other bondholders, and to her rights and equities compared with theirs. It is not necessary for her to intervene as a party defendant for the purpose of litigating that question. She can assert her superior equities, if she has any, and maintain them when the bonds are produced for proof before the master on an application for a decree of distribution. *Dickerman v. Northern Trust Co.*, 176 U. S. 193, 194, 20 Sup. Ct. 311, 44 L. Ed. 423. The decree of sale now presented to the court has been carefully framed so as to secure to her the fullest opportunity to contest, at the proper time, the rights of any other bondholder. This is not the proper time for instituting such a contest, and the petition must be denied.

INDEPENDENT BAKING POWDER CO. v. BOORMAN.

(Circuit Court, D. New Jersey. February 29, 1904.)

1. EQUITY PLEADING—ANSWER—IMPERTINENCE.

In a suit to enjoin infringement of a trade-mark, allegations in the answer that complainant acquired and uses the trade-mark pursuant to a conspiracy with a manufacturer, which is not a party to the suit, for the purpose of destroying the competition of the article sold by defendant with the product of such manufacturer, in violation of the anti-trust law, are impertinent and irrelevant, and will be stricken out on exception.

In Equity. On exceptions to answer.

Archibald Cox, for complainant.

Philip Carpenter, for defendant.

GRAY, Circuit Judge. This is a suit in equity brought to restrain the alleged infringement of a trade-mark. It comes now before the court on exceptions filed by the complainant to certain portions of the answer of the defendant.

The bill of complaint alleges that the Independent Baking Powder Company, and its predecessors, have been continuously and uninterruptedly engaged in the manufacture and sale of a baking powder known as "Solar Baking Powder," for a period of not less than 17 years last past, and the facts which support the complainant's title are set out in detail. It is alleged that the baking powder was first put upon the market about the year 1895, by Sherman Bros. & Co., of Chicago, Ill., and that the word "Solar" was at that time selected and used by said firm in advance of all others, as a trade-mark and a trade-name; that said firm continued to manufacture and sell the said Solar Baking Powder, without interruption, until the year 1900, when it sold its business, together with its right to the trade-mark "Solar," to one Engler, who proceeded at once to incorporate the complainant company, by whom said Solar Baking Powder has been made and sold ever since. It is alleged that the complainant and its predecessors have

at all times, and from the first, enjoyed the exclusive right to the use of the said word "Solar," as a trade-mark and trade-name for baking powder, and that their right has been recognized and acquiesced in by the trade and public, without dissent. It is alleged that, by reason of the premises, and the priority of adoption, and the long and continued use of its said trade-mark, the complainant is the owner thereof and entitled to be protected in its exclusive use. The bill also avers that, "even if by proof to your orator unknown, it be made to appear that your orator is not entitled to the exclusive use of the word 'Solar,' as its trade-mark, the acts of the defendant hereinbefore recited" amount to unfair competition, which is alleged in the usual form.

The answer is voluminous. It traverses the allegation of title in the complainant to the trade-mark "Solar," denying and attacking the grounds upon which it claims an exclusive property right therein, alleges that its use was fraudulent, inconsiderable, infrequent and confined to only a portion of the United States, that its use was in connection with other marks for the same baking powder, that it was used upon a cheap and inferior product, detrimental to health and injurious to life, that it was used in connection with a label alleged to have been a fraudulent imitation of a label used upon Royal Baking Powder, and that its use was abandoned some time prior to the transfer to Engler, and for these reasons, that "Solar" was not a valid trade-mark, when used by Sherman Bros. & Co. in 1885 and thereafter. The answer also denies and attacks the validity of the transfer to Engler, and alleges that since the transfer, the character of the product has been altered by substituting phosphate for alum, as one of the ingredients, and in other respects has been deceptive and fraudulent. It also alleges that the title of the Solar Baking Powder Company (the manufacturer and real defendant back of the nominal defendant, who is a mere dealer) is legal and superior to that of the complainant, and was adopted and used in good faith by the predecessors of the Solar Baking Powder Company, to whom it was transferred in 1901. All the material allegations in complainant's bill are thus denied, and the answer, in its scope as above indicated, fully and at length presents to the court the issues upon which complainant's right to maintain its suit may be determined. The answer as thus outlined is not excepted to by complainant.

Defendant, however, has gone further, and in a number of paragraphs set out in full by the complainant, in its exceptions, has raised the issue, that complainant acquired the trade-mark "Solar," and has since used it, as the result of a conspiracy for the purpose of destroying the competition of the baking powder of the manufacturer, under whom the defendant claims, with the baking powder of the Royal Baking Powder Company. This conspiracy is alleged by the defendant to be unlawful and in violation of the Sherman act, as being in restraint of trade between the states, and tending to create an unlawful monopoly. The allegations of the answer to this effect are made at considerable length, and are the substance of ten paragraphs thereof. To these paragraphs the complainant has excepted, as being impertinent, irrelevant, immaterial and scandalous, and as containing no defense to complainant's allegations.

Undoubtedly, the issue with which the court will be concerned at the final hearing will be, whether or not the complainant has established, by long and continuous use by its predecessors and itself, a right to claim as its exclusive property the trade-mark "Solar." It would unjustifiably embarrass the consideration and determination of this issue, to introduce a question as to the motives controlling complainant in the use of its trade-mark, and in prosecuting those who infringe it. The grounds upon which a valid trade-mark may be acquired, and property therein asserted, could not be affected by showing a conspiracy between complainant and Royal Baking Powder Company, to destroy the competition of the real defendant, the Solar Baking Powder Company. As said by counsel for complainant, assuming that "Solar" is a valid trade-mark, and the property of the complainant, it is immaterial to investigate either the motives with which the property right is asserted, or the complainant's relations with the Royal Baking Powder Company, or the relations of that company with other manufacturers, and whether they are within the prohibitions of the Sherman act. It does not tend to foster monopoly to sustain the right, if one has acquired it, to the exclusive use of a trade-mark. The establishment of such a right does not restrain in any degree the manufacture or sale by others of the article or commodity to which the trade-mark is attached. It is simply the protection of property. By granting such protection, the law enables the public to exercise a free choice between two products, and compels competing products to be sold without deception as to their source of production and manufacture. The complainant in this case is not seeking to prevent the manufacture of baking powder by the defendant, but only to prevent him from using a mark or brand that would tend to induce purchasers to believe that defendant's article was really the manufacture and production of complainant. So far, then, as the portions of the answer excepted to merely raise the question, whether the Royal Baking Powder Company is not so related in interest to the complainant as to be the real party to the suit, they are improperly introduced. So far as the matter is material, it should have been introduced into the pleadings by a plea in abatement, which would have been determined by itself at the threshold of the case, without embarrassing the trial of the principal and material issues. So far as the portions of the answer excepted to charge a conspiracy between complainant and the Royal Baking Powder Company and others, if others there be, for the purpose of erecting a monopoly in restraint of trade between the states, and in alleged violation of the act of Congress, known as the "Sherman Act," the same are clearly impertinent and irrelevant. They throw no light upon the real issue, but, by the introduction of a collateral issue, tend to embarrass and confuse the consideration of the same. The introduction of such an issue calls upon this court to determine in its adjudication of certain property rights between complainant and defendant, the question, whether the complainant and one not a party to the suit have committed a misdemeanor, by violating the act of Congress referred to. This collateral determination, the court cannot undertake to make.

Guided by these general views, we proceed to examine the exceptions. The first exception is allowed as to the words "and pursuant to a fraudulent conspiracy with the Royal Baking Powder Company, a corporation organized under the laws of the state of New Jersey, and having its principal place of business in New York City," and as to the words "with the baking powders manufactured and sold by said Royal Baking Powder Company."

The eighth exception, which is to the allegations contained in paragraph No. 35, is disallowed, except as to the following language at the end of said paragraph, to wit: "That the complainant has been and is manufacturing and offering for sale its said baking powder, and committing the acts aforesaid solely in the interests of the said Royal Baking Powder Company, and for the purpose of destroying the competition of the said Solar Baking Powder Company and its predecessors with the baking powders of the said Royal Baking Powder Company," as to which language the exception is allowed.

The allegations contained in all the other paragraphs of the answer excepted to, are admitted by the defendant in his brief, to have been either by way of inducement to the charge of conspiracy to violate the Sherman act, or to have been allegations as to the real interests of the Royal Baking Powder in the subject-matter of this suit, or of acts done by its authority and contrivance in furtherance of the alleged conspiracy. The exceptions to these paragraphs, to wit, exceptions 2, 3, 4, 5, 6, 7, 9, 10, 11 and 12 are allowed.

It is to be observed, that the bill of complaint not only charges an infringement and violation of its property right in the trade-mark alleged to have been lawfully acquired and owned by it, but also charges unfair competition. The consideration of this charge involves a wider scope of inquiry than the one relating to the infringement of the trade-mark. It does not, it is true, permit a limitless range of inquiry, or the introduction of whatever matters may suggest themselves to the defendant, however remote their bearing may be upon the real issues of the case, and it does not justify the defendant in entering into the wide domain of impertinent and irrelevant matter, the character of which has been indicated by what has already been said. However, lest in striking out the paragraphs excepted to and disallowed, allegations pertinent to the real issues, but not easily separable from the impertinent parts of the said paragraphs and not elsewhere contained in the answer, may have been eliminated therefrom, leave is hereby given to the defendant, if he so desire, to supplement and amend his answer in these respects within the lines indicated in this opinion.

FOLSOM et al. v. GREENWOOD COUNTY.

(Circuit Court, D. South Carolina. June 2, 1904.)

1. COUNTIES—INDEBTEDNESS—LIABILITY FOR DEBTS OF DISSOLVED TOWNSHIP.

A county in South Carolina, which, under the Constitution and laws of the state, can levy taxes only for specified county purposes, and has no power to contract obligations except such as are expressly or by necessary implication authorized by statute, cannot be adjudged by a federal court liable for the payment of bonds issued before the county was created by a township which was at the time a body corporate forming part of another county, but has, since its territory was included in the new county, been dissolved by a constitutional amendment; no provision having been made by the state for the payment of its debts.

At Law. Action at law on township bonds. On demurrer to complaint.

Shields & Mountcastle and H. J. Haynsworth, for plaintiffs.

F. B. Grier, J. B. Park, J. Wm. Thurmond, and C. C. Featherstone, for defendant.

BRAWLEY, District Judge. This case comes up on demurrer to the complaint, wherein the plaintiffs above named, citizens of Tennessee, seek a money judgment against the county of Greenwood upon certain overdue bonds and past-due coupons of the township of Ninety-Six. The prayer for judgment is:

"(1) Judgment against the defendant herein for the sum of \$1,000, being the amount of bonds alleged to be due, with interest thereon from March 25, 1902, at the rate of 7 per cent. per annum, and the further sum of \$6,230, being the amount of coupons alleged to be due, with interest on the respective coupons from the time of their maturity, respectively; (2) that said judgment be payable out of the general county funds by taxation upon the property within the county; or (3) by taxation upon the property within the limits of Ninety-Six township, as formerly established; (4) for such other and further relief as may be just in the premises, and for the costs of this action."

The validity of the bonds in question was established by the decision of the Supreme Court of the United States in *Folsom v. Ninety-Six*, 159 U. S. 611, 16 Sup. Ct. 174, 40 L. Ed. 278, and judgment was duly entered in this court against the township of Ninety-Six at the October term, 1896, for the amount of the past-due bonds and coupons then sued on. The township of Ninety-Six was declared to be a body politic and corporate under and by virtue of an act of December 23, 1882, chartering the Greenville & Port Royal Railroad Company, and acts amendatory thereof, and certain townships were by that act authorized to subscribe to the capital stock of such railroad company, and to issue coupon bonds in payment of such subscription, and the county commissioners of the respective counties were declared to be corporate agents of the townships so incorporated. 19 St. at Large S. C. pp. 239-241.

The township of Ninety-Six at the time of the execution of the bonds was situate in the county of Abbeville. Subsequently, by virtue of an ordinance of the constitutional convention in the year

¶ 1. Effect of dissolution and reincorporation of municipal corporation on indebtedness, see note to *City of Uvalde v. Spier*, 33 C. C. A. 506.

1895, the county of Greenwood was formed out of portions of Edgefield and Abbeville counties, and the territory comprised within the limits of Ninety-Six township was embraced in Greenwood county. By an amendment to the Constitution ratified February 3, 1903, the corporate existence of certain townships, including Ninety-Six township, was destroyed, and all offices under such townships were abolished, and all corporate agents removed. The defendant demurs to the complaint on the ground that it does not state facts sufficient to constitute a cause of action against the defendant county, and specifies as follows:

"(1) That the complaint shows on its face that plaintiffs are not entitled to the relief demanded or to any relief whatever against the defendant county, because: (a) That the obligation sued on is such that Greenwood county is absolutely without power to pay or discharge by taxation any judgment which might be rendered thereon against said county. (b) The said judgment could only be paid by taxation. Taxation is not a judicial function, but is entirely a legislative function. (c) The defendant county in all cases is only liable on such obligations as it has power to pay by taxation.

"(2) The complaint shows on its face that the defendant county was entirely without power or authority to contract the obligation sued on, and shows on its face affirmatively entire immunity on behalf of the defendant county from the alleged obligation or any liability thereon.

"(3) The complaint fails to state any facts tending to show any power or authority in the defendant county from the Legislature, or under the Constitution, either expressly or by implication, authorizing it to incur, assume, or become liable for the obligation sued on.

"(4) The complaint fails to state any facts showing that the defendant county is the successor, in law or in fact, of the defunct townships, or that the said townships merged into the defendant county.

"(5) The complaint shows on its face affirmatively that the obligation sued on is that of the township of Ninety-Six, which it had the power to contract and make, and which it did, in law and fact, make, contract, and enter into, and fails to state any facts tending to show that the defendant county issued, indorsed, adopted, ratified, or assumed, either expressly or by implication, the said township obligations, and fails to state any power whereby it could issue, indorse, adopt, ratify, or assume the said township obligations, or in any wise incur any liability thereon."

The bonds sued on appear on their face to be obligations of the township of Ninety-Six, and the act under which they were issued required that there should be assessed annually upon the property of the township such per centum as might be necessary to pay interest on the bonds subscribed, and further it was provided that all taxes collected from the railroad constructed through the township should be applied to the payment of such interest. It is not alleged that any taxes have been collected by the county of Greenwood for the purpose of paying such interest, or that there is any fund in the hands of the corporate authorities of such county applicable to this purpose, and it appears that the railroad in aid of which said subscription was made was never constructed; and therefore it will follow that the county of Greenwood is without means to pay any judgment rendered against it, except by taxation, and in support of the demurrer it is claimed that, under the Constitution of South Carolina, Greenwood county is limited in its power to levy and collect taxes to the following purposes, to wit:

"For educational purposes; to build and repair public roads, buildings and bridges; to maintain and support prisoners; pay jurors, county officers, and

for litigation, quarantine, and court expenses, and for ordinary county purposes; to support paupers, and pay past indebtedness." Const. 1895, art. 10, § 6.

It is well established in South Carolina that counties can contract no obligations except such as are authorized expressly or by necessary implication by some statute. The Supreme Court of the State, in *Cope v. Hampton County*, 42 S. C. 20, 19 S. E. 1019, says:

"This court has had occasion heretofore to hold that counties, being merely parts of the state government, may partake of the state's immunity from liability. The state is not liable except by its own consent, and so the county is exempt from liability unless the state first consented. Their liabilities, whether grounding in tort or contract, are mere creatures of statutes, and they possess no power and can incur no obligations except such as are expressly provided for by statute. In the absence of statute, there is no county liability."

The act creating the county of Greenwood (22 St. at Large S. C. p. 612) provided that it should assume its pro rata share of certain indebtedness of the counties of Abbeville and Edgefield, apportioned by a commission appointed by the Governor. The commissioners so appointed made the apportionment, and the indebtedness which Greenwood county assumed was thereby fixed and determined. At that time the township of Ninety-Six was a body politic and corporate; it contracted the debts now sued on, and was liable for them; and the county of Greenwood in no way assumed, or did the Legislature in any manner impose upon it, the independent debts of the township, and no statute has been brought to my attention which imposes the obligation to pay these bonds on the county of Greenwood. There would seem, then, to be no other or greater obligation on the part of the county of Greenwood to assume this indebtedness, than there would be to assume the indebtedness of any other municipality within its territorial limits. The city of Greenwood doubtless owes debts. If its charter was repealed, and its corporate existence destroyed, it could be as well contended that the county of Greenwood was liable for its indebtedness, because the territory embraced in the city was merged in the county, as it can be that the said county is liable for debts of Ninety-Six township, which at the time of their creation was as much an independent corporation as the city of Greenwood now is.

The plaintiffs rely for sustaining this action upon *Davenport v. Dodge County*, 105 U. S. 241, 26 L. Ed. 1018, and the line of cases following it. In the *Dodge County Case* the bonds were issued by the county commissioners for Dodge county, and recited that "Fremont precinct, in the county of Dodge, is indebted," etc., and the Supreme Court says:

"The bond implies an obligor bound to do what it is agreed shall be done. Precincts in Nebraska are all political subdivisions of the county. They have no corporate existence, and cannot contract or be contracted with. They have no corporate officers, and can neither sue nor be sued. Certain officers are elected by the voters of the precincts for political, administrative, and judicial purposes, but they are in no sense the representatives of the people of the territory as a municipality." *State v. Dodge County*, 10 Neb. 20, 4 N. W. 370.

Precincts are governed by the county commissioners, the governing board of the county, and by the appropriate officers of the state. Their

relation to a county is like that of a ward to a city; having no corporate existence, no separate municipal authority. "They cannot," says again the Supreme Court of the state in the case last cited, "enter into contracts, directly or indirectly, nor assume obligations which the court might be called on to enforce. Hence the precinct cannot become the obligor of present bonds, and we think it follows that the county which thus has a corporate existence, and can contract and be contracted with, and upon whose officers is imposed the duty not only of issuing the bonds, but of providing for the payment of them, is a political entity bound by the obligation and charged with the debt created thereby." The judgment went against the county for the reasons thus stated. It was because the precincts had no corporate existence, and because the county commissioners issued the bonds in their behalf, that the county became liable to be sued. The reasons failing, the rule fails, for here the township was incorporated, and the bonds were issued in the name of the township, and by its corporate agents. Nor does it seem to me that the action of the plaintiff can be supported by the cases relied on, such as *Broughton v. Pensacola*, 93 U. S. 266, 23 L. Ed. 896, *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 25 L. Ed. 699, etc., which rest upon this principle, thus stated in *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620: "Where the Legislature of a state has given a local community, living within designated boundaries, a municipal organization, and by a subsequent act or by a series of acts repeals its charter and dissolves the corporation, and incorporates substantially the same people as a municipal body, under a new name, for the same general purposes, and the great mass of the taxable property of the old corporation used for public purposes is transferred without consideration to the new corporation for the same public uses, the latter is the successor, in law, of the former, and liable for its debts"—for the facts here make such rule inapplicable. If Greenwood county was composed substantially of the same territory as Ninety-Six township, and was the same corporation under a new name, the case would be governed by the principle announced in the cases cited, but such is not the fact. Ninety-six township is but one of many townships which are embraced in the territory of Greenwood county. Most of them have no connection with Ninety-Six, except territorial propinquity. Some of them—notably Greenwood township—were expressly forbidden by the act under which Ninety-Six township made its subscription to incur any obligation of that nature. The people of Ninety-Six township, seduced by the delusive promises of adventurous promoters, and in the expectation of benefits to be derived from the construction of a railroad through its territory, voted for a subscription; and its bonds were improvidently issued, and allowed to be put upon the market, without adequate provision for the securing of the expected benefits. The Supreme Court of the United States has decided that these bonds, in the hands of bona fide holders, are valid obligations of Ninety-Six township, which was an independent corporation. It will be manifestly unjust to impose upon the other townships comprising Greenwood county, which were more provident, and refused to make a subscription, any obligation in respect to an indebtedness which they

never incurred or assented to. This case seems to fall within the rule stated in *Meath v. Phillips County*, 108 U. S. 553, 2 Sup. Ct. 869, 27 L. Ed. 819. In that case the question was whether a decree could be recovered against a county upon certain drafts drawn by the levee inspectors, and certain bonds issued by the county clerk of the county under the provisions of an act which provided for the division of the overflowed lands of the county in the levee districts for the purpose of reclaiming the lands, and for the taxation of such lands to pay the expenses incurred in their behalf. The county court was then to levy a tax upon the property charged to be collected, like other taxes, and, when collected, was to be disbursed on the drafts of the inspectors. The court held that the county court acted, not as the representative of the county, but of the district, and says:

"The case of the County of Cass v. Johnston, 95 U. S. 360 [24 L. Ed. 416], and of *Davenport v. Dodge County*, 105 U. S. 237 [26 L. Ed. 1018], presented entirely different facts. In the Case of the County of Cass the law provided in terms for an issue of bonds in the name of the county, and in that of the County of Dodge we construed the law to be in effect the same. Consequently there were in those cases obligations of the counties payable out of special funds. Here, however, there was a manifest intention to bind the levee districts only by the obligations incurred, and not to make the county, in its political capacity, responsible for the payment of the debts that were created for levee purposes under these laws. The machinery of the county was to be used in the levy and collection of the special taxes required, but the county, as a county, was to be in no way involved. It follows that the prayer for a money decree against the county, as well as that for an exchange of the bonds authorized by the act of 1873 for the orders or warrants held by the appellant, must be denied."

And some remarks of Mr. Justice Miller in *Heine v. Levee Commissioners*, 19 Wall. 655, 22 L. Ed. 223, seem to be pertinent:

"The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, state or national. In the case before us national sovereignty has nothing to do with it. The power must be derived from the Legislature of the state. So far as the present case is concerned, the state has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the Legislature, either to assess the taxes by a special statute, or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any federal court. It is unreasonable to suppose that the Legislature will have selected a federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the federal government of the legislative functions of the state government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom could foresee."

The corporation which issued these bonds has ceased to exist. Its officers have been removed by the authority of the state, and no provision has been made by the state for the settlement of its indebtedness. This court cannot presume that the state will refuse, upon proper representations, to provide some remedy. It is a case of great hardship. The creditors have in good faith invested their money in obligations issued by this township under the authority of law, and trusting in the good faith and honor of the state. On the other hand the people of the township, induced by specious promises, were led to issue these

bonds, and have received no benefit whatever from their subscription. When the original suit was brought, it seemed to the court that it was a proper case for adjustment upon some terms that would be fair to all parties, and, probably as the result of its suggestions, some terms of compromise were almost arrived at. Considerations of honor and of interest alike would seem to require that the people of this township and others in like plight should make some effort to obtain the necessary legislation to enable them to make some settlement with their creditors, and, if the like spirit moves the creditors, it is not to be doubted that the required legislation will be secured. However that may be, it is not for this court, moved by the apparent hopelessness of the position of the creditors, to usurp functions which do not belong to it.

Being of opinion, for the reasons stated, that the plaintiffs have no cause of action against Greenwood county, it is ordered and adjudged that the demurrer be sustained and the complaint dismissed.

WESTINGHOUSE AIR BRAKE CO. v. CHRISTENSEN
ENGINEERING CO.

(Circuit Court, S. D. New York. June 6, 1904.)

1. INJUNCTION—ISSUANCE—NOTICE—SERVICE.

Where an injunction against the sale of a patented article was served on defendant's counsel and on the manager of its Eastern office, and a copy was sent to defendant corporation at its home office by registered mail, it was given sufficient notice to sustain proceedings for contempt for a violation thereof without actual service on the corporation at its home office.

2. SAME—CONTEMPT—MOTION TO PUNISH—NOTICE—SERVICE.

Where notice of motion to punish defendant for contempt for violating an injunction was served on defendant's counsel, who admitted service, and also on a person whom defendant advertised to be its manager in charge of its Eastern office, such notice was sufficiently served though defendant's counsel denied that they had authority to accept service of process or other papers in contempt proceedings.

Motion to Punish for Contempt for Violation of Injunction Pendente Lite.

See 128 Fed. 749.

Fred'k H. Betts, for the motion.

Wm. A. Jenner, opposed.

LACOMBE, Circuit Judge. This motion was noticed for December 11, 1903. It came on for argument some weeks later, and decision was reserved, awaiting the determination of an appeal from the interlocutory decree. The Court of Appeals having handed down an opinion in which claim 2 of the patent was not sustained, this court filed an opinion denying the application. 128 Fed. 749. Application for reargument was at once made to the Court of Appeals, and in view of that circumstance this court took no further action, and no

order was ever entered. Upon rehearing the Court of Appeals sustained the second claim, whereupon rehearing of the motion has been had. The narrative in former opinion (128 Fed. 749) sufficiently sets forth the history of the litigation.

The counsel who have appeared for defendant throughout the equity suit have appeared specially at the hearing, protesting that they are not authorized to accept service of process or other papers in criminal or contempt proceedings, or to waive any rights of said defendant; and object that this court has no jurisdiction, because notice of motion has not been duly served so as to bring defendant into court. The notice of motion was served on counsel for defendant in this suit on December 2, 1903, and they admitted service. Such notice was also served on one Randall, whom defendant advertised to be its Eastern manager, at 135 Broadway, the signs on the door of the office stating it to be the office of the Christensen Engineering Company. This would seem to be sufficient service. The injunction which it is charged defendant has violated was served in October, 1901, on counsel, on the Eastern manager, and also on the defendant itself, at Milwaukee, by registered mail. This was sufficient notice to the defendant of the pendency of the injunction. Actual service of the order upon the person sought to be restrained is not requisite.

The affidavits submitted by complainant make out a *prima facie* case of sale and delivery of infringing valves, especially when the shop marks on the valve (concededly made by defendant) which was submitted as one of the four sold to the Boston & Maine Railroad, and for selling which defendant was held in contempt, is compared with those on one of the thirty which were delivered to the Denver & Northwestern Railroad. As pointed out in former memorandum, the proof does not warrant a finding that sale or delivery of any of these thirty was subsequent to March 19, 1903, but it sufficiently indicates a sale subsequent to October, 1901.

This is the second violation of the same injunction, and defendant does not offer even the excuse of inadvertence which it presented before. The first fine imposed was \$1,000. Under all the circumstances this one should be made much heavier, and it is fixed at \$4,000; half to the United States and half to the complainant.

AMERICAN BONDING CO. OF BALTIMORE v. SPOKANE BUILDING & LOAN SOC.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1904.)

No. 1,010.

1. FIDELITY INSURANCE—WARRANTIES—BREACH—CORPORATIONS—KNOWLEDGE OF OFFICERS.

Under 1 Ballinger's Ann. Codes & St. § 4255, providing that all corporate management shall be vested in a board of trustees, where an application for fidelity insurance by a building and loan association stated that the secretary insured derived his authority from the board of trustees, knowledge on the part of a single officer, trustee, or the president of the association that the secretary was indebted to it at the time the policy was issued could not be imputed to the corporation without proof that the officer's knowledge had been communicated to the board, so as to constitute a breach of a warranty in the policy that the secretary was not indebted to the association at the time of the issuance thereof.

2. SAME—FALSE STATEMENTS—KNOWLEDGE.

Where a fidelity bond securing a building and loan association against the embezzlement of its secretary provided that all the representations made by the employer to the surety were warranted by the employer to be true; that the employé had not, to the knowledge of the employer or its officers, been in arrears or a defaulter, and the association stated that its secretary was not at that time in debt to it; that he had property, funds, securities, and valuables on hand to balance his accounts—such statement did not constitute a warranty that the secretary was not indebted to the association at the time as a fact, but only that he was not so indebted, etc., to the knowledge of the association or its officers.

In Error to the Circuit Court of the United States for the Eastern Division of the District of Washington.

This is an action upon a policy of fidelity insurance issued by the American Bonding & Trust Company of Baltimore City to the defendant in error, the Spokane Building & Loan Society, a corporation of Spokane, Wash. The bond was in the sum of \$3,000, dated January 17, 1902, and insured the defendant in error against loss through the embezzlement of its secretary, R. L. Bogardus, for a term of one year. After the execution of the policy, the plaintiff in error changed its corporate name to "American Bonding Company of Baltimore." Prior to the delivery of this bond, and before it became effective, the bonding company requested the building and loan society to answer in writing certain interrogatories concerning the risk about to be assumed under the bond. Accompanying these written questions, and as part of the same instrument, which was addressed to the Spokane Building & Loan Society, was the following statement: "An application has been made to this company to issue a bond of security for Mr. R. L. Bogardus as secretary in your service, at Spokane, to the amount of \$3,000.00. This company desires to have written answers to the following questions, and these answers will be taken as the basis of the bond if issued." At the foot of this employer's statement was the following agreement: "It is agreed that the above answers are warranted to be true by the obligee, and are to be taken as conditions precedent, and as the basis of the said bond applied for, or any renewal or continuation of the same, that may be issued by The American Bonding & Trust Company of Baltimore City to the undersigned, upon the person above named. Dated at Spokane, Wash., this 13th day of January, 1902. Signature of the Employer Spokane Building & Loan Society. By S. S. Glidden, Prest. Official Capacity. [Seal of Spokane Building & Loan So-

¶ 1. Fidelity insurance, see note to American Credit Indemnity Co. v. Wood, 19 C. C. A. 273.

ciety.]” The building and loan society made written answer to the interrogatories, signed the agreement above set out, and returned the same to the bonding company, which thereupon executed its fidelity bond.

The employer's statement, besides others, contained the following questions and answers: “Q. 13. When were his accounts last examined? A. Being done now by a committee. Q. 14. Were they, at that time, in every respect correct, and proper funds, securities and values on hand to balance? A. Yes, last year. (Later: Now complete and found correct.) Q. 15. (a) Is there now, to your knowledge, any shortage due you by the applicant? A. (a) No. (b) Has he ever been short with you? (b) No. Q. 16. (a) Is he now in debt to you? A. (a) No. (b) If so, state amount and nature of indebtedness? (b) ———. Q. 17. Have you ever sustained loss through the dishonesty of any one holding the position of applicant? A. No.”

Among other provisions, the bond contained the following stipulations: “(2) That all the representations made by the employer, his or its officers, to the surety, are warranted by the employer to be true; that the employee has not, to the knowledge of the employer, his or its officers, been in arrears or a defaulter in that position covered by this bond or in any other position: (3) That the surety's liability hereunder shall cease immediately as to subsequent acts of the employee from and after: (a) Discovery by the employer, his or its officers, of any default hereunder on the part of the employee.”

During the term covered by this bond, R. L. Bogardus embezzled funds of the Spokane Building & Loan Society to the amount of \$3,880. The acts of embezzlement all occurred between September 30 and October 17, 1902.

The bonding company defended the action brought upon this bond on two grounds: First. That the answers to the interrogatories were warranted by the building and loan society to be true, whereas, in fact, the answers to questions 13, 14, 15, 16, and 17 were false, in that, at the time these questions were answered, Bogardus was short in his accounts, his accounts were not correct in every respect, he did not have proper funds, securities, and values on hand to balance, and was in debt to the society. Second. That on the 19th day of September, 1902, the Spokane Building & Loan Society discovered a default under the bond, i. e., discovered that Bogardus was short in his accounts; that the terms of this bond released the bonding company from all acts of embezzlement occurring after the discovery of a default; and that the defalcations in question all occurred after September 19, 1902.

In making his opening statement of this second defense to the jury, counsel said: “Gentlemen of the Jury: I will prove, in addition to what I have already stated, and in addition to what has already been brought out in the evidence, that on the 19th day of September, 1902, President S. S. Glidden, one of the officers of the Spokane Building & Loan Society, discovered a default under this bond; that is, he discovered that Mr. Bogardus was short in his accounts. Then, under the provisions of the bond, which is already in evidence, which provides that we shall not be liable for a default occurring after the discovery of a default—under that bond we shall ask, upon the evidence that has been introduced, and some in addition to that, a verdict at your hands on the ground that on the 19th of September, 1902, the plaintiff discovered a default under this bond, and that the pleadings themselves show that the acts of embezzlement complained of, which they are seeking to hold us for, occurred after that date.” Thereupon plaintiffs below moved the court to strike out this defense and rule out all evidence thereunder, for the reason that the facts therein stated did not constitute a defense. This motion the court granted on the ground that the default referred to by counsel in his statement was not known or discovered by the managing board of the plaintiff corporation, but simply by its president.

It is claimed by the plaintiff in error that the court erred in ruling out the second affirmative defense, and all evidence thereunder, upon counsel's opening statement thereof. It is further claimed that the court erred in giving instructions 2 and 3 to the jury, and in refusing to give instruction 4, asked by defendant. These instructions read as follows: “(2) This defense, as presented, is manifestly based upon the theory that this contract was made in two parts: That the statement made by the plaintiff to the defendant is one part of the contract, and the policy of insurance or guaranty issued by the

plaintiff to the defendant is the corresponding part; but that is not legally a correct theory of the case. The parties might have made a contract in that form, but that is not what they did do. All their preliminary negotiations and correspondence on the subject are merged in the policy that was issued, and this is a contract in one part; the liability of the defendant is to be determined by what is set forth in its policy or bond. Now, this policy refers to these answers to the interrogatories, and, so far as the bond itself contains a stipulation with respect to those parts, that stipulation is binding upon both sides, and the plaintiff is bound by that stipulation. (3) The material part of this contract with reference to this defense is contained in the second paragraph of the first one of the conditions annexed to the contract, and reads as follows: 'That all the representations made by the employer, his or its officers, to the surety, are warranted by the employer to be true.' Now, this is presented in the pleadings, and the defense has proceeded as if there were a period after the word 'true,' and that it was made an absolute condition that the answers should be taken as absolutely true, or else there was no contract; but the contract as it is set forth and admitted here is different. There is no period after the word 'true,' but a semicolon, and what follows thereafter is to be taken as a part of the same sentence, and as explanatory and as modifying the condition that the answers are to be true. Now, this is what is to be taken as true, 'That the employ  has not, to the knowledge of the employer, his or its officers, been in arrears or a defaulter in that position covered by this bond or in any other position; that the employer, his or its officers, upon becoming aware of the employ  gambling, speculating, or committing any disreputable, lewd, or unlawful act, will immediately notify the surety in writing.' By this language the warranty that the answers are true is qualified by the condition that they are, so far as the employer had any knowledge, to be taken as true, or warranted to be true. (4) By the terms of the bond here sued upon, and the employer's statement here in evidence, the Spokane Building & Loan Society warranted the truth of certain statements, and, among other things, the plaintiff warranted the truth of the statement that Romaine L. Bogardus had never been short to the society. Now, if you should find that Romaine L. Bogardus had in fact been short to the society, or, in other words, that the statement was not true, then your verdict must be for the defendant."

There are seven assignments of error which are claimed by the plaintiff in error to present two questions to be disposed of by the court: First. Did the fact that a default was discovered under the bond by the president of the Spokane Building & Loan Society on September 19, 1902, preclude said society from recovering for acts of embezzlement occurring after that time? Second. Was it a defense to the action on the bond to prove that Bogardus was short in his accounts, did not have proper funds, securities, and values on hand to balance, had been in arrears to the society, and was in debt to the society at the time the employer's statement was signed?

W. S. Gilbert, for plaintiff in error.

Mark F. Mendenhall and Ernest C. MacDonald, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement, delivered the opinion of the court.

The answer to the first question propounded by plaintiff in error depends upon whether or not the alleged knowledge of the president, under all the facts and circumstances of this case, can be imputed to the corporation defendant. The principles of law applicable to this question depend upon the particular facts of the given case, the character of the business of the corporation, the methods by which its business is conducted, the duties of its officers, etc. In the present case the

defaulting secretary is shown by the record to be the chief managing officer of the corporation. He collected the dues, had charge of the money, and was authorized to pay it out on account of the society by checks signed by the president and treasurer. The board of trustees was the controlling and governing body of the corporation. Among the questions asked and answers given in the employer's statement is the following:

"Q. 8. (a) Will he [Bogardus] be authorized to pay out of the cash in his custody any amount on your account? A. (a) Yes, by check of president and treasurer. (b) In what manner is such authority given? (b) By the trustees. * * * Q. 10. (a) How often and to whom will he remit or pay over the money received? A. (a) When ordered by the trustees."

The statutes of the state of Washington relative to private corporations prescribe that all corporate control and management shall be vested in and be exercised by a board of trustees. 1 Ballinger's Ann. Codes & St. Wash. § 4255. In the light of these undisputed facts, we are of opinion that the knowledge of a single officer or trustee or the president cannot be imputed to the corporation, unless it is affirmatively shown that his knowledge was brought home to the board of trustees.

The principles of law applicable to the facts of this case upon the point under discussion are so fully stated in *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 360, 22 Sup. Ct. 833, 46 L. Ed. 1193, that we quote at length therefrom:

"It is well settled that, in the absence of express agreement, the surety on a bond given to a corporation, conditioned for the faithful performance by an employé of his duties, is not relieved from liability for a loss within the condition of the bond by reason of the laches or neglect of the board of directors, not amounting to fraud or bad faith, and that the acts of ordinary agents or employés of the indemnified corporation, conniving at or co-operating with the wrongful act of the bonded employé, will not be imputed to the corporation. *United States v. Kirkpatrick* (1824) 9 Wheat. 720, 736 [6 L. Ed. 199]; *Minor v. Mechanics' Bank* (1828) 1 Pet. 46 [7 L. Ed. 47]; *Taylor v. Bank of Kentucky* (1829) 2 J. J. Marsh. (Ky.) 564; *Amherst Bank v. Root* (1841) 2 Metc. (Mass.) 522; *Louisiana State Bank v. Ledoux* (1848) 3 La. Ann. 674; *Pittsburg, Fort Wayne & Chicago Ry. Co. v. Shaeffer* (1868) 59 Pa. 350, 356; *Atlas Bank v. Brownell* (1869) 9 R. I. 168 [11 Am. Rep. 231]. The doctrine of these cases is thus epitomized in 59 Pa. 357:

"Corporations can act only by officers and agents. They do not guaranty to the sureties of one officer the fidelity of the others. The rules and regulations which they may establish in regard to periodical returns and payments are for their own security, and not for the benefit of the sureties. The sureties, by executing the bond, became responsible for the fidelity of their principal. It is no collateral engagement into which they enter, dependent on some contingency or condition different from the engagement of their principal. They become joint obligors with him in the same bond, and with the same condition underwritten. The fact that there were other unfaithful officers and agents of the corporation, who knew and connived at his infidelity, ought not in reason, and does not in law or equity, relieve them from their responsibility for him. They undertake that he shall be honest, though all around him are rogues. Were the rule different, by a conspiracy between the officers of a bank or other moneyed institution, all their sureties might be discharged. It is impossible that a doctrine leading to such consequences can be sound. In a suit by a bank against a surety on the cashier's bond, a plea that the cashier's defalcation was known to and connived at by the officers of the bank was held to be no defense. *Taylor v. Bank of Kentucky*, 2 J. J. Marsh. 564."

"So, also, in 3 La. Ann. 674, the court, after suggesting the distinction between the knowledge of the governing body of a bank, the board of directors, of the default of a bonded employé, and the knowledge of such default by another officer or employé, not communicated to the board, thus tersely stated the applicable doctrine (page 684): 'It cannot be said that if one servant of a bank neglects his duty, and by his carelessness permits another servant of the bank to commit a fraud, the surety of the fraudulent servant shall be thereby discharged.'

"And see *American Surety Co. v. Pauly*, 170 U. S. 156, 157 [18 Sup. Ct. 563, 42 L. Ed. 987], and cases cited. In other words, the principle of law discussed in the case of *The Distilled Spirits*, 11 Wall. 356 [20 L. Ed. 167], viz., that the knowledge of an agent is in law the knowledge of his principal, is intended for the protection of the other party (actually or constructively) to a transaction for and on account of the principal had with such agent. In the very nature of things, such a principle does not obtain in favor of a surety who has bonded one officer of a corporation, so as to relieve him from the obligations of his bond, by imputing to the corporation knowledge acquired by another employé, subsequent to the execution of the bond (and from negligence or wrongful motives, not disclosed to the corporation), of a wrong committed by the official whose faithful performance of duty was guaranteed by the bond. As the rule of imputation to the principal of the knowledge of an agent does not apply to such a case, it must follow that it can only obtain as a consequence of an express provision of the contract of suretyship."

2. Was it a defense to the action on the bond to prove that Bogardus was short in his accounts, did not have proper funds, securities, and values on hand to balance, had been in arrears to the society, and was in debt to the society at the time the employer's statement was signed? The answer to this question depends upon the interpretation to be given to certain provisions in the bond, and to certain answers given in the employer's statement; the contention of the plaintiff in error being that the defendant thereby warranted that Bogardus had never been short in his accounts to the defendant; that he was not at that time in debt to the defendant; that he had proper funds, securities, and values on hand to balance his accounts. By referring to the statement of facts, it will be seen that the language of the employer's statement is, "Is there now, to your knowledge, any shortage due you by the applicant?" and that the language of the provisions of the bond is that the employé "has not, to the knowledge of the employer, his or its officers, been in arrears or a defaulter." In the light of the language contained in the statement of the employer, and in the condition of the bond, we are of opinion that instructions 2 and 3 as given by the court were correct, and that the fourth instruction was properly refused because of the error therein stated that "the plaintiff warranted the truth of the statement that Romaine L. Bogardus had never been short to the society." The instructions of the court in this case were in accord with the principles announced by the Court of Appeals in *Supreme Council Catholic K. of A. v. Fidelity & Casualty Co.*, 63 Fed. 48, 59, 11 C. C. A. 96. The court in that case said:

"The defendant company offered to show that O'Brien was short on the 25th of April, 1891, about \$40,000. It also offered to show that O'Brien was short in the funds of the order \$61,000 at the time of the application for this bond. Upon objection the evidence was excluded. If this condition of O'Brien's affairs was unknown to the plaintiff order at the time this bond was applied for and accepted, such evidence would have been wholly immaterial. The only representation made by Mr. Coleman, and referred to in the contract as being the basis of contract, was in answer to question 13 of the statement de-

livered to the defendant company. That question was this: 'When were the accounts last examined, and were they in every respect correct?' To this question Mr. Coleman answered: 'May, 1891, and reported correct by examiners—three supreme trustees.' This evidence tended in no way to show that Mr. Coleman's answer was untrue. His representation was that three examiners had examined O'Brien's accounts, and reported his accounts correct. Now, if such an examination was made, and such a report was made to the council of the order, Mr. Coleman's representation was in no respect untrue. The particular offer covered by this exception embraces no offer to show that Mr. Coleman, or any other officer of the order, at the time this bond was applied for, knew that Mr. O'Brien was a defaulter."

But if it could be considered that the employer's statement and the provisions of the bond were fairly susceptible of two constructions, one favorable to the defendant in error and the other favorable to the plaintiff in error, the instructions of the court would still be correct, for, as is stated in *American Surety Co. v. Pauly*, 170 U. S. 133, 144, 18 Sup. Ct. 552, 42 L. Ed. 977:

"The former, if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers, or agents of the surety company. This is a well-established rule in the law of insurance. *National Bank v. Insurance Co.*, 95 U. S. 673 [24 L. Ed. 563]; *Western Ins. Co. v. Cropper*, 32 Pa. 351, 355 [75 Am. Dec. 56]; *Reynolds v. Commerce Fire Ins. Co.*, 47 N. Y. 597, 604; *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661, 666 [8 Sup. Ct. 1360, 32 L. Ed. 308]; *Fowkes v. Manchester, etc., Life Ass'n*, 3 Best & S., 917, 925. As said by Lord St. Leonards in *Anderson v. Fitzgerald*, 4 H. L. Cas. *484, *507: 'It [a life policy] is, of course, prepared by the company, and if, therefore, there should be any ambiguity in it, must be taken, according to law, most strongly against the person who prepared it.'"

There is no sound reason why this rule should not be applied in the present case. The object of the bond in suit was to indemnify or insure the defendant in error against loss arising from any act of fraud or dishonesty on the part of Romaine L. Bogardus in connection with his duties as secretary. That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the plaintiff in error if there be another construction equally admissible under the terms of the instrument executed for the protection of the defendant in error. As was said by the court below in refusing the motion for a new trial:

"If bonding corporations are to be sustained by the business interests of this country as being useful and worthy of support, they should be required to meet their obligations in all such cases as we have presented in this record."

The judgment of the Circuit Court is affirmed, with costs.

CONNER et al. v. MANCHESTER ASSUR. CO. OF MANCHESTER,
ENGLAND.

(Circuit Court of Appeals, Ninth Circuit. May 23, 1904.)

No. 1,029.

1. INSURANCE—STIPULATIONS—WARRANTY.

A stipulation in a fire policy that the insurance company should not be liable for loss caused, directly or indirectly, by order of any civil authority, is not a warranty within Cal. Civ. Code, §§ 2607, 2608, providing that a statement in a policy of a matter relating to the thing insured or to the risk as a fact, and a statement which imports that it is intended to do or not to do a thing which materially affects the risk, is a warranty.

2. SAME—OPEN POLICY—PROVISIONS—ENFORCEMENT.

Where complainants accepted an insurance certificate insuring their crop against fires subject to all the terms and conditions of a certain open policy in defendant's possession made a part of the certificate, plaintiffs were bound by the provisions of such open policy though they had no knowledge thereof.

3. SAME—FIRES—POLICE REGULATIONS—DE FACTO AUTHORITY.

Where the supervisors of a county ordered fires to be started on certain pasture land for the purpose of destroying insects which were injurious to fruit crops, etc., under Cal. St. 1897, pp. 465, 466, c. 277, authorizing such supervisors to provide for the destruction of insects and to make sanitary regulations not in conflict with general laws, such supervisors had de facto authority to start the fire, which was sufficient to relieve an insurer of grain destroyed thereby, under a provision in the policy that insurer should not be liable for any loss occasioned by order of any civil authority, though the fire was started on other property, and the burning of plaintiff's grain was occasioned by the fire getting beyond control.

In Error to the Circuit Court of the United States for the Northern District of California.

On June 9, 1902, the defendant in error, in consideration of a premium paid it by the plaintiffs in error, executed and delivered to them a certificate of insurance, certifying that in consideration of the payment of said premium, it insured them against loss or damage by fire to the amount of \$3,300 on their interest in a certain grain crop situated on certain described premises. The certificate proceeded to recite that it was understood and agreed that the insurance "is subject to all the terms and conditions embraced in open policy numbered 3,301,070, which is made a part hereof to the amount specified herein." Among the terms and conditions embraced in said open policy so referred to in the certificate were the following: "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority." The plaintiffs in error did not at any time see the said "open policy," nor did they know of the conditions thereof prior to the fire hereinafter referred to, and said policy always was in the exclusive possession of the defendant in error. In the month of June, 1902, lands in the county in which the land referred to in the certificate is situated were threatened with public disaster by a plague of grasshoppers, and on June 17, 1903, the board of supervisors of said county made an order referring to the threatened danger from said pest, and reciting that the only practical method of destroying the same and saving the orchards and vineyards in said county was by burning the grass upon certain pasture land, and ordering that the grass thereon be condemned and destroyed by fire. The order was carried out, and the fire was started at a point from three to four miles distant from the land upon which the grain of the plaintiffs in error was situated, but it got beyond control and reached the land of the plaintiffs in error, and burned

their grain insured as aforesaid, and no other fire contributed to the loss. On these facts the Circuit Court, on an action brought to recover on the policy, denied the right of the plaintiffs in error to recover.

Rosenbaum & Scheeline, for plaintiffs in error.

Goodfellow & Eells, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

It is contended on behalf of the plaintiffs in error that they are not bound by the terms and conditions expressed in the "open policy" referred to in the certificate of insurance, for the reason that they never assented thereto, and that said provisions were not contained in the instrument which they received from the insurance company. They rely upon the following sections of the Civil Code of California:

"Sec. 2605. Every express warranty, made at or before the execution of a policy, must be contained in the policy itself, or in another instrument signed by the insured, and referred to in the policy, as making a part of it."

"Sec. 2607. A statement in a policy, of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof.

"Sec. 2608. A statement in a policy, which imports that it is intended to do or not to do a thing which materially affects the risk, is a warranty that such act or omission shall take place."

It is contended that under these provisions of the Code the stipulation referred to in the so-called "open policy," that the insurance company should not be liable for loss caused directly or indirectly by order of any civil authority, is a warranty, and is therefore no part of the insurance contract, since it was not contained in the policy itself, nor in another instrument signed by the insured and referred to in the policy as making a part of it. We do not think the statute was intended to create any new definition of a warranty in insurance. In Bouvier's Law Dictionary it is said that a warranty in insurance is "a stipulation or agreement, on the part of the insured party, in the nature of a condition"; and in Phillips on Insurance, § 754, it is said:

"An express warranty is an agreement expressed in the policy, whereby the assured stipulates that certain facts are or shall be true, or certain acts shall be done relative to the risk. It may relate to an existing or past fact, or be promissory and relate to the future."

Section 2605 of the Civil Code of California was evidently intended to express in statutory form the rule that no express warranty made by the insured shall affect the contract of insurance, unless it be contained in the policy or in the application, or some other instrument signed by the insured and made a part of the contract, and is in effect an affirmation of the generally accepted doctrine applicable to such contracts. Section 2607 proceeds to define an express warranty in insurance, and declares it to be a statement of a matter relating to the person or thing insured, or to the risk, as a fact. Its language is entirely compatible with the ordinary definition of warranty as given in the authorities above cited. A stipulation in an insurance policy providing that the company shall not be liable for loss from certain specified causes is not

a warranty, as that term is generally used in fire insurance contracts, nor is it, under the terms of the statute, a statement of a fact relating to the person or thing insured, or to the risk. A warranty in such insurance contracts is a statement of fact made by the insured, on which the insurer relies, and on the strength of which he enters into the contract.

The plaintiffs in error cite *Levi v. Allnutt*, 15 East, 207, *Levy v. Vaughn*, 4 Taunton, 387, and *Oom v. Taylor*, 3 Camp. 207, in which it appears that in certain marine policies of insurance stipulations similar to that contained in open policy No. 3,301,070 were denominated "warranties." In the first two cases the policies contained the stipulation, "Warranted free from confiscation by the government in the ship's port or ports of discharge." In the third case the stipulation was, "Warranted free of capture and seizure in the port of discharge." But it will be observed that while these so-called "warranties" are in their substance exemptions of the insurance companies from liability from the specified causes, they are in form undertakings upon the part of the insured, and not upon the part of the insurer; and this fact undoubtedly accounts for the use of the term "warranted"—a use not in harmony with the generally accepted meaning of the word in modern policies of fire insurance.

The plaintiffs in error rely upon the decision of the Supreme Judicial Court of Massachusetts in *Eastern Railroad Co. v. Relief Fire Ins. Co.*, 98 Mass. 420, but the statute of California, it is to be regretted, differs materially from that of Massachusetts. The latter adopts the salutary provision that in fire insurance "the conditions of the insurance shall be stated in the body of the policy, and neither the application of the insured, nor the by-laws of the company, shall be considered as a warranty or a part of the contract, except so far as they are incorporated in full into the policy and so appear on its face before the signatures of the officers of the company." The court in that case pointed out the beneficent features of the statute, and said that its purpose was to prevent just claims under policies of insurance against loss by fire from being defeated by the provisions of other documents which the courts had previously been obliged to hold to be binding on the assured, because in law a part of the contract of which he often had no actual knowledge or appreciation. The plaintiffs in error cite this expression of the court as applicable to their case, and advert to the fact that they paid for and accepted the certificate of insurance, which declared in general terms that they were insured against loss by fire, but which elsewhere referred to another instrument, presumably a blank form of policy, containing certain limitations of the risk assumed, which policy they never saw and the terms of which they never knew. To that contention the law makes this answer: The plaintiffs in error accepted an instrument which contained a reference to another instrument in which were embodied the limitations, and which were made a part of the contract. They were presumed to know the contents of the paper which they received, and if they had read it they would have observed that it referred to and adopted the provisions of the other instrument. They had the right to demand an inspection of that instrument, and, if inspection had been refused, to decline to enter into the contract.

It is contended, further, that the property was not directly or indi-

rectly destroyed by order of civil authority; that there was no law authorizing the supervisors of a county to destroy the property of the citizens thereof; and that the property of the plaintiffs in error was destroyed by accident or neglect, and without their fault. The record of the findings of the trial court shows that the fact was established that the fire was started under an order of the supervisors of the county. The Statutes of California of 1897, pp. 465, 466, c. 277, confer authority upon the supervisors of a county to provide for the destruction of insects injurious to fruit trees, vines, or plants, and to make and enforce local police, sanitary, and other regulations not in conflict with general laws. But whether or not there was lawful authority to start the fire which indirectly caused the damage in this case, there was de facto authority. The order was in fact made, and made by the officers to whom the said powers were given, and thereby the loss occurred. This, we think, excuses the insurance company. *Barton v. Home Insurance Co.*, 42 Mo. 156, 97 Am. Dec. 329. The facts that the loss was the result of a fire started on other property, and that the property of the plaintiffs in error was not ordered to be burned, do not render the exemptions of the policy inapplicable. There was but one fire. It was ordered by civil authority. It indirectly caused the loss, and there was no intervening cause. *Insurance Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395; *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356; *Krippner v. Biebl*, 28 Minn. 139, 9 N. W. 671.

The judgment of the Circuit Court is affirmed.

THE LIVINGSTONE.

(Circuit Court of Appeals, Second Circuit. April 21, 1904.)

No. 99.

1. MARINE INSURANCE—TOTAL LOSS—EFFECT OF ABANDONMENT.

Neither the abandonment to the insurer of a vessel sunk in collision nor a bill of sale conveying the same vests the insurer with a right of action against the vessel in fault for the collision, which can exist only on the principle of subrogation arising out of the performance of the insurance contract.

2. SAME—VALUED POLICY—SUBROGATION ON PAYMENT OF TOTAL LOSS.

Where a ship sunk by collision and abandoned to the insurer, being an actual total loss, is insured by a valued policy, and the stipulated sum is paid to the owner, who subsequently recovers her actual value, which exceeds her insurance value, as damages from the vessel responsible for the collision, the insurer is only entitled to be reimbursed from such recovery by receiving back the amount it has paid out, with interest, and the insured is entitled to the remainder in payment of his uncompensated loss.

Appeal from the District Court of the United States for the Western District of New York.

For opinion below, see 122 Fed. 278.

This is an appeal by the Lackawanna Transportation Company et al. from a decree of the District Court for the Western District of New York, entered May 2, 1903, adjudging that the World Marine Insurance Company, and other insurance companies, interveners, be paid the entire remnants and remainder

of the moneys in the registry of the court, after paying certain court charges, and that the said amount be divided among the said interveners, pro rata, according to the amounts of insurance written by them, respectively, on the steamer *Grand Traverse*, which was sunk in Lake Erie, after collision with the steamer *Livingstone*, October 19, 1896. The *Livingstone* [D. C.] 87 Fed. 769; on exceptions to commissioner's report, 104 Fed. 918; on appeal, 113 Fed. 879, 51 C. C. A. 560. The *Livingstone* having been held solely at fault for the loss of the *Grand Traverse* and the value of the latter having been fixed at \$37,500 and interest, a decree against the *Livingstone* and her stipulator was entered for \$59,311.70, with interest and costs. The greater part of this sum was distributed by agreement between the parties. There still remains in the registry of the court the sum of \$12,500 and interest, which is in dispute in this controversy. The insurance companies claim this amount by reason of an abandonment of the *Grand Traverse* to them after the collision. The libelants claim the fund as owners of the *Grand Traverse*, insisting that they are entitled to the difference between the actual value of the lost vessel, \$37,500, and the value fixed in the insurance policies, \$25,000, and that the underwriters, having been reimbursed for the full amount paid by them upon said policies, are not entitled to the balance which was recovered by the diligence and perseverance of the owners. The facts now under review are carefully and correctly stated in the opinion of the District Judge in 122 Fed. 278.

John G. Milburn and Harvey D. Goulder, for appellants.
Wilhelmus Mynderse, for appellees.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge (after stating the facts). The amount in controversy was recovered by the unaided efforts of the libelants against the active opposition of the interveners. The \$25,000 paid by them to the libelants upon the policies of insurance, has been returned. The \$12,500 in the registry of the court represents the difference between the value of the *Grand Traverse* as fixed in the policies and the value as fixed by the court, before the insurers became parties to this action. If paid to the interveners they will realize from the transaction a clear profit of \$12,500 and the libelants a corresponding loss. If paid to the libelants they and the interveners will receive from the party responsible for the collision the exact amount of their respective losses.

The question briefly stated is as follows: Where a ship, sunk by collision and abandoned to the insurer, is insured by a valued policy for \$25,000 and this sum is paid to her owner who subsequently recovers \$37,500, her actual value, as damages, from the vessel responsible for the collision, is the insurer entitled to the entire recovery or only the \$25,000 paid by him under the policy? Viewed as an original proposition, to be determined solely by the fundamental rules of equity, it would seem that but one answer is possible. How can the court make a more equitable disposition of the fund than by disbursing it so that the status quo before the collision is re-established? The insurer gets back the money he has paid under the policy, the owner gets back the value of his ship, both are made whole, and neither is permitted to profit at the expense of the other. Such a result would certainly see equitable, but it must, of course, be sustained by authority. In our system of jurisprudence principle is reached through precedent. The rights of the interveners rest either upon abandonment, bill of sale or subrogation, or all combined. On

December 31, 1896, the libelants abandoned the Grand Traverse to the underwriters in the following words:

"The company has decided to abandon the ship and hereby gives notice of such abandonment as provided in the policies."

On the 7th of January, 1897, the underwriters wrote as follows:

"We have your favor of the 31st ult. making abandonment of the steamer Grand Traverse, which we hereby accept. * * * If you will send us proofs of loss and policies, we will at once proceed with settlement of total loss."

On the 22d of January thereafter the owners of the Grand Traverse executed to the underwriters a bill of sale of the "said steamer or vessel, together with the masts, bowsprit, sails, boats, anchors, cables, tackle, furniture and all other necessities thereunto appertaining and belonging."

There can be no question that these acts of the owners transferred to the underwriters the physical property and all the right, title and interest which the owners had therein. It is not easy, however, to understand how these transfers alone vested in the insurers the right to proceed against the vessel responsible for the collision or the right to appropriate the entire proceeds of a recovery in excess of the insurance. The conveyance of the res did not carry with it the right to proceed against the wrongdoer. That right had previously vested in the ship owners and, in the absence of express words of transfer, remained so vested.

The Grand Traverse was an actual total loss, "a mere congeries of planks," lying at the bottom of Lake Erie and worth no more than the bubbles that rose to the surface above the wreck. There was, in fact, nothing to abandon and nothing to sell. "If the loss be actually total, as there is nothing to abandon, an abandonment can have no effect whatever." Parsons on Marine Ins. vol. 2, p. 110; Hall & Long v. Railroad Co., 93 Wall. 367, 20 L. Ed. 594. The sale of the ship did not carry with it choses in action against those who had previously damaged the ship any more than the sale of a horse vests in the purchaser a right to prosecute one who before the sale had injured the horse; any more than the assignment of a patent carries with it a right to recover for past infringements. The thing abandoned and sold was the worthless wreck and not the right to recover \$37,500 from those who had caused the wreck. In order, therefore, to ascertain the true character of the title of the insurers to the fund in court we must look beyond the mere abandonment and sale to the source of that title, namely, the contract of insurance and to the equitable principles brought into being by the action of the parties thereunder.

The valuation clause in question is in these words:

"And it is also agreed and declared that the subject matter of this Policy as between the Insured and the said Company as far as concerns this Policy shall be and is as follows upon Hull Materials &c. valued at £3,605

Machinery Boilers &c. " " 1,545 £5,150."

The valuation clause was originally adopted in marine policies to avoid the difficulty and sometimes the impossibility of ascertaining with precision the value of the property insured. As this was the first step

in the accurate measurement of the loss the insurer and insured agreed upon a value which, as between them, was to be taken as the basis of subsequent calculations. Why the agreement of the parties upon a convenient basis of calculation should operate to change the principle upon which the insurer had, theretofore, been reimbursed to the extent of his payment under the policy, it is not easy to understand. The reason of the rule is plain. A contract of insurance is one of indemnity. The premium is supposed to be a full consideration for the risk. Nevertheless, where the insurer has paid the entire amount of the loss he becomes subrogated, to the extent of his payment, to whatever interest the insured has in the property and to the latter's right to proceed against one who has negligently caused the loss.

The doctrine of subrogation has its origin in equity, its purpose is indemnity and its object is attained when the insurer has been fully compensated. The doctrine cannot be invoked to consummate injustice; it does not permit one party to secure an unfair advantage over the other; it does not permit the insurer to speculate, or profit or drive an unconscionable bargain. When he is paid in full equity requires the return of the balance to the insured in payment of his uncompensated loss.

In *Memphis, etc., Railroad v. Dow*, 120 U. S. 287, 301, 7 Sup. Ct. 482, 30 L. Ed. 595, the Supreme Court says:

"The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties. All that the appellees can, in good conscience, demand, is reimbursement for their outlay in protecting the mortgaged property against the prior lien of the state. When relief to that extent is accorded, they will have no just ground to complain."

Again, in the leading case of *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788, the court say, at page 462, 129 U. S., page 479, 9 Sup. Ct., 32 L. Ed. 788:

"From the very nature of the contract of insurance as a contract of indemnity, the insurer, upon paying to the assured the amount of a loss, total or partial, of the goods insured, becomes, without any formal assignment, or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's right of action against the carrier or other person responsible for the loss; and in a court of admiralty may assert in his own name that right of the shipper. *The Potomac*, 105 U. S. 630, 634 [26 L. Ed. 1194]; *Phoenix Ins. Co. v. Erie Transportation Co.*, 117 U. S. 312, 321 [6 Sup. Ct. 750, 29 L. Ed. 873]."

See, also, *Norwich Ins. Soc. v. Standard Oil Co.*, 59 Fed. 984, 8 C. C. A. 433; *Fairgrieve v. Marine Ins. Co.*, 94 Fed. 686, 37 C. C. A. 190; *The St. Johns* (D. C.) 101 Fed. 469, 474, 475; *Arnould* (7th Ed.) § 1227.

We conclude, therefore, that the insurance companies, having paid the full amount stipulated in the policies, are entitled to recoup that sum and that neither the abandonment nor the subrogation permits them to appropriate the balance recovered from the wrongdoer.

It is undoubtedly true that this ruling is not in accord with the English decision in the *North of England Association v. Armstrong*, L. R. 5 Q. B. 244. That decision carries no greater weight in this

country than is compelled by the force of its reasoning, and, after careful consideration, we are unconvinced by its logic and are unable to accept its conclusions. It proceeds upon what, to our minds, is an unnecessarily harsh and inequitable exposition of the rights of the insured, based upon the assumed change in the law produced by what the Chief Justice considered a "new-fangled form of insurance." That he doubted the equity of his conclusion may be inferred from the following excerpt from the opinion:

"Therefore, though it certainly startles one a little that the underwriters, who have only paid £6,000, the estimated value, as stated in the policy and agreed upon between the parties, shall, if the vessel should prove to be equal to that £6,000, or worth more, get all that can be recovered in respect of the loss of the vessel, yet still I think that is an incident which arises from this novel form of policy in which the value of the vessel is taken at a fixed sum as agreed upon between parties."

This decision has been questioned even in England, Lord Blackburn saying, in the House of Lords:

"I own that if I had a similar case to decide, sitting in the Court of Error, I should pause before I said that it was rightly decided." *Burnand v. Rodocanachi*, L. R. 7 App. Cas. 333.

It has never been followed in this country to the extent of sustaining the position taken by the appellees.

The case of *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527, is cited in refutation of the foregoing statement. This case arose under a policy of fire insurance and turned largely upon a question of practice under the Alabama Code. The *Armstrong Case* is cited by way of illustration, but the point now under consideration did not arise and was not decided. The action was brought in the name of the shippers of the burned cotton and their right to recover the full value was sustained, the court observing:

"Although the suit is brought for the use of the insurer, and it is the sole party beneficially interested, yet its rights are to be worked out through the cause of action which the insured has against the common carrier. The legal title is in the insured, and the carrier is bound to respond for all the damages sustained by the breach of his contract. If only part of the loss has been paid by the insurer, the insured is entitled to the residue. How the money recovered is to be divided between the insured and the insurer is a question which interests them alone, and in which the common carrier is not concerned."

The case of *Mason v. Marine Ins. Co.*, 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700, is also cited, but the question there determined was whether the underwriters, having paid the full amount of the insurance, \$51,175, were entitled, after abandonment and conveyance to them of the ship, to a fund of \$7,879 awarded for demurrage occurring after the collision. It was held that they were entitled to this sum, but it is not perceived how the decision bears upon the question now in controversy.

The contention that the appellees are entitled to some consideration because they had written policies upon the *Livingstone* by which they bound themselves to pay any loss for which she might become legally liable seems to us irrelevant to the present issue.

A distinction is pointed out between the language of the policy issued by the *Reliance Company* and that of the policies issued by the other

companies, but we think the question suggested is disposed of by what has been said already.

This is also true of the question of costs and expenses.

We are dealing with a case where, through the efforts of the owners of a wrecked vessel, damages in excess of her insured value have been recovered against those responsible for her loss. The insurers not only refused to participate in the litigation which produced this fund, but persistently and actively opposed it. They have been, or will be, completely indemnified for the loss sustained by them in paying the insurance, and they now seek to appropriate the remainder of the fund which is also claimed by those whose exertions brought it into court. The title of the insurers, by virtue of the valued policies, abandonment and conveyance, to the physical property and to salvage, may well be conceded, as may also their right to share in the recovery to the extent of full and complete reimbursement for all losses and expenditures made by them incident to the insurance. We are fully convinced that equity and good conscience do not require the court to go further and permit them to realize an enormous profit from the transaction. No controlling authority compels such a decision; no principle of equity requires it. By limiting the recovery within the bounds of indemnity we are on safe and logical ground, where exact justice is done to both parties and where injustice to either is impossible.

The decree is reversed with costs of this appeal and the case is remanded to the District Court with instructions to enter a decree awarding the appellees interest on the sums paid by them during the time they were deprived of the use of said sums, and awarding the balance of the fund in court, after paying court fees and charges, to the libellants.

THIRD NAT. BANK OF CITY OF PHILADELPHIA v. ATLANTIC
CITY et al.

(Circuit Court of Appeals, Third Circuit. June 21, 1904.)

No. 49.

1. EQUITABLE ASSIGNMENT—NOTICE—ACCEPTANCE OF ORDER.

A contractor for a city building, to whom money was due from the city, presented an order to the comptroller, requesting him to issue a warrant for a specified sum in favor of a bank, which order the comptroller, by an indorsement thereon, accepted, to be paid when the architect's certificate should be filed. The next day the contractor delivered the order to the bank, which advanced him money thereon. *Held*, that the accepted order, on its delivery, operated not merely as an equitable assignment of so much of the fund as was covered thereby, but as a transfer of the legal title thereto to the payee, creating a direct indebtedness from the city to the bank as of the date of the acceptance; that no further notice to the city than was involved in the presentation and acceptance of the order was required.

2. DECREE PRO CONFESSO—CONCLUSIVENESS—MATTERS CONCLUDED.

Where a bill to establish complainant's right to a fund which set out the grounds of such right, and alleged its priority was taken pro confesso as to certain defendants, and a decree rendered thereon as provided in equity rule 19, after the expiration of the term such decree became con-

clusive against the defendants in default as to any claim which might have been set up in answer to the bill, whether or not such claim was correctly recited therein.

Appeal from the Circuit Court of the United States for the District of New Jersey.

For opinion below, see 126 Fed. 413.

A. B. Repetto, for appellant.

John R. Embery, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This bill was brought by the Third National Bank of Philadelphia against the city of Atlantic City and others to enforce payment to the complainant of the sum of \$7,500 out of a fund amounting to \$18,692.72 in the hands of the city; the same being a balance due to M. P. Wells & Co. upon a contract for the erection of a city hall. The bank claims such payment under the following order and acceptance:

| | | |
|----------------------|--|-------------------------------------|
| Order for Warrant | "Property | Atlantic City, N. J., May 31, 1901. |
| | A. M. Heston, City Comptroller, | |
| | Dear Sir:—Please issue a warrant for Seven thousand Five hundred | |
| | Dollars to Third National Bank, Philada. and deduct the same from the | |
| | amount of my Warrant for City Hall Contract, due | |
| | \$7500.00 | M. P. Wells & Co. |
| | "Note.—The City Comptroller will not hold himself responsible for the payment of the above, unless the order is filed in this office at least five days before the date of Warrant." | |
| | Indorsed: "Accepted and to be paid from moneys due M. P. Wells & Co. on the filing of architects' certificate in this office. | |
| | | A. M. Heston "Comptroller." |

This acceptance was written and signed by Mr. Heston, the comptroller of the city of Atlantic City, on the day of the date of the order.

The evidence shows that about May 28, 1901, M. P. Wells & Co. applied to the above-named bank for a loan, stating that money was due to them from the city of Atlantic City. They were told by the cashier of the bank to get a writing to that effect from the city comptroller, and a statement that he would accept an order for a certain amount. Accordingly M. P. Wells & Co. procured the acceptance of the foregoing order, and on June 1, 1901, delivered to the bank the order and acceptance as security for money they desired to borrow, and upon the faith thereof the bank loaned to M. P. Wells & Co. \$5,000 on June 1, 1901, and subsequently \$2,500 more.

This controversy is between the complainant and other creditors of M. P. Wells & Co., defendants in the bill, who respectively hold equitable assignments of portions of the said fund by virtue of orders drawn by M. P. Wells & Co. upon the city comptroller. The city itself has no interest in the distribution of the fund between the claimants.

The court below held that the bank acquired no interest in the fund by virtue of the acceptance of its order by the city comptroller, and its advancement of money upon the security thereof, and that its right to the fund did not attach until it gave notice of its claim to

the debtor, which was not until November 20, 1901, when the bank lodged its order with the city comptroller. The court therefore decreed that other claimants who had given notice to the comptroller prior to November 20, 1901, of their orders, were entitled to preference over the complainant.

The court ruled the case against the complainant upon the ground that where two assignments of a chose in action, for valuable consideration, are made to different persons, the assignee who first gives notice of his claim to the debtor has prior right. *Laclede Bank v. Schuler*, 120 U. S. 511, 516, 7 Sup. Ct. 644, 30 L. Ed. 704; *Methven v. Staten Island Light, Heat & Power Co.*, 66 Fed. 113, 13 C. C. A. 362. But even upon that principle the conclusion of the court, we think, was wrong. The order of May 31, 1901, in favor of the Third National Bank of Philadelphia, was accepted on that day by the comptroller of the city of Atlantic City, who was the fiscal agent of the city, and clothed with the amplest powers touching all its fiscal concerns. The comptroller placed the accepted order in the hands of the drawers, creditors of the city, who the next day delivered it to the payee as security for a loan of money. M. P. Wells & Co. made such use of the accepted order as presumably was intended by the comptroller. The bank had a right to rely upon the acceptance of the comptroller, and when, on June 1st, it loaned to M. P. Wells & Co. \$5,000 on the faith of the accepted order, the transaction was consummated and became irrevocable. The title of the bank to the accepted order and to the fund covered thereby was then complete, and related back to the date of the acceptance, May 31st. No further notice was necessary to perfect the bank's title. Notice was involved in the transaction. Moreover, the complainant does not stand upon a mere equity. The bank is not simply the holder of an order operating as an equitable assignment of the fund. The complainant holds, for value, an accepted order. The city became directly liable to the payee, the bank. The title of the complainant to the fund is grounded upon a legal right.

The assignments of error present for our determination another question, arising upon a decree in this cause entered against the Atlantic City National Bank, one of the defendants, under equity rule No. 19 of the Supreme Court of the United States, which provides that:

"When the bill is taken pro confesso the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill pro confesso and such decree rendered shall be deemed absolute unless the court shall, at the same term, set aside the same or enlarge the time for filing the answer upon cause shown upon motion and affidavit of the defendant."

The Atlantic City National Bank was duly served with the subpoena on the 31st day of January, 1902, and, having failed to appear or plead, answer, or demur to the bill of complaint, an order was entered on the 12th day of April, 1902, that the bill be taken pro confesso against the Atlantic City National Bank and certain other defendants who were in default. On the 24th day of May, 1902, a de-

cree was entered against the Atlantic City National Bank and the other defendants included in the order pro confesso "that said defendants have not, nor has any of them, any right, title, claim, or interest whatever in or to that certain fund of \$18,692.72 in said bill of complaint particularly mentioned; that the claim of the complainant thereto is good and valid and that the said defendants and each of them be, and they and each of them are, forever enjoined and restrained from asserting any claim whatsoever in or to said fund adverse to complainant." No application was made to the court during the term to set aside that decree, and it became absolute under the above-cited rule. Nevertheless the court below, in its decree of January 4, 1904, brought before us by this appeal, gave priority to the Atlantic City National Bank upon its order over the claim of the complainant. This was inadmissible. *Thomson v. Wooster*, 114 U. S. 104, 114, 5 Sup. Ct. 788, 793, 29 L. Ed. 105. In that case Mr. Justice Bradley, speaking for the court, said:

"From the authorities cited, and the express language of our own rules in equity, it seems clear that the defendants, after the entry of the decree pro confesso, and whilst it stood unrevoked, were absolutely barred and precluded from alleging anything in derogation of or in opposition to the said decree, and that they are equally barred and precluded from questioning its correctness here on appeal, unless on the face of the bill it appears manifest that it was erroneous and improperly granted. The attempt on the hearing before the master to show that the reissued patent was for a different invention from that described in the original patent, or to show that there was such unreasonable delay in applying for it as to render it void, under the recent decisions of this court, was entirely inadmissible, because repugnant to the decree. The defendants could not be allowed to question the validity of the patent which the decree had declared valid."

Here the bill set out the order and acceptance of May 31, 1901, and expressly averred priority of right in the complainant by virtue thereof. The question of priority as between the complainant and the Atlantic City National Bank was thus directly involved, and it was expressly decided in favor of the complainant. It is true that the bill stated that the Atlantic City National Bank claimed to have a lien on the fund by virtue of a certain writ of foreign attachment, and did not mention an order in favor of this defendant bank. But if the bank had a defense grounded on an order, it was bound to set it up in answer to the bill. *Stockton v. Ford*, 18 How. 418, 15 L. Ed. 395; *Aurora City v. West*, 7 Wall. 82, 19 L. Ed. 42; *Cromwell v. County of Sac*, 94 U. S. 351, 352, 24 L. Ed. 195. In the latter case the rule as to the conclusiveness of a judgment, if rendered upon the merits, is thus stated:

"It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

A judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as when rendered after answer and contest. *Last Chance Mining Company v. Tyler Mining Company*, 157 U. S. 683, 691, 15 Sup. Ct. 733, 39 L. Ed. 859.

The decree of the Circuit Court is reversed, and the case is remanded to that court for further proceedings in accordance with the views expressed in the foregoing opinion.

CLARK v. LANGENBACH et al.

(Circuit Court of Appeals, Sixth Circuit. May 14, 1904.)

No. 1,273.

1. FORCIBLE ENTRY AND DETAINER—ACTION UNDER KENTUCKY STATUTE—ISSUES.

Under the Kentucky statute providing a summary proceeding to recover possession of lands from which plaintiff has been forcibly ousted, a lessee in an oil lease who was actually in possession for the purposes of his lease, under claim of right, when he was forcibly dispossessed by defendants, claiming under a subsequent lease, may recover his possession, although the owner and lessor was, in subordination to the lease, also in possession for general purposes, and regardless of the validity of his lease, the question of title not being an issue in such proceeding.

2. SAME—EVIDENCE.

In such an action plaintiff's lease was admissible in evidence for the purpose of showing the extent of his possession taken thereunder.

3. SAME—RIGHT TO REMEDY—RESISTANCE TO DISPOSSESSION.

Under such statute, which defines a forcible entry as "an entry without the consent of the person having the actual possession" (Civ. Code Ky. 1900, § 452), the person in possession is not required to resist dispossession by actual force, but is entitled to the remedy where he yields to threatened violence.

In Error to the Circuit Court of the United States for the Western District of Kentucky.

See 119 Fed. 349, 56 C. C. A. 253.

The court below gave to the jury the following charge:

"Gentlemen of the Jury: The first question submitted to you is this: When this action was brought, did the property sought to be recovered exceed in value the sum of two thousand dollars? If you believe from the preponderance of the evidence that the said property was then of the value only of two thousand dollars or less, you will return your verdict in this form: 'We of the jury find that the property sued for did not, when this action was brought, exceed in value the sum of two thousand dollars.' And if that is your verdict it will conclude your labors. I have so charged you because, unless the value of the property sued for then exceeded two thousand dollars, this court will have no jurisdiction to determine this case at all. But if you shall conclude from the evidence that the value of the property sued for did then exceed in amount the sum of two thousand dollars, then and in that event, but only in that event, the court instructs and charges you to find for the plaintiffs, and if you do find for the plaintiffs the form of your verdict can be simply: 'We of the jury find for the plaintiffs.'

"The reasons upon which the court charges you as last suggested may be thus stated: The lease to the plaintiffs was executed and delivered on May 22, 1900, and became effective from that time. Possession followed that lease as matter of law, at least so far as defendants were concerned. The rights conveyed by the lease covered the exclusive privilege to drill for minerals on the land for a period of 10 years, and of the existence and terms of the lease the defendants seem to have had notice when they entered. As both plaintiffs and defendants ultimately claim title under and from a common source,

all parties are estopped from denying or disputing the validity and sufficiency of the title to the land of W. H. Mann, and from that circumstance it must be presumed, for the purposes of this trial, that Mann's title to the land was good. *Woolfolk v. Ashby*, 2 Metc. (Ky.) 289; *Winn v. Wilhite*, 5 J. J. Marsh. 524; *McClain v. Gregg*, 2 A. K. Marsh. 456.

"I have stated in an opinion in writing, heretofore filed in the case, my views as to the proper construction of the terms of the plaintiffs' lease, and nothing has occurred to change the views then expressed. The lease by Mann to John A. Moore, A. C. Moore, and James & James, through whom the defendants claim, was made on September 2, 1901. The defendants' pleadings show conclusively, and the testimony is definite and positive, that the two leases covered the same tract of land; that it is located in the state of Kentucky, notwithstanding the word 'Ohio' in the plaintiffs' lease; and, speaking generally, both leases were for the mining and mineral privileges on that land. The defendants' pleadings manifest in the clearest way the immateriality of such use of the word 'Ohio,' and that it was regarded and treated by the defendants as immaterial. See, on this point, the very satisfactory language of the court in *Smith v. Brown*, 34 Mich. 459. It is too late to change that position now.

"It is contended on behalf of the defendants that the covenants of the plaintiffs' lease have not been performed by the lessees, and therefore that Mann had the right to lease to Moore & James, although Mann has not been heard to make any complaint of any breach of those covenants, nor any claim to a right to re-enter therefor. The court is of opinion that all questions as to the payment of rents, royalties, and penalties, and also all questions as to the performance of the covenants of the contract of lease between plaintiffs and W. H. Mann, are matters to which the defendants are strangers, and with which they have nothing to do. Those questions could properly arise only between the plaintiffs and the person with whom such covenants were stipulated. It is obvious that the defendants are not parties to any of those stipulations. These are matters which we speak of as 'res inter alios acta.' They are transactions between persons other than any of the defendants, and therefore are not available for them.

"The court is furthermore of opinion that the lease to the plaintiffs was not capable of being annulled merely by a subsequent lease from Mann to other persons without the consent of the plaintiffs, and there is no sufficient proof that the witness Cox had any authority, orally or otherwise, to consent to any surrender or release of plaintiffs' interests in or possession of the land. There was no evidence of any re-entry by Mann for breach of any condition subsequent in the lease to plaintiffs, and merely making a later lease to others was not equivalent in law to a re-entry. The court, moreover, is of opinion that there was no sufficient evidence to show that Mann either desired or had the right to re-enter. I think the defendants have not shown any right of entry as against the plaintiffs, and, if so, their entry was tortious.

"The lease from Mann to others, and their sublease to one or more of the defendants, seem to the court in no wise to afford an adequate shield or defense for either of them as against the prior and better rights acquired by the plaintiffs under the lease to them, and of which lease the defendants appear to have had notice. It seems to the court to be quite clear from the testimony of the defendants themselves that enough interference with the possession of the plaintiffs had occurred to justify the bringing of this action, and that, the priority of right being in the plaintiffs by virtue of the earlier lease to them, they are entitled as against the defendants to the possession of the mineral privileges covered by the lease to them. Mann's rights, if any, are in no way involved in this litigation. Both defendants, I believe, have testified that they took possession of the premises after the plaintiffs had done so under their lease, and the disseisin of the plaintiffs seems to have been accomplished by the acts of both of them.

"In consequence of these views, the court is of opinion that the plaintiffs are entitled to all of the relief they specifically claim in their petition, and the jury is directed to find a verdict for the plaintiffs. The court thinks that no reasonable construction of the evidence would permit any other verdict."

Campbell & Campbell and C. L. & H. E. Jewett, for plaintiff in error.

Greer & Reed, for defendants in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This case was here on a former occasion upon a question relating to the jurisdiction of the Circuit Court, and was remanded to that court for further proceedings. *Roberts v. Langenbach*, 119 Fed. 349, 56 C. C. A. 253. For a statement of the nature of the action, reference may be had to the opinion of this court there reported. It is sufficient now to say that the suit was brought under a statute of Kentucky providing a summary proceeding for the recovery of the possession of lands from which the plaintiff has been forcibly ousted. The title is not involved further than it may characterize the possession of the plaintiff. The petition elaborates with unnecessary fullness the origin of the rights of the respective parties, but the substance of it is that the plaintiff was in possession of the lands described under what is termed a "mineral and oil lease" from one W. H. Mann, granting the right to explore, dig, mine, and sink wells and operate the same for the purpose of obtaining and removing the minerals, oil, and gas which might be found, and the construction of the necessary buildings and pipe lines; for which purposes the lessees were "to have and to hold the said premises" for the term of 10 years from May 23, 1900, rendering to the lessor a certain proportion of the oil, and a specified price for the minerals which might be produced. The lessor reserved the right to use and enjoy the land for the purpose of tillage, but not so as to interfere with the rights granted by the lease. The petition also states that the lessees went into possession of the premises for the purposes specified in the lease; that the defendants, with knowledge of this lease, subsequently procured a lease of similar character from Mann, and forcibly entered upon and dispossessed the plaintiffs while so in possession under the former lease; and the prayer was that the possession be restored to the plaintiffs. The answer denied that the sum involved in the controversy amounted to as much as \$2,000, and claimed that for that reason the court was without jurisdiction, but admitted the plaintiff's lease, claiming, however, that it had been forfeited; admitted the procurement of their own lease, but denying that the plaintiffs were in possession at the time stated in the petition, or that the defendants forcibly entered the said premises. The cause was tried by the court and a jury. Evidence was produced by the parties upon the question of the sum or value of the subject of the controversy, and also upon the question as to whether the plaintiffs had been forcibly dispossessed. The court, in its instructions, left to the jury the question as to whether the value of the matter in controversy amounted to the sum of \$2,000, exclusive of interest and costs, and instructed them that, if they should find for the plaintiff upon the issue respecting the amount involved, they should render a verdict on the merits for the plaintiffs; but that if they should find for the defendant on the issue relating to the jurisdiction, they should render a general verdict for that party. The jury found a verdict for the plaintiff which

signifies that they found the issue relating to the jurisdiction for the plaintiff, and accepted the court's instruction that the evidence required a verdict for the plaintiffs on the merits, if they reached that question. A judgment for the plaintiffs having been entered, the defendants brought the case here on a writ of error. There are several assignments of error, but, as counsel have preferred to discuss the questions they desire to submit in a more general way than they are presented by the particular language of their assignments, we are content to follow their method.

1. It is contended that the lease to the plaintiffs "was a mere option, which, not having been exercised, the owner of the land might treat as abandoned," the assumption being that the lease did not bind the lessees to do anything, and that they had not in fact done anything, under the lease. And on this contention counsel submit an argument fortified by reference to decided cases bearing on the construction of such leases. But we held in *Allegheny Oil Co. v. Snyder*, 106 Fed. 764, 45 C. C. A. 604, and *Logan Natural Gas Co. v. Great Southern Gas Co.*, 126 Fed. 623, that, notwithstanding there was no express covenant on the part of the lessee, there was an implied stipulation that he would within a reasonable time proceed with the exploration and development of the lands leased, and that, if he did not do so, the lessor might treat the lease as forfeited. But we need not pursue that subject. If the plaintiffs were actually in possession under a claim of right, that was enough. The defendants, whether they had the better right to the possession or not, could not lawfully acquire it by force. If they should venture on such a course, they would expose themselves to such a proceeding as this for the purpose of depriving them of the advantage gained by violence and replacing the parties. The question of title is not to be tried.

2. The lease to the plaintiffs was properly given in evidence for the purpose of showing the extent of the possession acquired by the plaintiff's entry upon the premises; that is to say, to show that the possession extended to the boundaries of the land described as granted by the lease.

3. It is contended also that the possession accorded by the lease was not such as would entitle one to have this statutory remedy. It is claimed that Mann was the party actually in possession, and, if their entry was unlawful, he alone could complain. This contention proceeds upon an erroneous assumption. If the plaintiffs entered under their lease, their possession was superior to that of Mann, for by its terms his possession was to be subordinate to the right of possession given to his lessees. The possession taken thereunder would, we think, be sufficient to protect the plaintiffs against a violent dispossession, and entitle them to the remedy provided by this statute.

4. From these conclusions the case is narrowed to the question whether the court was right in taking the view that the evidence left no fair room for doubt as to whether the defendants intruded upon the possession of the plaintiffs by violence. The proof was that the agents of the plaintiffs had, for several days before the difficulty occurred, been digging and prospecting upon the land, and were upon it at the time when the defendants' party entered, and protested against the

entry of the defendants. High words followed. The defendants persisted, and threatened violence to gain their point. No blows were struck, but they were threatened. Calmer counsels, however, prevailed. The plaintiffs' agents gave way, asserting that legal steps would be taken to obtain a remedy. There were some disputes in the evidence in respect to the minor particulars of the transaction. But there was none as to the substantial facts that the defendants entered with a show of force, and that the plaintiffs opposed it as far as they could without engaging in a combat. They were not required to go to that extremity in order to lay the ground for complaint under the statute. The object of the law was to prevent strife, and it would be inconsistent with its purpose to require that the injured party should have resisted to the point of a physical struggle. The statute defines a forcible entry as "an entry without the consent of the person having the actual possession." Civ. Code Ky. 1900, § 452. Upon that interpretation of the law a verdict finding that the defendants' entry was not forcible would have been absurd. We think the court did not err in holding that a forcible entry was proved beyond fair doubt.

There are no other questions of sufficient importance to require separate discussion.

The judgment must be affirmed, with costs.

WHITMAN v. ATKINSON.

(Circuit Court of Appeals, Second Circuit. April 26, 1904.)

No. 140.

1. FEDERAL COURTS—STATUTORY LIABILITY—RULES OF DECISION.

Where a cause of action is created by a state statute, the question when the right of action accrues, and what conditions authorize its enforcement, is one of judicial construction, as to which the decisions of the highest court of the state are controlling on the federal courts.

2. CORPORATIONS—INSOLVENCY—STOCKHOLDERS' LIABILITY—STATUTES—CONSTRUCTION—LIMITATIONS.

Kan. Gen. St. 1889, c. 23, § 32, provides that, after an execution has been issued against a corporation and returned nulla bona, an execution may be issued on an order of court against stockholders to an extent equal in amount to the amount of his stock, or plaintiff in the execution may proceed by action to charge the stockholder with the amount of his judgment. Section 44 provides that if such corporation be dissolved, leaving debts unpaid, suits may be brought against stockholders at the time of the dissolution, and by another section the corporation is declared dissolved for such purposes when it has suspended business for more than a year. Under the decisions of the state courts, a creditor of a moneyed corporation may proceed by action to enforce the stockholder's liability under section 44 immediately after the expiration of a year from the date of suspension of business without recovering judgment against the corporation, the right being complete on the corporation's dissolution. *Held*, that a creditor was not entitled to delay suit against a stockholder under section 44 while he was maintaining a suit against the corporation under sec-

¶ 1. State laws as rules of decision in federal courts, see notes to *Griffin v. Overman Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

tion 32, and obtaining the return of executions unsatisfied, and hence the maintenance of such proceedings did not suspend the statute of limitations against an action against stockholders under section 44.

In Error to the Circuit Court of the United States for the Southern District of New York.

William G. Wilson, for plaintiff in error.

William B. Hornblower, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff. The action was tried by the court below without a jury, a jury having been waived by the stipulation of the parties, and the judgment rests upon the findings of fact and law made by the court, which cover all the questions litigated in the case.

The action was brought in the United States Circuit Court for the Southern District of New York to enforce the statutory liability of the defendant, under the laws of Kansas, as a stockholder of the Arkansas City Investment Company, a moneyed corporation of that state, for certain debts of that company. The plaintiff is a judgment creditor of that corporation, and is also the assignee of the debts and judgments of two other creditors against the corporation. The judgments against the corporation were recovered respectively in 1893, 1894, and 1895, in actions brought in one of the state courts of Kansas after the debts of the plaintiff and his assignors had severally accrued. Executions were issued upon these judgments in September, 1897, and were returned unsatisfied on November 20, 1897. The present action was commenced April 1, 1898. The Arkansas City Investment Company made an assignment for the benefit of its creditors December 15, 1890, and thereupon completely suspended business, and has never resumed.

Among the defenses interposed is that of the New York statute of limitations, which requires an action against a stockholder of a moneyed corporation to be brought within three years after the cause of action has accrued. The ruling of the trial judge that this statute was not a good defense is the basis for some of the assignments of error.

The statutes of Kansas creating the liability of stockholders for the debts of Kansas corporations are found in the Kansas General Statutes of 1889, c. 23. By section 32 it is provided that after an execution has been instituted against a corporation (except a railway, religious, or charitable corporation), and there cannot be found any property whereon to levy such execution, an execution may be issued upon an order of the court made in the action, upon reasonable notice to the stockholder against any of the stockholders, to an extent equal in amount to the amount of his stock; or the plaintiff in the execution may proceed by action to charge the stockholder with the amount of his judgment. Section 44 provides that if such a corporation be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of the dissolution, without joining the corporation. By another section it is provided that a cor-

poration is dissolved, for the purpose of enabling any creditor to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than a year.

If the plaintiff's cause of action accrued at the date of the dissolution of the corporation, the three-years statute of limitations is a bar, as it has been decided by this court, and by the Supreme Court, that the statute pleaded applies to such a cause of action as is alleged in the complaint. *Hobbs v. National Bank of Commerce*, 96 Fed. 396, 37 C. C. A. 513; *Platt v. Wilmot* (Sup. Ct. April 4, 1904) 24 Sup. Ct. 542, 48 L. Ed. 809.

It is not disputed that the corporation became dissolved, within the meaning of section 44, on December 16, 1890; but the contention for the defendant in error is that the cause of action did not accrue in respect to the several debts until the recovery of the judgments thereon, and the return of the executions unsatisfied.

When a cause of action is created by statute, the question when the right of action is brought into existence, and what conditions authorize its enforcement, is one of judicial construction, and, upon all questions concerning the interpretation and construction of the statute of a state, the decisions of the highest court of that state are authoritative and controlling. The interpretation becomes a part of the law of that state, as much so as if incorporated into the body by the Legislature. *Christy v. Pridgeon*, 4 Wall. 196, 18 L. Ed. 322.

By the decisions of the highest courts of Kansas construing the statutory provisions which have been referred to, a creditor of a moneyed corporation may proceed by action to enforce the liability of its stockholders under section 44 immediately after the expiration of a year from the date of its suspension of business, without awaiting the recovery of a judgment against the corporation, and the right of action is complete the moment the corporation is dissolved. According to the view of these decisions, section 32 relates to the exigency of corporate insolvency, and section 44 to that of corporate dissolution; under the one the action against the stockholder lies because the corporation is bankrupt, though not necessarily dissolved; under the other it lies because the corporation is dissolved, though not necessarily bankrupt.

In *Cottrell v. Manlove*, 58 Kan. 405, 49 Pac. 519, the court say:

"The remedy of the section last quoted (44) is open to the creditors immediately upon the dissolution of the corporation. Under its provisions there is no occasion to await the recovery of a judgment against the company, but action may at once be brought against its stockholders. * * * Indebtedness maturing after the dissolution, and growing out of a contingent liability existing at the time of such dissolution, is, in our judgment, within the intent of the act. The controlling factors in the problem which arises under this statute are the facts of indebtedness and corporate dissolution, and not the time of their occurrence."

In *First National Bank of Atchison v. King*, 60 Kan. 733, 57 Pac. 952, it was held, in substance, that the right of action in favor of the creditors of the corporation, as against stockholders, accrues at the expiration of one year after the corporation has ceased to transact

business, and not after such suspension of business has been shown or determined in some judicial proceeding.

In *Brigham v. Nathan*, 62 Kan. 243, 62 Pac. 319, it was held that the creditor, notwithstanding the immaturity of his demand against the corporation, had an immediate right of action against the stockholder when the corporation had ceased for one year to transact all business for which it was organized, and in the meantime had confined itself to the doing of such acts as were incidental and necessary to the final closing up of its affairs.

These decisions, as well as those in *Crocker v. Ball* (Kan.) 59 Pac. 691, *Remington v. Hudson*, 64 Kan. 45, 67 Pac. 636, and *McHale v. Moore* (Kan.) 71 Pac. 522, clearly establish the proposition that the plaintiff might have maintained the present action against the defendant at any time after the 16th day of December, 1891. The construction of the statute placed upon it by the courts of Kansas seems to be the reasonable, and, indeed, the necessary one; but, if we were disposed to differ from the courts of Kansas, nevertheless we are concluded by it, because the decisions of the highest court of a state in the construction of its own statutes are controlling upon the federal courts.

In *Seattle National Bank v. Pratt* (C. C.) 103 Fed. 62, it was held by the United States Circuit Court for the Northern District of New York that the decisions which have been referred to were in construction of sections 32 and 44 of the corporation law of Kansas, and as such were binding upon the federal courts. This court affirmed that decision. 111 Fed. 841, 49 C. C. A. 662.

In *Hilliker v. Hale*, 117 Fed. 220, 54 C. C. A. 252, in an action to enforce the liability of a stockholder of a Minnesota corporation, this court held that the question when the cause of action against the stockholder arose was controlled by the decisions of the court of that state in construction of its statutes relating to the liability of stockholders of corporations, and the court said:

"In courts outside of Minnesota, there is conflict as to when such cause of action arose; but we are of opinion that such question should be decided in conformity with the decision of the Minnesota courts, and they speak with no uncertain sound."

So far as the decision in *Whitman v. Citizens' Bank*, 110 Fed. 504, 49 C. C. A. 122, is in conflict with these decisions, it does not meet with our approval.

If the present action could have been brought to enforce the liability of the defendant immediately after the dissolution of the corporation, the bar of the statute cannot be parried by the election of the creditors to bring actions against the corporation pursuant to section 32, prosecute them to judgment, issue executions, and await the return of the executions unsatisfied.

"When a party knows that he has a cause of action, it is his own fault if he does not avail himself of those means which the law provides of prosecuting his claim, instituting such proceeding as the law regards sufficient to preserve it." *Amy v. Watertown*, 130 U. S. 320, 325, 9 Sup. Ct. 537, 32 L. Ed. 953.

In *Bauserman v. Blunt*, 147 U. S. 657, 13 Sup. Ct. 466, 37 L. Ed. 316, the court mentioned two general rules to be observed in apply-

ing statutes of limitation, in the absence of an express statute or controlling adjudication of the contract. The second rule was this:

"The bar of the statute cannot be postponed by the failure of the creditor to avail himself of any means within his power to prosecute or to preserve his claim."

It is entirely clear that the maintenance of the present action does not depend upon the issuance or return of executions under section 32, and that the plaintiff would be entitled to recover under section 44 if his action had been brought within three years from the date of the dissolution of the corporation.

It is impossible to escape the conclusion that the statute of limitations was a perfect bar to the action, and that the court below erred in failing to give it such effect.

Judgment should have been rendered for the defendant, and accordingly the judgment will be reversed, with instructions to render such a judgment.

BURRELL et al. v. CROSSMAN et al.

(Circuit Court of Appeals, Second Circuit. April 12, 1904.)

No. 194.

1. SHIPPING—DEMURRAGE—DEFENSE OF VIS MAJOR.

Where a vessel commenced discharging cargo in Rio de Janeiro on the day that the revolution began there in 1893, in which the insurgents captured government warships in the harbor, and there was thereafter more or less firing between such ships and forts and batteries on shore, and such a condition of affairs was produced by the hostilities as to render it practically impossible to receive the cargo with the dispatch contemplated by the charter, either because of the intrinsic danger incident to unloading or the inability to procure the necessary men to do the work, such condition constituted an unavoidable hindrance, and, to the extent that it prevented compliance with the contract, excused performance, and relieved the charterers from liability under the provision requiring them to pay demurrage for detention by the default of themselves or their agent.

Appeal from the District Court of the United States for the Southern District of New York.

For opinions below, see 111 Fed. 192, and 124 Fed. 838.

Everett P. Wheeler, for appellants.

Lawrence Kneeland, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

WALLACE, Circuit Judge. This is an action for demurrage, the libelants claiming that the charterers are liable for the detention of the chartered vessel at the port of Rio de Janeiro during the time of the revolution of 1893.

By the terms of the charter party the cargo of lumber was to be discharged at the port of destination at the average rate of not less

¶ 1. Damages, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *City of Laredo v. International Bridge & Tramway Co.*, 16 C. C. A. 4.

than 20,000 superficial feet per running day, Sundays excepted. Lay days were to commence from the time the vessel was ready to discharge and gave written notice thereof to the consignees; and for each and every day's detention by default of the charterers \$59.46 was to be paid. The vessel arrived at Rio de Janeiro prior to September 4th, and upon that day was ready to discharge, and gave due notice to the consignees, and, having been ordered to her discharging berth, on September 6th commenced to discharge. She had on board 514,000 feet of lumber, and, discharging at the rate of 20,000 feet per day, Sundays excepted, the lay days would have expired October 6th. Her discharge was not completed until November 28th.

The defense of the charterers is that, owing to the existence of the hostilities between the rebels and the government, the consignees were directly or indirectly prevented from doing more than they did to take the cargo. It appears by the proofs that the revolution began September 6th. The insurgents captured the warships of the government lying in the harbor, and the officers and crews of the seized ships went over to the rebels. From that time on the revolted squadron controlled the inner harbor to within a limited distance of the shore line, which was defended by barricades and intrenchments, and with artillery, infantry, and police forces; and there was firing intermittently between the vessels and the forts at the entrance of the harbor and the fortified hills in the city, and occasional fighting in the bay and along the shore. At times the rebel squadron bombarded the city, and at times fired with machine guns and small arms at the troops upon the shore. All this created a condition of fear, suspense, and panic on the part of the population, which resulted in a partial paralysis of business within the city. Foreign commerce was practically suspended. The practice of the government, in impressing the gangs of workmen employed around the harbor or in the streets into the military service, deterred laborers from accepting employment. The effect of this state of affairs upon the discharging of vessels is fairly characterized in a letter written November 17th to the libelants by their agents in Rio:

"It is, we understand, most difficult to get labor, and many vessels are lying for weeks unable to discharge for want of men. We fear Capt. Wilson will not be able to collect any demurrage in these times, but have told him that he should look to the consignees to make the claim on the owners of the cargo."

By the decree of the court below the libelants were awarded the per diem rate for the whole period of detention between October 6th and November 28th. The court was of the opinion that the indirect effect of such a state of affairs as was shown by the proofs was not to be considered, and that the inquiry was to be confined "to the result of the firing in the vicinity of this vessel which directly affected the discharge of the cargo."

When this cause was considered by the Supreme Court (179 U. S. 100, 21 Sup. Ct. 38, 45 L. Ed. 106), it was presented, as to the questions now involved, upon the pleadings, and this question was whether, upon the facts alleged in the answer, the detention of the vessel was caused by default of the charterers or by the acts of the

public enemy. It was not necessary to decide whether, upon the facts now in proof, the charterers were answerable, and the opinion was confined strictly to the point involved. We do not read the opinion of the court as intending to decide that such a condition of affairs at the port of discharge, caused by military hostilities, as would prevent the consignees from obtaining men to engage in unloading the vessel, would not excuse them; and we think the court below fell into error by adhering too literally to some of the expressions in the opinion. One of the cases cited with approval in the opinion of the court is *Towle v. Kettell*, 5 Cush. 18. In that case the vessel, after reaching her anchorage place for the discharge of her cargo, was ordered into quarantine and moved from the place. The court said:

"The consignees were not bound to receive the cargo under the disadvantages and at the increased expense arising from the remote situation of the vessel. As soon as the vessel was restored to her original place of anchorage, the discharging of the cargo commenced, and proceeded, so far as appears, with all reasonable dispatch."

It was held, inasmuch as the demurrage was recoverable only for the "default" of the defendants, that there was no breach of the charter party, notwithstanding they could have taken the cargo from the place to which the vessel had been removed at some additional expense.

Another of the adjudged cases cited in the opinion of the court was *Davis v. Pendergast*, 16 Blatchf. 565, Fed. Cas. No. 3,647. By the terms of the charter demurrage was to be paid for every day of detention "by default" of the charterers, and the court placed this construction upon the meaning of the contract:

"The respondents in effect agreed that no more than 45 running days should be occupied in loading and discharging the cargo, unless it was occasioned by some fault of the vessel, or some unusual and extraordinary interruption that could not have been anticipated when the contract was made."

We are of the opinion that if there was such a condition of affairs produced by the hostilities as to render it practically impossible to receive the cargo with the dispatch contemplated by the charter, either because of the intrinsic danger incident to unloading, or the inability to procure the necessary men to do the work, such a condition constituted an unavoidable hindrance, and, to the extent that it prevented compliance with the contract, excused performance.

It is quite impossible to find upon the proofs that the consignees did not receive the cargo as rapidly as was reasonably practicable under the circumstances. Some of their witnesses, no doubt, gave a very highly colored picture of the hostilities; but that the hostilities interfered very seriously with the unloading of the vessels in the harbor, and with this particular vessel, directly or indirectly, it is impossible to doubt. The fact that the consignees took cargo from the vessel on quite a number of days when active hostilities had previously taken place, or took place later in the day, some of them in the immediate vicinity of the vessel, indicates that they were trying to do what lay in their power to facilitate the discharge. The further fact that the libelants, who were doubtless kept informed of the sit-

uation by Capt. Wilson, were during the period of detention instructing their agents to make claim upon the government of Brazil for the delay and attendant expenses, shows that they regarded the government as responsible for it, and did not attribute it to the consignees.

We conclude that the libelants have failed to establish such a default on the part of the charterers as entitles them to a recovery for the detention.

The decree is reversed with costs, and with instructions to dismiss the libel.

FRYE & BRUHN v. CARSTENS et al.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1904.)

No. 1,026.

1. APPEAL—INTERLOCUTORY JUDGMENT—TEMPORARY INJUNCTION—DISSOLUTION.

Act March 3, 1891, § 7, as amended by Act June 6, 1900, c. 803, 31 Stat. 660 [U. S. Comp. St. 1901, p. 551], provides that where, on a hearing in equity in a district or circuit court, an injunction shall be granted or continued by an interlocutory order or decree in a case in which an appeal from a final decree may be taken to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the Circuit Court of Appeals. *Held*, that, where a temporary injunction was dissolved on a demurrer to the bill being sustained, plaintiff was not entitled to an appeal from so much of the order only as dissolved the injunction.

Appeal from the Circuit Court of the United States for the Western Division of the District of Washington.

James M. Ashton, for appellant.

R. G. Hudson and R. S. Holt, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The motion made to dismiss the appeal in this cause must be granted. To the bill filed by the complainant the defendants demurred, upon the ground that upon its face it failed to show that the complainant was entitled to the relief sought. Among the relief so sought was a restraining order and injunction, and upon the bill a restraining order was granted by the court, a motion to dissolve which was afterwards made by the defendants, and came on for hearing before the court with the demurrer to the bill, and resulted in this order of the court:

"The demurrer to the bill and motion of defendants to dissolve the restraining order herein coming on for hearing in open court on this 23d day of September, 1903, and the court having heard read the said bill and demurrer, with the record and files herein, and having heard the arguments of counsel for all parties:

"It is ordered and decreed that the said demurrer be, and the same is hereby, sustained, whereupon plaintiff upon its motion therefor was granted leave to file an amended bill of complaint herein, and at the request of its counsel was allowed thirty days from this date so to do; and, plaintiff having thereupon given notice of appeal from said decision to the United States Circuit

Court of Appeals for the Ninth Circuit in so far as the same might operate to dissolve said restraining order or injunction, the court did order and direct that said restraining order continue in force, and that all proceedings thereon pending said appeal be stayed, upon the plaintiff filing an additional bond on appeal in the sum of fifteen hundred dollars."

The appellant's petition for appeal, which was allowed by the court below, is as follows:

"The above-named plaintiff conceiving itself aggrieved by the interlocutory order made and entered herein by the above-entitled court on the 23d day of September, 1903, whereby said court declined to continue the restraining order herein in force, and permitted the same to stand as a temporary injunction pending the determination of this appeal, only upon this plaintiff giving an additional bond herein on appeal in the sum of fifteen hundred dollars, and requiring that said additional bond be given as a condition of said appeal, and as a condition for the order of said court staying proceedings under said injunction or temporary restraining order during the pendency of said appeal, and this plaintiff having on said 23d day of September, 1903, in open court, given notice of an appeal from said interlocutory order:

"Now, therefore, said plaintiff does hereby appeal from said order to the United States Circuit Court of Appeals for the Ninth Circuit, and for the reasons specified in the assignment of errors filed herewith; and the plaintiff hereby prays that this its said appeal may be allowed, and that a transcript of the record, proceedings, and all papers upon which said interlocutory order was made may be sent, duly authenticated, to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California."

The appeal must be dismissed, because the sustaining of the demurrer to the bill upon the ground that it did not state sufficient facts to warrant the relief sought necessarily resulted in a dissolution of the restraining order, which could not stand while that upon which it was based fell. The complainant had the right, of course, to stand upon its demurrer, submit to final judgment against it, and bring the case here for review, or to avail itself of the privilege given by the court below to amend its bill, which it seems it did. The only appeal the plaintiff sought to take was from so much of the order made by the court below as undertook to work a dissolution of the restraining order, which, under the statute as it now exists, is not appealable, section 7 of the act of March 3, 1891, c. 517, 26 Stat. 828, establishing the Circuit Courts of Appeals, having been amended by the act of June 6, 1900, c. 803, 31 Stat. 660 [U. S. Comp. St. 1901, p. 551], so as to read as follows:

"Sec. 7. That where, upon a hearing in equity in a District Court or in a Circuit Court, or by a judge thereof in vacation, an injunction shall be granted or continued or a receiver appointed, by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction or appointing such receiver to the Circuit Court of Appeals; provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court, or by the appellate court or a judge thereof, during the pendency of such appeal: provided further, that the court below may in its discretion require as a condition of the appeal an additional bond."

The appeal is dismissed.

ARTER v. NORTHWESTERN MUT. LIFE INS. CO. OF MILWAUKEE

(Circuit Court of Appeals, Third Circuit. June 13, 1904.)

No. 59.

1. LIFE INSURANCE — POLICIES — APPLICATION — ATTACHMENT — PHOTOGRAPHIC COPY.

A correct photographic copy of an application for life insurance, reduced in size, but legible, attached to the policy, constituted a compliance with the Pennsylvania laws (Act May 11, 1881, P. L. 20) requiring insurance companies to attach a copy of the application to policies where such application is referred to and made a part of the policy.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

J. W. Kinnead, for plaintiff in error.

H. A. Miller, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and KIRKPATRICK, District Judge.

DALLAS, Circuit Judge. This was an action by Lydia B. Arter (plaintiff in error) against the Northwestern Mutual Life Insurance Company (defendant in error) to recover upon a policy of insurance upon the life of her husband, Winfield S. Arter, who died upon December 27, 1901. The defense was that within two years from the date of his application for the insurance he had died by his own hand, and that, therefore, the company was not liable, because the application (which was expressly made a part of the contract) contained the following agreement:

"It is hereby declared and agreed all the statements and answers written in this application, marked Part I, as well as those to be made to the Medical Examiner, marked Part II, are warranted to be true and full and fair answers to the questions and are offered to the company as a consideration for the Contract of Insurance, which shall not take effect until the first premium shall have been actually paid during the life of the person herein proposed for insurance, and while he is in good health. It is also agreed that if within two years from the date hereof, I shall pass south of the Tropic of Cancer, or be personally engaged in blasting, mining or sub-marine operations, or in the production of highly inflammable or explosive substances, or in switching or coupling or uncoupling cars, or be employed in any capacity on the trains of a railroad except as passenger or sleeping car conductor, mail agent, express messenger or baggage master, or in ocean navigation, or shall enter or be engaged in any military or naval service (except in time of peace), without a written permit therefor signed by the President or Secretary of the Company, or shall, within the said two years, either undertake an aerial voyage, or die in consequence of a duel, or, *whether sane or insane, die by my own hand*, then, and in every such case, any policy issued on this application shall be null and void."

A Pennsylvania statute (Act May 11, 1881, P. L. 20) provides (section 1):

"That all life and fire insurance policies upon the lives or property of persons within this commonwealth, whether issued by companies organized under the laws of this state or by foreign companies doing business therein, which contain any reference to the application of the insured * * * either as forming part of the policy or contract between the parties thereto, or hav-

ing any bearing on said contract, shall contain or have attached to said policies correct copies of the application as signed by the applicant, * * * and unless so attached and accompanying the policy no such application * * * shall be received in evidence in any controversy between the parties to or interested in the said policy, nor shall such application or by-laws be considered a part of the policy or contract between such parties."

The only substantial point presented by this record is whether the court below was in error in instructing the jury, with reference to the foregoing statutory provision, that a correct copy of the application was attached to the policy in suit, and in declining to submit that question to the jury. There was in fact a photographic copy attached to the policy, which comparison with the original demonstrates to be a correct one, and the only testimony upon the subject was that it is so. Therefore, if there were nothing more in the case, it would be difficult to assign any rational ground for objection to the action of the court; but the real subject of complaint is, not that the copy is not a correct one, but that it is not legible, and it has been not unreasonably urged that in fairness to the insured the original should not have been so greatly reduced in the reproduction. But the learned trial judge appears to have experienced no difficulty in reading it, and, although it has become somewhat blurred—probably since the trial—we, too, have been able to read it. Under these circumstances there was nothing to be left to the jury. The photographic print was certainly "correct," and, in the absence of any specific designation or description in the statute, we know of no more apt test by which to determine whether it should be regarded as a "copy" than that supplied by Stephen (Dig. of Ev. p. 3) in defining the word "document," which, he says, "means any substance having any matter expressed or described upon it by marks *capable of being read.*"

The judgment of the circuit court is affirmed.

NOTE BY THE COURT. The judgment in this case was determined upon prior to the death of the late Judge Kirkpatrick, and was concurred in by him.

JOHNSTON v. TURNBULL.

(Circuit Court of Appeals, Third Circuit. June 13, 1904.)

No. 23.

1. MASTER AND SERVANT—STEVEDORES—INJURIES—DEFECTIVE APPLIANCES.

Where a chain used in unloading a vessel, the breaking of which caused the death of a stevedore, had been subjected both to test and inspection shortly before the injury, and did successful service for at least one day before it broke, evidence of two expert witnesses that in their opinion a crack must have been present in the chain, and could have been seen by a careful observer, was insufficient to establish that the chain was dangerously defective at the time it was inspected.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 124 Fed. 476.

J. H. Brinton, for appellant.

Henry R. Edmunds and J. Parker Kirlin, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This is an appeal from a decree in admiralty dismissing the libel of Margaret Johnston, widow of Michael Johnston, by which she sought an award of damages to compensate her for the loss resulting to her from his death. He, with others, had been employed to unload a cargo of iron from the steamship Fairmead, and while he was engaged in that work a chain which was used to hoist the loaded buckets broke or parted, and a filled bucket which was attached to it fell back into the hold of the vessel, where Johnston was, and so injured him that he soon after died. These facts were undisputed, but they, of course, did not suffice to support the libel. The gravamen of the cause rested in the libelant's averment that those who were in charge of the Fairmead had not exercised due care to provide a reasonably safe chain; and the only substantial question was as to whether the truth of that averment had been established by the weight of the evidence. The learned district judge found that it had not been, and we have independently arrived at the same conclusion. There was evidence that this chain had been subjected both to test and inspection shortly before it was put to the use for which, after at least one day of successful service, it proved to be unfit. That the test was not made with especial reference to the occasion in question is immaterial. It is enough that it was in fact made, and that it was amply adequate to warrant the belief that the chain was not dangerously defective. The testimony of two witnesses that they had carefully inspected it was consonant and positive, and we think the court below was clearly right in refusing to discredit them because two persons whom the libelant called as experts testified that, in their opinion, a crack must have been present, which could have been seen by a careful observer.

No useful purpose would be subserved by reviewing the evidence in detail. Its attentive consideration has satisfied us that it did not sustain the essential charge of negligence, and nothing further need be said of it.

The decree of the District Court is affirmed, with costs.

YOCUM et al. v. PARKER et al.

(Circuit Court of Appeals, Eighth Circuit. April 8, 1904.)

No. 1,964.

1. JURISDICTION OF FEDERAL COURTS—ALLEGATIONS OF CITIZENSHIP.

An averment of residence is not equivalent to one of citizenship for the purpose of invoking the jurisdiction of a federal court.

2. SAME—DENIAL OF JURISDICTIONAL ALLEGATIONS.

A federal court is without jurisdiction of an action at law where the answer contains a general denial, which under the state practice puts in

¶ 1. Averments of citizenship to show jurisdiction of federal courts, see note to *Shipp v. Williams*, 10 C. C. A. 261.

issue the jurisdictional allegations of the complaint, and there is no proof to sustain such allegations.

In Error to the Circuit Court of the United States for the Western District of Missouri.

For opinion below, see 130 Fed. 722.

This was an action in ejectment to recover possession of real property in Platte county, Mo. In the jurisdictional averments of the petition it is recited that one of the plaintiffs is a resident of the state of Colorado, that the other is a resident of the state of Idaho, and that all of the defendants are residents and citizens of the state of Missouri. The answer of the defendants contains a general denial, but does not contain any admission or averment concerning the residence and citizenship of the parties. There is nothing in the remainder of the record touching the matter. Upon motion of the defendants, judgment upon the pleadings was rendered by the Circuit Court in their favor. The judgment was upon the merits.

Vinton Pike and J. B. Shackelford, for plaintiffs in error.
J. W. Coburn and B. R. Vineyard, for defendants in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Courts of the United States are of limited jurisdiction, and the cases of which they have cognizance are specially circumstanced. Hence the presumption that a cause is without the jurisdiction of one of those courts unless the contrary affirmatively appears from the record. This doctrine was announced more than a century ago by the Supreme Court (*Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718), and it has since been frequently applied and unvaryingly adhered to. The question of jurisdiction is self-asserting in every case. It arises although the litigants are silent. Even their consent cannot authorize cognizance if fundamental grounds of jurisdiction are absent.

An attempt was made in the case before us to invoke the jurisdiction of the Circuit Court on the ground of diversity of citizenship. But the citizenship of the plaintiffs does not appear. An averment of residence is not an averment of citizenship. *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057. Passing this, the defendants denied by their answer that the plaintiffs were even residents respectively of the states of Colorado and Idaho, and they also denied that they themselves were citizens of the state of Missouri. By the rules of the common law, objections to the jurisdiction of the court were pleadable in abatement only (*Sheppard v. Graves*, 14 How. 504, 510, 14 L. Ed. 518), but by the act of June 1, 1872, c. 255, § 5, 17 Stat. 197 (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), the rules of pleading and practice in actions at law in the Circuit and District Courts of the United States were assimilated to those prevailing in the courts of the states. Under the civil practice act of Missouri, if the want of jurisdiction is apparent on the face of the petition, advantage thereof may be taken by demurrer; otherwise it may be taken by answer, together with defenses upon the merits. Rev. St. Mo. 1899, §§ 598, 602, 604. In that state a general denial puts in issue every fact which it is incumbent upon the plaintiff to prove. Waiving the rule that residence is not synonymous with citi-

zenship, nevertheless the absence of proof upon the issue of fact tendered by the answer required the court to proceed as though the plaintiffs' averments of the jurisdictional status of the parties were unsustained. The judgment was rendered in favor of defendants upon the pleadings, and no room is left for inferences or presumptions, even were it proper to indulge in them. The conclusion is unavoidable that the Circuit Court was without jurisdiction. *Roberts v. Lewis*, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579; *Southern Pacific Company v. Denton*, 146 U. S. 209, 13 Sup. Ct. 44, 36 L. Ed. 942; *Mattingly v. Railroad*, 158 U. S. 57, 15 Sup. Ct. 725, 39 L. Ed. 894. The controlling facts in *Roberts v. Lewis*, *supra*, and those in the cause before us are substantially identical.

The judgment will be reversed, and the cause remanded to the Circuit Court with directions to dismiss the same, unless by appropriate proceedings under the direction of that court its jurisdiction is made to appear.

GENERAL ELECTRIC CO. v. WAGNER ELECTRIC MFG. CO. et al.

(Circuit Court of Appeals, Second Circuit. May 5, 1904.)

No. 105.

1. PATENTS—INFRINGEMENT—ELECTRIC TRANSFORMERS.

The Moody patent, No. 591,869, for an electric transformer, especially designed for high potentials, and having two independent ventilating systems for the circulation of air for cooling purposes, was not anticipated, and discloses invention. Claims 4, 5, 6, and 11, also, *held* infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 123 Fed. 101.

This cause comes here on appeal from a decree of the United States Circuit Court for the Southern District of New York affirming the validity of complainant's patent, No. 591,869, granted October 19, 1897, to W. S. Moody, for an electric transformer, and ordering an injunction and accounting.

James H. Bryson, for appellants.

Thomas B. Kerr, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The patent in suit relates to transformers with a voltage of twenty to thirty thousand volts. Its objects, as stated by the patentee, are "to so arrange the energizing coils that they are well insulated from the surrounding core and from each other, at the same time providing suitable means for ventilation," and "to provide a transformer having two complete and separately controlled systems of cooling, one being for the coils and the other for the laminated core." The only issue herein is anticipation.

The patented transformer comprises an outer inclosing case mounted on a base provided with a chamber open at the bottom for the admission of air or other insulating medium. Within the said

case are primary and secondary coils, vertically placed, and the laminated core, horizontally placed, and divided into sections, separated by passages through which the insulating and cooling medium can flow. The fundamental principle of construction consists in so inclosing the coils and their ventilating passages in an inner inclosing case, extending from a point at a considerable distance above the coils to a point equally below the coils, as to insure complete electrical and mechanical insulation of the core and its ventilating system from the coils, and adapt it to independent regulation. It further consists in insulating the primary coils from the secondary coils and providing ventilating spaces between and around the coils in such a way as to materially reduce the quantity of heat-inclosing wrappings and still preserve sufficient electrical insulation. It is sufficient for the purpose of this inquiry to say that the patentee substituted for the large quantity of insulating covering required by the prior art a small amount of such mechanical insulation, and also ventilating air spaces, and thereby overcame the objections of overheating attendant upon the use of insulating material alone. One current of air enters at the base, passes up through the vertical passages between the coils; another current passes up at the side, and through the horizontal passages between the laminations of the core, and to the outside of the case. "It will be seen that there are two separate ventilating systems for cooling the transformer, one for the coils, the other for the iron, and that each of them is controlled independently of the other."

The claim of complainant as to the prior art, and the nature of the patented improvement thereon, is shown by the following extract from the deposition of the patentee, Moody:

"The arrangement differs from the earlier forms on which our experiments above mentioned were made, and in accordance with which our first two or three years' commercial production was carried out, in that there is no connection between the spaces between the coils and the spaces between the sections of the iron. We found it necessary to adopt this arrangement for the following reasons: I am referring to transformers wound for quite high potentials, say from 10,000 to 40,000 volts. To insulate such potentials with the best-known insulating materials, one must have a considerable thickness of insulation—so great a thickness as to greatly retard the dissipation of the heat from the windings if the insulation is wrapped upon the coil itself. Having found this to be so, we attempted to arrange a considerable portion of the insulation exterior to the coils. This was at first accomplished by the use of various forms of spacing strips, which held the coils some distance from each other and from the iron; also by the use of sheets of solid insulation placed between the coils.

"As we attempted to design for higher and higher potentials, however, we soon found that, in an air-cooled transformer at least, this construction soon reached its limit, due to the fact that the surfaces on which we depended for this insulation could not be kept clean, and that a surface which is dusty and dirty is a very poor insulator. For instance, such a surface under a strain of 20,000 volts might break down when the distance between the parts between which such difference of potential existed was 8 or 10 inches.

"In the form in which we originally arranged our cooling ducts, the air first passed through a section of the iron core, then through one side of the coils, then to the center of the core, next through the other side of the coils, and finally escaped through the outer section of the core on the opposite side from where it entered. We had therefore four places between the coils and the iron in which it was necessary to have insulating spacing strips, and the

width of these strips had to be sufficient to stand the pressure against which they were supposed to insulate, and then the spacing strips were dirty. In other words, if we were building a 20,000-volt transformer, and expected the insulation on the coils to take one-half of the total strain, the dirty spacing strips must take the remaining 10,000-volt strain. For this a distance of three inches might, perhaps, be necessary; consequently six inches of the space available for winding within the transformer's iron core was sacrificed for insulation.

"Due to these facts, we found it commercially impossible to design transformers along such lines, and intended for air cooling, for potentials much above 10,000 volts. I began to see that it was necessary that we should have nothing but solid and continuous insulation between the winding and the iron core and between the high-pressure winding and the low-pressure winding, and consequently that all openings for the entrance and exit of the air must be outside of the transformer's core, where the necessary projections could be made of the solid insulation to obtain safe distances against the leakage of the current, without increasing in any way the dimensions of the coils or core in order to give space for such insulation.

"The arrangement as shown in the patent is the outcome of this thought. In it we have a construction where high potential coils are completely incased in a solid insulating box, separated from the coils by the necessary air passages, and projecting beyond the core at either end a sufficient distance to safely allow of the opening of the box for the entrance and egress of the air. The cooling of the iron is taken care of separately, and solid insulations completely separate the windings as a whole from the iron core."

The claims in suit are as follows:

"(4) In a transformer, the combination of primary and secondary windings with passages extending between the windings for the circulation of a cooling medium, and a laminated iron core with a second set of passages, through which circulates an insulating cooling medium, said sets of passages forming independent cooling and ventilating systems, one for the coils and one for the core.

"(5) In a transformer, the combination of primary and secondary windings, a laminated iron core, passages extending between the windings through which an insulating medium circulates to cool the windings, a second set of passages extending through the iron core, independent of the first, in which an insulating medium circulates to cool the iron, and means for regulating the circulation through both sets of passages.

"(6) In a transformer, the combination of primary and secondary windings, a laminated core, means for maintaining an up-and-down circulation of air through the coils, and means for maintaining a transverse circulation of air through the iron core, both circulations being independent.

"(7) In a transformer, the combination of primary and secondary windings separated by air passages, a laminated core divided into sections, and air passages independent of those between the windings formed between the sections, a common source of air supply, and means for regulating the flow of air through each set of passages independently. * * *

"(11) In a high-potential transformer, the combination of primary and secondary windings divided into sections, a laminated core, an insulating case between the core and the windings, air passages between the case and the windings, insulating cases surrounding the primary windings and separating it from the secondary, the cases being provided with open ends which project above and below the ends of the coils so as to increase the creeping or leakage surface, air passages between the primary coils and the casings, and a common chamber supplying the air for both sets of passages."

The closest approximation to the patent in suit is shown in defendants' exhibit "Model of Ferranti Transformer." It is claimed that this model accurately represents the construction disclosed in the Ferranti British patent of 1891, and certain details shown in the Ferranti patent of 1885 and referred to in said later patent. It

comprises two vertically disposed oval core plates in sections or strips, having open spaces between said sections, and high and low potential coils, horizontally disposed, which link with the core plates, and are separated from each other and from the iron core by "cylinders of insulation," between which and the coils are air spaces. The coils are subdivided into parallel rings or sections, with air spaces between them. The position of defendants in regard to this model and the patent in suit is shown by the following statement by their expert:

"In both the Ferranti patent and in the patent in suit, the devices shown in the drawings reveal a transformer mounted upon a base, the transformer being so mounted that the air of the room rises up through the base or into the base from the side, passing through between the outside case next to the iron and the secondary winding; passing also between the secondary winding and the insulating cases within; it passes also upward through all of the channels between the insulating cases within and the primary winding, and also between the sections of the primary windings. The air passing through all of these channels is in each case and in the same sense supplied from a common source or chamber."

This statement may be accepted as correct. In view of the language used in the Ferranti specification, and the admissions of complainant's expert, it may be assumed that Ferranti extended the ends of the insulating cylinders above and below the coils. On these grounds it is forcibly argued that the Ferranti device of 1891 fully meets claim 11 of the patent in suit.

These Ferranti patents are chiefly relied on to defeat the alleged novelty of the plan of insulation covered by claim 11. The two insulators are strikingly similar in construction and arrangement. Upon mere inspection, irrespective of questions of function or result, the Ferranti patent closely corresponds with the following description in the specification of the patent in suit:

"The insulation thus applied forms a sort of openwork structure having a number of channels or air passages, preferably closed or substantially closed from one another, and open top and bottom to allow a free circulation of air between the different windings and between the coils and insulation. The insulation forming the walls of these channels preferably extends beyond both ends of the coils, so as to present an extended creeping surface over which the current must pass before it can reach the secondary winding."

It is only by a consideration of the objects sought and a comparison of the results accomplished by the two devices that the materiality of the differences can be determined. Generally speaking, Ferranti's device does not appear to be so constructed as to provide for or promote circulatory ventilation. His air spaces "not only serve to keep the coils cool, but also to secure improved insulation." Moody's object is "providing suitable means for ventilation * * * by means of a current of air or other insulating medium." But even if the idea of ventilation is sufficiently disclosed (and it is mentioned in Ferranti's specification), his construction precludes the possibility of ventilation through separate and distinct passages about the primary and secondary coils insulated from each other and independent of the transverse passages of the core, which is an essential element of the Moody invention. If a current of air were passed through the Ferranti air spaces, it would flow indis-

criminally back and forth through core and coil spaces. The passages, therefore, are neither mechanically nor electrically separate. That Ferranti's air spaces were rather in the nature of mechanical insulators than of means for positive ventilation is further indicated by Ferranti's suggestion to put the coils in jars of insulating material, sealed over at the top to prevent leakage of current or entrance of moisture. Complainant's expert states that the Ferranti construction would be impracticable for high power transformers, and gives substantial reasons therefor. He testifies that he attempted to use such a construction as is proposed by Ferranti, and was obliged to abandon it. That the Ferranti transformer was not used during the years when inventive genius had been stimulated by the development of the demand for high-power transformers indicates that, at best, it was only an imperfect, undeveloped theory of reduced coverings and air spaces. That it did not sufficiently disclose the patented invention is demonstrated; that it might by the genius of an inventor, or upon some afterthought theory of an infringer, be adapted for practical use, is insufficient. The answer to this latter contention is that these defendants did not see fit to use it or to improve upon it, but have appropriated complainant's construction. While this claim 11 is especially directed to the insulating feature of the patent in suit, it sufficiently covers the novel means infringed by defendants, by which the air passages through the coils are secured. For the foregoing reasons, we conclude that it is not anticipated by the Ferranti patents.

The date of the patent in suit is October 19, 1897. Defendants have introduced evidence that in 1896, no date being given, and in 1894, they constructed transformers which, it is claimed, embody the construction covered by claim 11. The complainant has introduced evidence to carry the date of invention back to August, 1896. While this evidence is not as definite or certain as is desirable, it is thought to be sufficient to establish priority over defendants' 1896 transformer. The claim of anticipation by the 1894 transformers is not pressed in defendants' brief. They were intended to be immersed in oil, and, when thus immersed, were never used at a higher pressure than 4,000 volts. When used with air, their capacity was reduced between 25 and 33 per cent. They did not embody the independent, separate systems of cooling of the patent in suit, and other details of its construction are lacking. Defendants' 1896 transformers were similar to those of 1894, except that they were designed for a higher potential and therefore show wider air spaces between the coils, and mica insulation surrounding the high and low tension coils. These differences merely involve the degree of insulation and ventilation. It does not appear that there are any other substantial differences of construction; in fact, the testimony of defendants' expert indicates that in other respects the transformers of 1894 and 1896 are practically the same. The defense of anticipation by defendants is not sustained.

The remaining claims cover the combination of primary and secondary windings with passages between for the circulation of air or other cooling medium, with the core and its passages so con-

structed and arranged as to secure independent ventilation systems for coil and core. The patentable novelty of said combination is first challenged on the ground that the patent is for a transformer cooled either by air or oil, and is anticipated by prior oil-cooled transformers. The repeated references in the specification to "ventilation" or "air cooling" or "circulation," the construction of the patented device which negatives the idea of its use with oil, because if oil were to be used various elements would be unnecessary or modified in form or arrangement, in connection with the references to "air or other insulating medium" to be used for ventilation, are strongly suggestive, if not conclusive, that the patentee conceived his invention to consist, inter alia, in an air-cooled and ventilated construction, and merely wished to protect himself against equivalents of such medium. The Thomson patent, No. 516,850, shows a casing surrounding the coils filled with oil, and the core located outside of said casing. Between said casing and the core are air spaces, provided in order to insulate against the escape of electricity and heat between the case and the core. The heated oil is conveyed by pipes to a water-jacket above the casing, where it is cooled, and it then returns to the coil case. The air spaces are separate from and independent of the oil case, but there is no suggestion of their use for purposes of ventilation. The language of the specification as to the passage between the core and the case which surrounds the coils and the oil, relied on by defendants' counsel as a description of a means of ventilation, falls far short of disclosing or describing the system of ventilation of the patent in suit. The objections to this patent as an anticipation are well stated by complainant's expert as follows:

"The patent of Thomson, No. 516,850, does not tell the reader skilled in the art how to make use of air for the independent and efficient cooling of the core so as to co-operate with the cooling medium which is sent through the spaces between the windings; but, more important than this, he does not tell how to make use of air for cooling the windings in any way which would be practically valuable. * * * Nor does it teach the desirability of the use of air as a cooling medium in the passages between the windings; nor does it teach the desirability of the combination of any system of coil passages coacting with any system of core passages for the purposes of cooling and ventilation, these two systems being mutually independent."

The Forbes patents and publications show and describe means for oil-cooling stationary armature coils, and are only remotely relevant to the issues herein. In the prior patent, No. 558,090, granted to Moody, the patentee herein, he described a transformer designed to be cooled by oil, although it was so constructed that air might be substituted for oil. There is no separation of the coils from each other, the insulation is applied directly to the coils, and the channel filled with oil serves both as an insulating and cooling medium. There is no sectional division of the core; there are no separate sets of independently regulated air passages. There is but one continuous set of passages, and but one single system of distribution, with a single regulation. The transformer was designed and adapted for moderate potentials, and the evidence indicates that it could not, as thus constructed, withstand any such voltages as those for which the transformer in suit is adapted. It is unneces-

sary to discuss the other patents introduced by defendants. Oil-cooled transformers with circulating systems were old, and air passages, more or less remotely suggesting ventilation, were shown in the prior art. The discussion of the Ferranti patent shows how closely prior inventors had approximated to the construction of the patent in suit. We have been unable to find in the prior art any single device, or any sufficiently definite suggestions derivable from the various devices, which sustain the contention of defendants that the patented improvement is merely the result of mechanical skill. The reasons for the conclusion that the patented device involved invention sufficiently appear from a comparison of its construction, adapted to attain the objects stated in the specification and the practical results thereby secured, with the impracticability or insufficiency of the devices of the prior art. The failure of defendants to avail themselves of said earlier devices or improve them, and their bodily appropriation of the patented construction, is most persuasive upon the question of invention.

The decree is affirmed, with costs.

ROYAL METAL MFG. CO. v. ART METAL WORKS.

(Circuit Court of Appeals, Second Circuit. April 25, 1904.)

No. 151.

1. PATENTS—VALIDITY—DESIGN FOR MECHANICAL CONSTRUCTION.

The Lowenthal design patent, No. 34,357, for a design for a belt to be worn, is void; the essential element of the so-called design being the mechanical construction to give the belt the required shape.

2. COSTS—APPORTIONMENT—UNNECESSARY PADDING OF RECORD.

Where counsel for both parties have largely increased the costs of a case by irrelevant and improper examination of witnesses, the prevailing party will not be allowed to recover all his costs, but they will be so adjusted as to apportion the unnecessary expense between the parties.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here on appeal from a decree dismissing a bill for infringement of complainant's patent, No. 34,357, granted April 9, 1901, to Isaac Lowenthal, for a design for a belt.

For opinion below, see 121 Fed. 128.

Joseph L. Levy, for appellant.

Charles G. F. Wahle, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. We concur in the opinion of the court below that the complainant has no ground for equitable relief. The specifications of the patent and the admissions of complainant's expert show that the essential element of the so-called design is a mechanical construction consisting in the attachment of the fabric of a belt to triangular metal front parts at such an angle that, when the parts are engaged, they will cause the front portion of the belt to dip in a downward direction. In these circumstances, it is immaterial that such an

arrangement was old, and that, even if the patent could be construed to cover the subject-matter of a design, it is not infringed by defendant.

The only question requiring discussion herein is raised by the contention of complainant that the decree of the court below, in so far as it awards costs to the defendant, should be reversed on the ground that defendant had introduced a mass of incompetent, immaterial, and irrelevant depositions herein. Permission was given to counsel at the hearing on this appeal to file tabulated statements of the testimony, in order to enable this court to determine the responsibility of the respective parties for this enormous record of 559 pages. An examination of the record shows, *inter alia*, the following facts: The deposition of Lowenthal, the patentee of the patent in suit, and the secretary and treasurer of the complainant corporation, called by defendant, appears to cover 100 pages of the record. In fact, said 100 pages are devoted to the wranglings of counsel on matters many of which were entirely immaterial from any point of view, and to questions by defendant's counsel, most of which were either immaterial, or consisted in mere repetitions of questions which the witness had already refused to answer. The deposition of Max Hecht, president of the defendant corporation, also appears to consume about 100 pages of the record. His direct examination covered 14 pages of the record, in answer to 57 questions, most of which were entirely proper. Complainant's counsel, however, objected to more than 50 of said questions, and, having given notice that he would move to strike out the entire deposition, as entirely incompetent, immaterial, and irrelevant, indulged in a cross-examination pregnant with repetitions, inquisitorial and exhausting inquiries concerning irrelevant matters, and motions to strike out, covering nearly 70 pages of the record. Defendant's counsel, on redirect examination, having examined the witness on a single material point raised on the cross-examination, namely, as to whether defendant had in fact applied for a patent for his design for a belt, counsel for complainant stuffed the record with 9 more pages of inexcusable cross-examination. Jacob Hirshfeld, called by defendant to prove the use of the V-shaped buckle prior to the date of the patent in suit, failed to produce any record evidence in support of his assertions, although he deposed that such evidence was in his possession, and complainant's counsel was justified in his refusal to cross-examine. On the other hand, complainant's counsel unnecessarily prolonged the cross-examination of Sanders, called by defendant to prove prior use. It is unnecessary to further discuss the character of the depositions. Counsel for both sides have vied with each other in padding the record, regardless of the rules of evidence and of their duty to the court. In such a case of mutual fault, it is difficult to apportion such penalty as this court is permitted to impose. It would seem, in view of all the circumstances, however, that defendant should not be permitted to recover more than two-thirds of its costs.

The decree of the court below, dismissing the bill, is affirmed, with costs of this court, but is modified as to costs so as to permit defendant to recover two-thirds only of its costs in the court below.

SCHINOTTI v. WHITNEY.

(Circuit Court, E. D. Louisiana. May 31, 1904.)

No. 13,222.

1. BANKS—DEPOSITS—NATURE OF CONTRACT—WHAT LAW GOVERNS.

Where plaintiff, a citizen and resident of New York, deposited her money, subject to check, in the private bank of defendant's firm in that state, defendant being then a resident of New York, and interest was agreed to be paid on the deposits in New York, the nature and character of the transaction should be determined by the laws of New York.

2. SAME—LIMITATIONS.

Limitations do not begin to run against the recovery of a bank deposit until demand is made for repayment.

3. SAME—SUSPENSION OF BANKS.

Suspension of payment and discontinuance of banking operations by a bank constitutes a waiver of a demand by a depositor for a repayment of the deposit, so that limitations against the recovery thereof begin to run from the date of the suspension.

4. SAME—MONEY LENT.

Money deposited in a bank in New York at interest and subject to check constitutes "money lent" to the banker within Civ. Code La. art. 3538 (3503), requiring actions for the payment of money lent to be brought within three years.

At Law.

Plaintiff, a citizen and resident of the state of New York, sues the defendant for a balance which she alleges to be due her on deposits of money which she made with a firm of private bankers then doing business in the city of New York, of which firm the defendant was a member. The deposits were made in the years 1889 and 1890, during which time she drew several checks against the deposits, which checks were paid. It was stipulated that interest at the rate of $4\frac{1}{2}$ per cent. per annum should be paid the plaintiff on her deposits, to be credited to her monthly. In November, 1890, the firm suspended payments, and was dissolved. On February 25, 1897, the assignee of the firm made a partial payment to the plaintiff. On March 12, 1900, and on December 20, 1900, the defendant personally made two other partial payments. This suit was filed, and the defendant was cited on February 13, 1904. The plea of prescription of three years having been interposed on behalf of the defendant, and having been heard, was sustained for the following reasons.

Farrar, Jonas & Kruttschnitt, for plaintiff.

Saunders & Gurley, for defendant.

PARLANGE, District Judge (after stating the facts as above). The question to be decided is whether the bank deposits in question were "money lent" within the meaning of article 3538 (3503), Civ. Code La., which provides that actions "for the payment of money lent" are prescribed by three years. The matter was argued before me on the assumption that it was one wholly governed by the law of Louisiana. If this were so, there might be some difficulty in reaching a conclusion. As I read the decisions of the Supreme Court of Louisiana, that court has never decided the precise matter now in hand. But I am inclined to believe that in such a case as the present one, where the agreement was to pay interest on the moneys, it would be held under Louisiana law (as it certainly would be held in other states) that the

transaction was a loan. However, it is obvious that, in order to ascertain the nature of the contract, we must look not to the law of Louisiana, but to the law of New York. *Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S., at page 447, 9 Sup. Ct. 469, 32 L. Ed. 788; *Am. & Eng. Ency. of Law* (2d Ed.) verbiis "Private International Law," vol. 22, p. 1322, and cases there cited. The plaintiff, a citizen and resident of New York, deposited her money in the private bank of defendant's firm in New York, the defendant being then, presumably at least, a resident of New York. Interest was to be paid on the deposits in New York, and the moneys themselves were to be paid back in New York by checks on the bank there. No plainer or stronger instance of a New York contract could be conceived. Whatever difficulties might arise in determining whether, under the law of Louisiana, the deposits constituted "money lent," it is perfectly plain that under the law of New York they were "money lent." In *Phoenix Bank v. Risley*, 111 U. S., at page 127, 4 Sup. Ct. 322, 28 L. Ed. 374—a case in error to the Court of Appeals of New York—language from the decision in the case of *Marine Bank v. The Fulton Bank*, 2 Wall. 252, 17 L. Ed. 785, was quoted approvingly to the effect that a bank deposit is a loan to the banker. In *Davis v. Elmira Savings Bank*, 161 U. S., at page 288, 16 Sup. Ct. 505, 40 L. Ed. 700—also a case in error to the Court of Appeals of New York—it was said:

"The deposit of money by a customer with his banker is one of loan, with a superadded obligation that the money is to be paid when demanded by check;"—citing cases.

See, also, to the same effect, *N. Y. County Bank v. Massey*—a New York case—192 U. S., at page 145, 24 Sup. Ct. 199, 48 L. Ed. —. In *Morse on Banks and Banking*, § 298, it is said:

"The original and every subsequent deposit by the customer is in strict legal effect a loan by the customer to the bank, and e converso every payment by the bank to or on account of the customer is a repayment of the loans *pro tanto*."

Notice an interesting case in the Court of Exchequer (1847) *Pott v. Clegg*, 16 Meeson & Welsby, 327, in which the precise matter in hand was decided. It was there held that money deposited with a banker is money lent, and its recovery is barred by the statute of limitation applying to money lent. Other authorities could be cited showing that under the law of New York bank deposits are loans, but the matter seems so clear that I deem it unnecessary to make further citations.

The law of New York is the same as that of Louisiana on the point that prescription does not begin to run until demand is made for the payment of the deposit. *Morse on Banks and Banking* (3d Ed.) § 322; *Brown v. Pike et al.*, 34 La. Ann. 577. Suspension of payment and discontinuance of banking operations by the bank waive demand by the depositor, and the statute of limitations begins to run from the suspension. *Morse on Banks and Banking* (3d Ed.) § 322, p. 548. The deposits being "money lent" under the law of New York (whatever else they might be held to be under a Louisiana contract), the action for their recovery is barred, under the law of Louisiana (see *C. C. A.*, 7th Circuit, in *Hutchings v. Lamson*, 96 Fed. 720, 37 C. C.

A. 564; Am. & Eng. Ency. of Law [2d Ed.] verbiis "Private International Law," vol. 22, p. 1385, and cases there cited), because more than three years elapsed between the partial payment by the assignee on February 27, 1897, and the partial payment by the defendant on March 12, 1900, and possibly also because of the time which elapsed between the suspension of the bank and the partial payment of February 27, 1897.

There is nothing to show a renunciation of the acquired prescription. See Succession of Slaughter, 108 La. Ann. 492, 32 South. 379, 58 L. R. A. 408. Therefore the plea of prescription must be sustained, and the petition dismissed.

In re GOODHILE.

(District Court, N. D. Iowa, C. D. May 23, 1904.)

No. 472.

1. BANKRUPTCY—HEARING ON APPLICATION FOR DISCHARGE—EVIDENCE.

On the hearing on a petition for discharge and the specifications of objection thereto, the testimony of the bankrupt given at the first meeting of creditors is admissible, but the testimony of other witnesses taken at such time is not.

2. SAME—IRREGULARITY IN HEARING.

It is an irregularity for a referee to take testimony on an application for discharge against which objection is filed before returning the same to the court; but where both parties appear, so that no prejudice can result, testimony so taken will not be stricken out.

3. SAME—DISCHARGE—OBTAINING PROPERTY BY FALSE STATEMENT.

A bankrupt who, while in the mercantile business, made a written statement to a wholesale house as a basis for credit, and on which she obtained goods on credit which were unpaid for at the time of the bankruptcy, in which statement she listed as an asset, at a net valuation of \$1,400, land which she did not own and had never owned, obtained property on credit upon a materially false statement, and under Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411], is not entitled to a discharge.

In Bankruptcy. On petition for discharge and specifications of objection thereto.

See 130 Fed. 471.

Standberry, Hill & Eulett, for bankrupt.

Deacon & Good and Glass, McConlogue & Witwer, for opposing creditors.

REED, District Judge. Margaret L. Goodhile was adjudged bankrupt March 28, 1903. In June following she filed a petition for discharge, and in due time thereafter the Warfield-Pratt-Howell Company, creditor, filed specifications in opposition thereto upon the grounds, among others, that the bankrupt had obtained property on credit from such creditor upon a materially false statement in writing, made for the purpose of obtaining such property on credit. Objection was made by the bankrupt to the introduction upon this hearing of testimony taken upon former hearings in the case before the

referee. Such testimony is that of the bankrupt upon her examination at the first meeting of creditors, and of other witnesses at such meeting, and upon other hearings before the referee. It appears that when the petition for discharge and the objections thereto were filed before the referee, he proceeded to take the evidence of the objecting creditors and the bankrupt thereon before sending the petition and objections to the clerk as provided by the rules; and after so taking such testimony he sent the petition, the objections thereto, and the evidence so taken to the bankruptcy court. The time was then fixed for the hearing of the issues presented by the petition for discharge and the specifications in opposition thereto, and the matter was returned to the referee to take the evidence upon the issues so raised. The objecting creditors then offered the testimony formerly taken by the referee upon the petition for discharge and specifications in opposition thereto, to which objection was made by the bankrupt as above stated.

That the testimony of the bankrupt, given by her at the first meeting of creditors was admissible seems clear, but the testimony of other witnesses taken at such time is not admissible. The taking of testimony by the referee of other witnesses upon the petition for discharge, and the specifications in opposition thereto before he returned the same to the bankruptcy court, was an irregularity; but as the bankrupt appeared in person and by her attorneys, and cross-examined the witnesses whose testimony was then taken upon such issues, it can result in no prejudice to her if the testimony so taken is now used upon this hearing, and her objections thereto will be overruled.

From the evidence so admitted in support of the objections, it appears that the bankrupt was engaged in mercantile business either at Mason City or at Manly prior to March 11, 1902; that she had applied to the Warfield-Pratt-Howell Company, a wholesale firm doing business at Cedar Rapids, Iowa, for credit, and on March 11th she wrote the company the following letter:

"Manly, Iowa, March 11, 1902.

"Warfield-Pratt-Howell & Co.—Dear Sir; The enclose statement is of my standing and indebtedness as I stand today before assuming the account of A. A. Hrubets.

"[Signed]

M. L. Goodhile."

The statement inclosed is upon a printed blank, evidently furnished by the company, the material part of which is as follows:

"Dated March 11, 1902.

"Warfield-Pratt-Howell Co., Cedar Rapids, Iowa—Gentlemen: For the purpose of obtaining goods and merchandise from you, and for the purpose of obtaining extensions of time of payment of amount now due you, and of obtaining future extensions on amounts hereafter becoming due to you from me. I hereby make to you the following statement and representations of my present financial circumstances, resources and liabilities, wealth, mercantile respectability, and connections, which said statements and representations are made by me to you for the sole and express purpose of obtaining goods, wares and merchandise from you, to be paid for in the future, and as a basis of credit with you, both for present purchases and extensions of time of payment. And also for goods and merchandise obtained or purchased from you for and during the period of two years from this date, and I hereby bind

myself, and agree to immediately notify you of any and all changes in or of my business matters, during the period above named; and particularly of any change in my financial condition or circumstances, which notice shall be full and complete, and shall be and become a part of this statement.

Assets.

| | |
|--|---------|
| Goods on hand, actual value..... | \$3,200 |
| Cash in bank | 150 |
| Real Estate, 160 acres in Faulk Co. S. D., not a homestead, cash value | 1,600 |

Liabilities.

| | |
|--|---------|
| Owing for goods not due, open account..... | \$ 125 |
| Encumbrance on real estate | 200 |
| Amt. of insurance on mdse..... | \$2,000 |
| Individual names of firm M. L. Goodhile | |
| Total assets | \$4,950 |
| Total liabilities | 325 |

| | |
|--------------------------------------|---------------|
| Amt. of assets over liabilities..... | \$4,625 |
| "[Signed]" | L. Goodhile." |

The credit man of the Warfield-Pratt-Howell Company testifies that after the receipt of this statement the company shipped goods to the bankrupt nearly every week till some time in October following upon the strength of the statement furnished by her as above. At the time of the adjudication in bankruptcy she owed this company about \$700. It is clear that when this statement was made the bankrupt did not own the land in South Dakota which is listed as a part of her assets, and that she so knew. The only excuse offered for including it in the statement is that her husband held a contract for the purchase of a quarter section of land in Faulk county, S. D., upon which he had paid but little, if anything, but for which he was to pay \$200. The \$200 listed in the liabilities by the bankrupt as the encumbrance on the land is this \$200. The statement was signed either by Mrs. Goodhile or by her husband, Louis Goodhile, with her authority. It is therefore her statement. It is clearly materially false, was made for the purpose of obtaining from this creditor property on credit, and upon the strength of which the property was so obtained by her.

The bankruptcy law expressly provides that a discharge shall not be granted to a debtor who obtains property from another upon credit upon a materially false statement in writing made for such purpose. Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411].

The discharge is therefore denied.

NYBACK v. CHAMPAGNE LUMBER CO.

(Circuit Court, W. D. Wisconsin. March 17, 1903.)

1. NEW TRIAL—GROUNDS—INSTRUCTIONS.

The failure of the court to expressly state to the jury in its charge in an action for a personal injury that the damages recoverable for future pain and suffering must be limited to such as plaintiff is reasonably certain to endure, is not material error, such as to require the granting of a

new trial, where the whole tenor of the instructions calls for such measure of damages, and where the verdict rendered is within the amount clearly recoverable, if there can be any recovery, without considering such element.

2. SAME—NEWLY DISCOVERED EVIDENCE.

A new trial will not be granted on the ground of newly discovered evidence, after the case has been tried four times, to enable a party to produce a witness who, although he was accessible and his testimony known to be material, was not produced at either trial, merely because it was not known until after the last trial that his testimony would be favorable to the moving party.

At Law. On motion for new trial.

Julius J. Patek, for plaintiff.

Van Hecke & Smart, for defendant.

SEAMAN, District Judge. The plaintiff was seriously injured more than 10 years ago while employed in the defendant's mill, and this is the fourth trial of his suit to recover damages for alleged negligence on the part of the defendant as the proximate cause thereof. The issues thereupon present no serious conflict in the evidence, and on two writs of error the Circuit Court of Appeals (90 Fed. 774, 33 C. C. A. 269) has held that the issues of negligence were for the jury on the testimony; clearly upholding the sufficiency of the case on the part of plaintiff for submission. As now presented, the substantial facts are unchanged, and it is plain that the verdict cannot be set aside on the alleged ground of insufficiency of the evidence. The rulings of the appellate tribunal thereupon are controlling, whatever view I might otherwise take of the just force of the evidence. So considered, the finding by the jury of liability is not open to question, if no substantial error arose in the submission; and the amount awarded as damages is surely not excessive for the undisputed injuries in any aspect, if liability exists.

Various errors are assigned in the rulings of the court upon the admission and rejection of testimony and in the instructions. Concerning the former I have no doubt of the correctness of the rulings under the circumstances of each instance, and further comment seems unnecessary. Re-examination of the instructions satisfies me that the case was fairly submitted to the jury, with no room for misunderstanding the rights of the defendant in their inquiry. The main contention is that the instruction for assessing damages was erroneous in authorizing recovery for future pain and suffering without expressly limiting it to such as "he is reasonably certain to endure." That recovery must be so limited is undoubted, and, if the defendant's twenty-third request was of that effect, it was overlooked, or it would have been given. But the omission is plainly immaterial for two reasons: (1) That the whole tenor of the instructions clearly called for such measure; and (2) that the amount of the award is so clearly within a reasonable allowance for the maiming and impairment of the hand, without other considerations, that omission to define the allowance for pain is manifestly harmless, if omission there was. Moreover, the testimony of the plaintiff of present pain at times from the injury (if believed by the jury, as they well might believe) after

the lapse of 10 years would justly infer future pain, and call for no guesswork. I am clearly of opinion that no cause appears for disturbing the verdict upon any error assigned.

The remaining ground to be considered is for newly discovered evidence. It rests on an affidavit of one Odegaard, accompanied by affidavits of counsel, by way of excusing the failure to produce this important witness. That the testimony would be material, if truly stated in the affidavit, may well be conceded. But the failure to produce him at either of the four trials of the case is not excused. It is my understanding that the plaintiff has named this man as the one who acted as interpreter between the plaintiff and the employer on the occasion in question, and it now appears that this fact was known to the defendant; that Odegaard remained in its employ for some time, and in the vicinity long after suit was brought and was interviewed on behalf of defendant; that he has not been called as a witness for the sole reason that he was supposed to be inimical from a disagreement with the superintendent, and had stated that his testimony would hurt the defendant. No effort was made to obtain his presence or testimony for either of the former trials, nor for the instant trial, after the decision of the Circuit Court of Appeals placing stress on the plaintiff's undisputed version of his entry upon the work as a green hand with the defendant so informed. Under the spur of an adverse verdict—surely not unlikely in view of the opinion referred to—Odegaard is speedily found offering another version. If the omission arose through surprise in the testimony, or possibly upon a second trial, it might be excusable, but not under the circumstances now appearing. To set aside the verdict for the purpose of letting in this new version by an available witness, whose knowledge of the facts was known from the outset, would be unjust and an abuse of judicial discretion.

I am of opinion that no substantial error appears, and that the verdict conforms to the decision of the Circuit Court of Appeals. The motion for a new trial is therefore denied, and judgment will enter on the verdict.

CAMPBELL, for Use, etc., v. EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES.

(Circuit Court, E. D. Pennsylvania. May 28, 1904.)

No. 21.

1. REFERENCE—REVIEW OF FINDINGS—EFFECT OF STIPULATION.

Under an agreement that findings of fact made by a referee shall have the same force and effect as the verdict of a jury, such findings cannot be reviewed by the court on exceptions.

2. CONTRACTS—CONSTRUCTION—RIGHTS OF ASSIGNEE.

A provision of a contract between a life insurance society and an agent that "the said society may offset against any claims for commissions under this contract any debt or debts due at any time by the said party of the second part to the society" construed, and held to apply only to such debts as arose out of the relation created by such contract, and not to entitle the society to offset against renewal premiums due thereunder

advances made to the agent after the relation had ceased, and the agent's rights under the contract had been assigned to a third person, of which the society had notice.

At Law. On exceptions to report of referee.

Wm. A. Manderson, for plaintiff.

Thomas De Witt Cuyler, for defendant.

J. B. McPHERSON, District Judge. As the agreement of reference in this case provides that the referee's findings of fact "shall have the same force and effect as the verdict of a jury," I do not see how I can review them. Apparently, it is only "his rulings on the admission or rejection of testimony and his conclusions of law" that are "reviewable on exceptions by the United States Circuit Court," and therefore, as I understand the agreement, his findings of fact are not the subject of exception at all. This being so, there seems to be little left for controversy. The referee's finding establishes the fact that the defendant had notice in September, 1890, before the advances were made to Campbell that are the subject of the suit, that Campbell had assigned his interest in the contract to Scott, and the authorities are clear that advances after such notice were made at the defendant's own risk. After receiving notice that Scott had become the owner of the contract, it could not create a distinct and separate indebtedness against Campbell, and charge it against what had now become Scott's property. For example, it could not lend Campbell the money to buy a house, and repay the loan out of future commissions.

The defendant agrees that this proposition is sound as a general rule, but argues that the first contract, which was made in 1886, when Campbell was first employed as its agent, contains a clause that justifies the course which has been pursued. The clause is as follows:

"It is further understood and agreed that the said Society may offset against any claims for commissions under this contract, any debt or debts due at any time by the said party of the second part [Campbell] to the Society."

These words are, no doubt, comprehensive enough to bear the construction contended for by the defendant, but I think that other considerations lead properly to the conclusion that they should be confined to debts that might arise out of the relation created by the contract of 1886. The sum now in question was advanced to Campbell in 1891, when he returned to the defendant's service as an agent (having been employed by another company for the previous year), and entered upon a wholly new and separate contract, having no connection with and no relation to the contract of 1886. Now, it is clear that the clause above quoted is also capable of bearing the meaning that the debt or debts which may be "due at any time" are only such as may arise under the particular agreement that was then being made; and, as this is the meaning least favorable to the company, a well-established rule of construction requires that it should be adopted, for the contract is the company's own agreement upon its printed form, prepared evidently with great care, and

what it does not clearly express is not to be read into it by implication. If the clause had been intended to cover debts of any kind which might become due from Campbell to the company, no matter of what nature, during the whole period in which the company should be bound to pay his commission on renewal premiums, words to that effect would naturally have been inserted, for the contract was expected to run for more than 20 years. This commission upon renewals was to be paid during that period, whether Campbell was alive or dead, and contingencies were evidently being provided against which might arise during this long period. I think, therefore, that the ambiguity of the clause, considered in connection with the circumstances surrounding the execution of the contract, should be resolved in favor of the plaintiff's view of its meaning, and that the clause must be construed to refer simply to obligations into which Campbell might enter to the company, growing out of that particular agreement.

And this conclusion is strengthened by observing that, when the contract of 1891 was entered into, an identical clause was inserted in that contract also. This was certainly a superfluous precaution, if by the contract of 1886 the company already had the right to charge against Campbell's commissions any debt that he might thereafter owe to the company, no matter how it might arise, or for what purpose it might be created. Without prolonging the discussion, I am of opinion that the conclusion of the learned referee was correct, and that the defendant, having charged up against Campbell's account the sums advanced to him under the contract of 1891, must repay them to the equitable plaintiff.

The proper judgment may therefore be entered in favor of the plaintiff, with costs of suit.

In re ADAMS.

(District Court, D. Rhode Island. May 25, 1904.)

No. 427.

1. BANKRUPTCY—JURISDICTION OF COURT—ADVERSE CLAIM TO PROPERTY.

A claim by one who acquired possession of property of a bankrupt before the filing of the petition in bankruptcy that such property was delivered to him in part payment of a debt, and that he had no reasonable cause to believe that a preference was thereby intended, is clearly an adverse claim, which a referee has no jurisdiction to summarily determine on its merits, except by the claimant's consent.

In Bankruptcy. On appeal from order of referee made on summary petition requiring Otto J. Nass to surrender certain property.

Gainer & Gorham, for Otto J. Nass.

Chas. C. Remington, for the trustee.

BROWN, District Judge. The claim of Nass that, before the filing of the petition in bankruptcy, he had received the property in question as part payment of a debt, and that he had no reasonable cause to be-

lieve that it was intended thereby to give a preference, was clearly an adverse claim. In *re Hartman*, 10 Am. Bankr. Rep. 387, 121 Fed. 940. The referee, however, found as facts that the taking of possession by Nass was without authority from Adams; that Nass knew, or had reasonable cause to know, that the taking constituted a preference, and that the taking of the property was equivalent to trover and conversion, and carried no title; that, in consequence thereof, Nass had not even a colorable claim to title. This was not a decision that, upon the facts as claimed by Nass, he was not an adverse claimant, nor an inquiry into the existence of an adverse claim; but a decision of the merits of an adverse claim of right, and a finding that the claim was not adverse because, in the opinion of the referee, it was not, as a matter of evidence, meritorious in point of fact. As it is clear from the report of the referee, and from his decree, that Nash was, properly speaking, an adverse claimant, the referee, upon objection, should have declined to finally adjudicate the merits of the case on a summary petition. *Mueller v. Nugent*, 184 U. S. 1, 15, 22 Sup. Ct. 269, 46 L. Ed. 405; *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 25, 22 Sup. Ct. 293, 46 L. Ed. 413; *Jaquith v. Rowley*, 188 U. S. 620, 625, 23 Sup. Ct. 369, 47 L. Ed. 620; In *re Tune* (D. C.) 115 Fed. 906.

The order of the referee is overruled.

MADISONVILLE TRACTION CO. V. ST. BERNARD MIN. CO.

(Circuit Court, W. D. Kentucky. May 27, 1904.)

1. FEDERAL COURTS—REMOVAL OF CAUSE—CITIZENSHIP—EMINENT DOMAIN.

Where suit was brought for the condemnation of land for a railroad right of way by a Kentucky railroad corporation against a citizen of another state, the railroad company was the sole actor in the proceeding, though attempting to use the state's power of eminent domain, and, the suit being one of a civil nature involving more than \$2,000, exclusive of interest and costs, it was removable to the federal courts.

2. SAME—STATUTES—CONSTRUCTION.

Section 1, Acts March 3, 1887, c. 373, 24 Stat. 552, and August 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 509], providing that any suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, "being non-residents of that state," *held*, that the phrase "being non-residents of that state" should be construed as equivalent to the words "not being citizens of that state."

3. SAME.

The jurisdiction of the Circuit Court of suits removed from the state court, as authorized by section 1, Acts March 3, 1887, c. 373, 24 Stat. 552, and August 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], depends alone on the diverse citizenship of the parties and the amount in controversy, those parts of the statute relating to "inhabitaney" and "residents" being matters which affect the personal privilege of venue only.

¶ 1. Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullagham*, 27 C. C. A. 298.

4. SAME—EFFECT OF REMOVAL.

Where preliminary proceedings were taken for the condemnation of land for a railroad right of way without notice to the nonresident owner thereof, and no notice was given to such owner until after the report of commissioners had been filed in the state court, whereupon such owner removed the proceedings to the federal courts, the suit not having been begun until process was first issued against such owner, it was entitled in the federal court to contest the complainant's right to take the land, as well as the amount of compensation to be paid therefor.

Gordon, Gordon & Cox and E. G. Sebree, for plaintiff.

Fairleigh, Straus & Fairleigh and H. H. Huffaker, for defendant.

EVANS, District Judge. This is a proceeding under the Kentucky Statutes, instituted in the county court of Hopkins county by the Madisonville Traction Company, a citizen of Kentucky, against the St. Bernard Mining Company, a citizen of Delaware, for the condemnation of certain lands in that county, belonging to the mining company, for the uses of the traction company. Without notice to the mining company, the county court appointed commissioners, who valued the land said by the traction company to be needed for its uses, and returned their report to the county court. Upon its being filed, process was served upon the mining company. Thereupon, and in due season, it removed the case to this court. The traction company has moved to remand it to the state court, and urges that step upon grounds which will be developed in the course of what is about to be said.

If the commonwealth of Kentucky by a similar proceeding were seeking to condemn for its own public purposes the land of the St. Bernard Mining Company, say, for a courthouse or a jail, no doubt could arise upon the question of whether the proceeding could be removed from the state court to this court. It could not be removed for one all-sufficient reason which would meet the attempt at the threshold, namely, there would be no adverse citizenship, inasmuch as the state, for jurisdictional purposes, is not to be treated as a citizen, within the meaning of that term as used in the judiciary act. *Postal Telegraph Co. v. Alabama*, 155 U. S. 487, 15 Sup. Ct. 192, 39 L. Ed. 231. But here the commonwealth of Kentucky is not a party to the litigation, either actually or formally. The Madisonville Traction Company alone is the party, the litigant, the actor. It is true that this company is using power conferred by state laws, but so also do all litigants who come into the courts of the state to enforce rights conferred by its laws, written or unwritten. The traction company, a citizen of Kentucky, being the sole litigant, the sole actor, on one side, and the mining company, a citizen of Delaware, being the sole litigant and respondent on the other, the contestation is between those two citizens alone, and the amount in controversy being shown to exceed \$2,000, exclusive of interest and costs, the other question is whether this proceeding is a "suit of a civil nature," and one of which this court might have had jurisdiction if it had been brought here in the first instance. That it is a suit of a civil nature admits of no doubt. *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449; *Boom Co. v. Patterson*, 98 U. S. 406, 25 L. Ed. 206; *Searl v. School District*, 124 U. S. 199, 8 Sup. Ct. 460, 31 L. Ed. 415;

Union Terminal Co. v. Chicago, etc., Ry. Co. (C. C.) 119 Fed. 209; Kirby v. Chicago, etc., Ry. Co. (C. C.) 106 Fed. 551.

It seems to me, also, inasmuch as there was in each one of those cases, except the first named, a removal, which was sustained, although the proceeding was to condemn land by a corporation, that they, at least inferentially, establish the distinction, already noticed, that while proceedings for that purpose by the state itself could not be removed, yet that the same reasons do not by any means apply to cases where corporations use the power given to them by the Legislature to condemn to their own uses lands which belong to another. The argument of the learned counsel for the traction company is ingenious and plausible, but, I think, overlooks the distinction referred to. It seems to the court, after a careful examination of them, that there is nothing in the actual decisions of the court in *Boom Co. v. Patterson*, 98 U. S. 404, 25 L. Ed. 206, *Searl v. School District*, 124 U. S. 197, 8 Sup. Ct. 460, 31 L. Ed. 415, and *Mexican, etc., R. R. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672, which at all conflicts with the view just expressed, although those cases are greatly relied on by counsel. So much of the judiciary act of 1887-88 as is applicable to the point we are discussing is in this language:

"Section 1. That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and * * * in which there shall be a controversy between citizens of different states in which the matter exceeds, exclusive of interest and costs, the sum or value aforesaid. * * * But * * * no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

"Sec. 2. That any suit of a civil nature at law or in equity * * * of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending or which may hereafter be brought, in any state court, may be removed into the Circuit Court of the United States for the proper district, by the defendant or defendants therein, *being non residents of that state.*" Acts March 3, 1887, and August 13, 1888 (24 Stat. 552, c. 373; 25 Stat. 433, c. 866 [U. S. Comp. St. 1901, pp. 508, 509]).

It may at this point be observed that the last words in section 2, which I have quoted and italicized, have been construed to be equivalent to the words "not being citizens of that state." *Martin v. B. & O. R. Co.*, 151 U. S. 676-677, 14 Sup. Ct. 533, 38 L. Ed. 311. And it may also be remarked that it has been conclusively settled that in suits of a civil nature the jurisdiction given by the statute depends alone upon the diverse citizenship of the parties and the amount in controversy, while those parts of the statute which relate to "inhabitaney" and "residence" are matters which affect the personal privilege of venue only, and not jurisdiction as such. *McCormick, etc., Co. v. Walthers*, 134 U. S. 41, 10 Sup. Ct. 485, 33 L. Ed. 833; *Shaw v. Quincy Mining Co.*, 145 U. S. 448, 12 Sup. Ct. 935, 36 L. Ed. 768; *Martin v. B. & O. R. Co.*, 151 U. S. 676, 14 Sup. Ct. 533, 38 L. Ed. 311; *In re Keasbey & Mattison Co.*, 160 U. S. 229, 16 Sup. Ct. 273, 40 L. Ed. 402; *Simonton*,

J., in *Empire, etc., Co. v. Propeller, etc., Co.* (C. C.) 108 Fed. 900, and *Whitworth v. Ill. Cent. R. R. Co.* (C. C.) 107 Fed. 557.

In its opinion in *Mexican Natl. R. R. Co. v. Davidson*, 157 U. S., at the bottom of page 208, 15 Sup. Ct. 566, 39 L. Ed. 672, the court, in speaking of the provisions of the act of 1887-88, says:

"Section 2, however, refers to the first part of section 1, by which jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought."

It may not be amiss to remark that these cases in no wise appear to conflict with the case of *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511, much relied on by counsel. The syllabus in that case very accurately expresses the exact point of that decision.

But it seems quite unnecessary to pursue further this phase of the subject, and we proceed to the consideration of the proposition most pressed in behalf of the traction company, which, stated generally, is that the case is not removable at all as to that part of it which seeks to condemn the land, though it is admitted that that part of the case involving the mere ascertainment of compensation may possibly be so. In other words, it seems to amount to this: that the basic controversy, viz., that involved in the claim to the land, cannot be removed, because that is to be settled by the exercise of the right of eminent domain, but that its inevitable incident—the ascertainment of compensation—possibly may be removed. In disposing of this contention, I think we may assume, at all events, that we have here a suit of a civil nature, the parties to which are citizens of different states, and that there is a matter in controversy which exceeds in amount \$2,000, exclusive of interest and costs. Of such a suit this court would undoubtedly have had original jurisdiction, even if it were a condemnation proceeding. It would come literally within the express language of the statute. Where those three jurisdictional prerequisites coexist, either party, under section 1 of the act, may bring its suit in this court, and this would be so whether the suit were to enforce a mortgage, a note, a trust, or any right created by a statute of the state. The fact that it is exceedingly seldom that such a proceeding as this is instituted in the federal courts does not make it impossible or unlawful for it to be done. On the contrary, the rule, with a few exceptions not pertinent here, is established by an unbroken line of authorities, that where a state statute gives any remedy which is available in a state court it is also available, if other jurisdictional requisites are present, in the federal courts, although those courts are not mentioned in the statute. This is said to be axiomatic in federal jurisprudence. *Ex parte McNeil*, 13 Wall. 243, 20 L. Ed. 624, and many subsequent cases. So that in the proper sense, this court would have had jurisdiction of this action if it had been originally brought here by the traction company. *Union Terminal Co. v. Chicago, etc., R. R. Co.* (C. C.) 119 Fed. 209. If the proceeding had been instituted here, this court would have been bound to give to the traction company the exact relief which it would be entitled to under the state law—no more, no less. It must be presumed that it will do so now. So that it is only a question of the right of the respondent to

choose the tribunal to try the case. This right is given by the supreme law of the land.

When this case was first brought to my attention upon a motion for a temporary restraining order made in a suit in which that relief was sought, the question of the court's jurisdiction in this proceeding necessarily suggested itself, and was somewhat considered. The cases above referred to, or most of them, were then examined. Now a distinction is urged by the learned counsel for the plaintiff to the effect that this case only involves questions concerning the assessment of damages, and must be limited to that phase of it in this court; but, even if this be true, it cannot affect the motion to remand, which would have to be overruled if upon any ground the case is properly here. They insist that the preliminary proceedings in the county court, of which the mining company had no notice until after the report was filed, exerted, beyond recall, the power of eminent domain, condemned the land to the uses of the traction company, and vested in it all the owner's title thereto. While, possibly, it may be premature to pass upon this question, I cannot refrain from now saying that it seems to me that this proposition is wholly unmaintainable. As the contention points out, it would leave nothing to be done here except to consider the mere reassessment of values and compensation. It assumes that the mere condemnation part of the case was finally concluded when the process on the commissioners' report was issued and served, and could not be affected by a hearing before the court, an opportunity for which was supposed to be afforded by the service of process. In short, it assumes that the most important part of the case ended before the service of process, leaving only remnants of the controversy to be wound up thereafter. While it is ably urged, the court finds itself unable to yield to the contention. It would require the anomalous conclusion that the principal object of the litigation was achieved before the suit was begun. The litigation—the suit—against the mining company was begun when the process was first issued, and that company then for the first time was tendered a day in court. Not till then did a controversy arise or begin. Then a suit of a civil nature was commenced. Civ. Code Prac. § 39. The object of that suit was to take from the mining company its property and confer title thereto upon the traction company, the latter first paying therefor just compensation. This required a judicial proceeding; but only one, not two. Counsel would have the court divide this suit into two separate and distinct parts, treating one of those parts, namely, the controversy respecting the title to the land, as having been finally and conclusively settled by the preliminary proceeding taken in the county court, without notice to the owner, and therefore as not being removable, and the other part, namely, that which involves the settlement of the compensation only, as still being open and removable. But it seems to me that this division would be wholly artificial, not to say arbitrary, and without any warrant in law. The mining company, the owner of the land, has the right to litigate in the courts the right of the traction company to take its land at all, as well as the right to compensation therefor. The chief object the traction company has in view is the acquirement of the land, and

that is the principal element of the litigation. Its interest in the other matter is quite secondary and incidental, and it follows that, if anything is removable, it is the entire suit, in all its parts, root and branch. In any event, and even if the distinction drawn by the counsel is well conceived, the case was well removed as to the question of compensation, and the motion to remand cannot prevail.

It seems to me that the motion should be overruled, and it is accordingly so ordered.

ST. BERNARD MIN. CO. v. MADISONVILLE TRACTION CO.

(Circuit Court, W. D. Kentucky. May 27, 1904.)

1. STATE COURTS—REMOVAL OF CAUSE—FURTHER PROCEEDINGS—INJUNCTION.

Where a proceeding to acquire land for a railroad right of way was properly removed to the federal court after the report of commissioners had been filed in the state court, the state court having been deprived of jurisdiction by the removal proceedings, the federal court had jurisdiction to enjoin the plaintiff from proceeding further with the action in the state court, though section 720, Rev. St. [U. S. Comp. St. 1901, p. 581], provides that an injunction shall not be granted by any court of the United States to stay proceedings in a state court except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

E. G. Seabee, for complainant.

Fairleigh, Straus & Fairleigh, for defendant.

EVANS, District Judge. The defendant, a citizen of Kentucky, having instituted a proceeding in the Hopkins county court to condemn to its own uses certain real estate belonging to the complainant, a citizen of Delaware, the latter removed that proceeding to this court. Subsequently it filed its bill of complaint stating the grounds upon which it asked the court, in aid of its jurisdiction in the other proceeding, and to prevent irreparable injury to the complainant, to enjoin the defendant from further proceedings in the state court. The defendant demurred to the bill.

In view of the peculiarities of that litigation, and the great inconvenience that might otherwise result, the court originally granted the temporary restraining order against the traction company for those reasons, and upon the idea that the case for the condemnation of the land was certainly removable, and that it certainly had been removed. Those reasons still apply with undiminished force. When the proper steps for removal have been taken, the statute—the supreme law of the land, binding upon all courts, state and federal alike—expressly enjoins that the state court shall proceed no further in the cause. The court, in its opinion this day delivered upon the motion to remand the condemnation suit, has, as it is believed, shown that it now has jurisdiction of that case. 130 Fed. 789. This being so, the power of the court to grant the injunction, if, on the facts, it becomes advisable, seems clear under the authorities, for, notwithstanding the provisions of section 720, Rev. St. [U. S. Comp. St. 1901, p. 581], the

¶ 1. Enjoining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575.

courts hold that in removal cases they may, where it seems necessary to the ends of justice, protect their jurisdiction by enjoining the plaintiff from proceeding further with the action in the state court. This is in part upon the ground that by the removal the state court has been deprived of jurisdiction, and that thereafter the federal court alone has it. *French v. Hay*, 22 Wall. 253, 22 L. Ed. 857; *Moran v. Sturges*, 154 U. S. 269, 270, 14 Sup. Ct. 1019, 38 L. Ed. 981; *Black's Dillon on Removal of Causes*, § 194, and the numerous cases cited; *Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. Ed. 497, and its attendant case, *Kern v. Huidekoper*, 103 U. S. 483, 26 L. Ed. 354; *Abeel v. Culberson* (C. C.) 56 Fed. 329; *Wagner v. Drake* (D. C.) 31 Fed. 849; *B. & O. R. R. Co. v. Ford* (C. C.) 35 Fed. 170; *Frishman v. Insurance Co.* (C. C.) 41 Fed. 449; *Terre Haute, etc., R. R. Co. v. Peoria, etc., R. R. Co.* (C. C.) 82 Fed. 943. In the last of these cases, at page 946, Judge Grosscup said:

"The removal statutes have, in substance, from the original judiciary act to the present time, provided that any suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction, shall be removable. It seems plain that, if the federal court cannot protect its jurisdiction by restraining all proceedings in the state court destructive thereof, the whole case is not in fact removed. Indeed, had not the right of such injunction upon state proceedings been sustained in *Dietzsch v. Huidekoper*, the federal court would by the removal have obtained nothing but the shell of the case while its substance—the real power, affecting the interests of the parties—would have remained in the state court.

"These statutes, conferring jurisdiction in all cases arising in law or in equity, where certain conditions exist, were not intended to confer merely fractional jurisdiction. The right of the federal court to take cognizance of the controversies arising in such cases, with all the remedies usually applied in law and in equity, was clearly contemplated. Section 720, Rev. St. [U. S. Comp. St. 1901, p. 581], could never have been intended to trench upon this grant of jurisdictional domain. Such interpretation would imply an intention on the part of Congress to repeal a portion of the power expressly given to the courts both by the Constitution and the judiciary act. In their literal scope, the Constitution and statutes conferring jurisdiction, and this section 720, are in conflict, and to the extent of such conflict the legal effect of the latter statute must be narrowed down. The cases cited, and a line of cases in the Supreme Court of the United States, of which they are a development, clearly show that this is the interpretation put upon these two apparently inconsistent lines of legislation."

The demurrer to the bill is accordingly overruled, and, as it seems necessary to the ends of justice, the motion of the mining company for the injunction pendente lite will be sustained.

In re WILKESBARRE FURNITURE MFG. CO.
(District Court, M. D. Pennsylvania. June 18, 1904.)

No. 107.

1. BANKRUPTCY—FUNDS—DISTRIBUTION—COLLATERAL ATTACK.

Where money was awarded to a lien creditor of a bankrupt as the result of an audit after hearing, she was protected in the possession of the fund by the order of the referee until such order was vacated by a direct proceeding for that purpose.

2. SAME—TRUST FUNDS—MISAPPROPRIATION—PREFERENCE.

Where a trustee of a bankrupt corporation, who was also a member of a firm, appropriated money belonging to the firm to pay a misappropriation of the funds of the bankrupt corporation, and the creditors of the firm, which also became bankrupt, took no steps to stay the distribution of the funds of the corporation pending bankruptcy proceedings against the firm, nor to follow the firm's funds so misappropriated, they were not entitled to claim that such funds awarded to a lien creditor of the corporation constituted a preference which the firm's trustee was entitled to recover.

3. SAME—RECLAIMING OF TRUST FUNDS.

Misappropriated trust funds in the hands of a trustee in bankruptcy should be followed and reclaimed by appearing before the referee and making claim to them before they have been distributed to other parties.

In Bankruptcy. On exceptions to report of referee.

W. N. Reynolds, Jr., for exceptions.

P. A. Meixell, for lien creditor.

ARCHBALD, District Judge. The fund for distribution, amounting to the sum of \$1,440.39, was derived from the sale of the bankrupt's real estate, and was awarded by the referee to Mary E. Kulp, who held a mortgage thereon, which, as a first lien on the property, was prima facie entitled to be paid. The money is claimed, however, by the trustee of Harrower Bros., bankrupts, upon the following grounds: This firm was composed of D. C. and Frank B. Harrower, the latter being trustee of the Wilkesbarre Furniture Manufacturing Company, of whose estate the fund in controversy is a part. On May 21, 1903, before proceedings against Harrower Bros. had been instituted, Frank B. Harrower, being short in his accounts as trustee, appropriated \$1,944 to make them good out of moneys derived from a sale by Harrower Bros. just prior thereto of their stock in trade. The moneys so obtained, along with others on deposit in bank to his credit as trustee, amounting in all to the sum of \$5,838.29, and representing, to the extent of \$4,710, the proceeds of real estate of the furniture company which he had sold as trustee, were subsequently distributed by the referee, \$3,745.25 being awarded to Mrs. Kulp to apply on her mortgage.

It is contended that the appropriation by Frank B. Harrower of the money of the firm to make good his accounts constituted a preference, and that Mrs. Kulp, having knowledge of the facts, and having benefited thereby, cannot retain the advantage which she secured, and must now forego, in favor of the trustee of Harrower Bros., the claim which

she would otherwise have to the fund in court. But it is difficult to follow the reasoning by which this result is sought to be brought about. The money which Mrs. Kulp received as a result of the former audit was awarded to her after due hearing, and she is protected by the order of the referee, which established her right to it, until it is set aside by proceedings directly taken for that purpose. Ostensibly the fund distributed represented the proceeds of real estate on which she had a lien, and did so, in matter of fact, to the extent of \$4,710, which was more than enough to pay what she received. But whether it did so or not, she is not responsible. It stood for that, and was adjudged to her in due course, without fraud or collusion on her part; and that is all we need to know. The suggestion that it constituted a preference has nothing whatever on which to stand. Passing by the fact that she cannot be said to have got the money of Harrower Bros. any more than others who participated in the distribution, her acceptance of that which the law gave her in response to her claim cannot be wrested into anything of that kind. The preference, if preference there was within the meaning of the act, was to the estate represented by the trustee, to make good what he had abstracted from it, for which the estate, if it could be made liable for the act of the trustee, would have to respond, and not creditors who have simply received dividends out of it. The truth is that, if there was this diversion of funds by which the estate of the furniture company profited at the expense of the estate of Harrower Bros., that which was diverted from the one to the other should have been directly followed and reclaimed. It was undoubtedly a fraud on the creditors of Harrower Bros. for Frank B. Harrower to appropriate the money derived from the sale of the firm stock in order to make good his individual delinquencies as trustee, and upon proof of this, if the fund could be sufficiently identified and traced, an order might have been obtained restoring it to where it belonged. But the time and place for this was at the audit, where the fund into which it entered was being disposed of, and not here and now, when it is not. Ordinarily, in the distribution of a fund, only those are entitled to come in who are not adversary. *McBride's Appeal*, 72 Pa. 480; *Law's Estate*, 140 Pa. 444, 21 Atl. 429; *Staub's Estate*, 11 Pa. Super. Ct. 447. But there is a well-recognized exception to this where it appears that the fund in whole or in part includes that which rightfully belongs to others, who would otherwise be deprived of it without redress. *Marshall v. Hoff*, 1 Watts, 440; *Miller's Appeal*, 84 Pa. 391; *McDermott's Appeal*, 106 Pa. 358, 51 Am. Rep. 526. It became the duty, therefore, of those who had the interests of the Harrower estate in charge to appear before the referee at the former distribution and prefer the claim that is now made. It is true that as yet there was no trustee, the proceedings against the firm being resisted, and an adjudication not being reached until some time afterwards; but that difficulty could have been met by a stay of proceedings, which the petitioning creditors would have had a standing to suggest. It is said, however, that this was requested, and refused both by the referee and by the court. But if this be so as to the court—of which I have no remembrance and there is no record—I can only say it was a

mistake which cannot be rectified in the way proposed. If the same parties were before the court, it is possible that it might be, treating this distribution as simply a continuation of the first. But that is not the case. The parties who participated in the former audit are paid and gone, and the result of reopening it is not to be visited on Mrs. Kulp alone. However much, therefore, I may regret that an attempt in the proper direction should have been made abortive by any error of mine, I see no way of remedying it as the case stands. The right that is sought to be enforced is the return of moneys wrongfully included in the fund previously distributed, which should therefore have been specifically claimed and traced. It cannot be made to attach under different conditions, by substitution, to another fund, derived beyond question from an unobjectionable source.

The report of the referee is confirmed.¹

SOUTHERN TRUST & SAFE DEPOSIT CO. v. YEATMAN.

(Circuit Court, E. D. Pennsylvania. May 28, 1904.)

No. 17.

1. CORPORATIONS—RATIFICATION OF UNAUTHORIZED CONTRACT—ESTOPPEL BY DELAY.

Under the Maryland statute which provides that a corporation may accept property in payment for its stock, when previously authorized by the stockholders, where on its organization a corporation issued stock to defendant on a subscription by which it was to be in part paid for by stock of another corporation, and the company accepted the latter stock, had it transferred to its own name, pledged the same, and received dividends thereon, retaining it for two years, and until it had depreciated in value, it was a question for the jury whether or not its stockholders had not ratified the transaction, so as to bind the corporation, and estop it from thereafter repudiating the contract.

At Law. Sur motion for new trial.

John G. Johnson, for plaintiff.

George Wharton Pepper, for defendant.

BUFFINGTON, District Judge. This was an action by a corporation chartered by the state of Maryland to collect an alleged unpaid subscription to its capital stock. There is no allegation of insolvency, and the rights of creditors are not involved. The contract of stock subscription, dated April 19, 1901, on which the suit is based, is marked "Paid," and a contemporaneous paper explains the mode of payment. This paper, signed by one Sherman, through whom the subscription was obtained, and who became the secretary of the plaintiff on its organization, later, and which witnessed the contract by which the subscription was made, recited payment of

¹ As to the following and reclaiming of trust funds in bankruptcy, see *In re Marsh*, 8 Am. Bankr. R. 576, 116 Fed. 396; *In re Mulligan*, 9 Am. Bankr. R. 8, 116 Fed. 715; *Welch v. Polley* (N. Y.) 69 N. E. 279, 11 Am. Bankr. R. 215; *Bills v. Schliep*, 11 Am. Bankr. R. 607, 127 Fed. 103.

the subscription in full by payment of \$2,600 cash, and the balance in stock of the Monumental Savings Association. The certificates for this last stock were accepted by the plaintiff company in 1901, and a new certificate taken out by it, which it used as collateral to borrow money. It also received dividends thereon. Subsequently the plaintiff repudiated this arrangement, tendered back the stock of the Monumental Company, which had been depreciated in value, and in the fall of 1903 brought suit to recover the part of the subscription paid in stock; alleging that the payment of the subscription in stock was illegal, under the laws of Maryland. On trial the jury found in favor of the defendant, and a new trial is now moved for on several grounds; the substantial one being that the court should have given binding instructions for the plaintiff. No contention is made that the purchase by the plaintiff company of stock such as defendant paid his subscription in was not within its corporate power, or that the payment of a subscription in such stock was unlawful, if certain statutory requirements were followed. Such statutory provisions are found in sections 69 and 70 of article 23 of the Public General Laws of Maryland of 1903, vol. 1, p. 358, which are as follows:

"Sec. 69. Subscriptions to the capital stock of such of said corporations as have capital stock may be made in land or other property at a valuation agreed upon between the corporation and the subscriber, where the said property so subscribed shall be such as it is proper that the said corporation shall own for the advancement of the purposes for which it was incorporated, but such subscriptions shall not be otherwise received, nor shall they be so received unless the same shall have been previously authorized by the stockholders assembled in general meeting, pursuant to a call to consider the propriety of receiving the said subscription and of fixing the terms upon which it shall be received.

"Sec. 70. Where property of any kind is received by the authority of the stockholders in general meeting as aforesaid, in payment for stock, the books of the company shall be so kept as to show at all times fully what property was received for the said stock, at what value and the number of shares of the capital stock issued for the same; in all other cases money only shall be considered as payment of a subscription to any part of the capital stock."

After careful consideration, we are of opinion binding instructions were properly refused, and the case properly went to the jury on the question of ratification. An investment in the stock of the Monumental Savings Association by the plaintiff company was presumably "for the advancement of the purposes for which it was incorporated." Indeed, the proofs here are express that, as an investment, it served to bring dividends to the plaintiff, and enable it to borrow money. It was taken "at a valuation agreed upon between the corporation and the subscriber." The plaintiff corporation was therefore not doing an illegal or ultra vires act in taking this stock, provided it was sanctioned by the stockholders. We find no case in Maryland holding that ratification by stockholders is limited to the express mode pointed out by the statute. In this case there was evidence of the terms of the defendant's subscription being expressly called to the attention of the stockholders when they met to organize, and, indeed, to the important fact that no organization could be effected unless this subscription, to be paid in

part in stock, was accepted. There is evidence it was known later to other stockholders, and, in view of the fact that the company's management subsequently passed from the faction that took this subscription to the one now contesting it, a jury might well infer that stockholders' meetings were held, the old management voted out, the new voted in, and that this transaction was known generally. Indeed, under the proofs of the value of Monumental stock when it was taken by the company, its subsequent retention thereof, the use of it for collateral, and the acceptance of dividends upon it, we think, in view of its depreciation in value and the lapse of time, that there was evidence from which a jury might well find ratification by the stockholders. The case falls within the spirit of the law of ratification laid down in *Salem Iron Co. v. Lake Superior Consol. Iron Mines*, 112 Fed. 239, 50 C. C. A. 213, where the court said:

"Under this state of facts, we think the question of ratification was properly submitted to the jury. We think, also, it was proper to submit to the jury another aspect of this same question, viz., whether, with the knowledge shown to be possessed by all or nearly all the individual directors of the fact that this contract had been made, of its terms, and the circumstances surrounding it, the formal resolution of repudiation had not been too long delayed to be effectual for that purpose—in other words, that the board of directors had such knowledge of this contract that refusal for so long a period to disaffirm amounted to ratification."

We do not regard *Baile v. Calvert College*, 47 Md. 117, as ruling this case. There the subscription had not been paid, and the agreement remained unexecuted. When the subscriber was sued for the money which he had agreed to pay, he did not, and presumably could not, show that, to fulfill its purposes, the corporation had a right to acquire the land in which he sought to pay. Indeed, the later case of *Weber v. Fickey*, 52 Md. 516, would seem more applicable, where it was said:

"When the contract is executed by a transfer of the property and the issue of the stock, the corporation is estopped from setting up the invalidity of the contract. *Oil Creek & Allegheny R. R. Co. v. Pennsylvania Transportation Co.*, 83 Pa. 160; *East New York & Jamaica R. R. Co. v. Lightall*, 5 Abb. Prac. (N. S.) 458; *Smith v. Sheeley*, 12 Wall. 358 [20 L. Ed. 430]."

On the whole, we think the case was properly submitted to the jury, and its verdict should not be disturbed. The motion for a new trial is refused.

GUARANTY TRUST CO. OF NEW YORK v. NORTH CHICAGO ST. R. CO.

KOHN et al. v. NORTH CHICAGO ST. R. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. April 16, 1904.)

No. 1,037

1. FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION—ENJOINING SUIT IN STATE COURT.

The pendency in a federal court of a creditors' suit against a street railroad company, for which a receiver has been appointed, but whose road is being operated under a 99-year lease, by a receiver of the lessee appointed by the same court in another creditors' suit against such lessee, does not exclude the jurisdiction of a state court to entertain a suit by stockholders to enjoin the delivery of an amended lease which has been agreed to by the company's directors, extending the term for a long period at a greatly reduced rental, and releasing stocks deposited in trust by the lessee to secure its performance, on the ground that such extension is ultra vires, and was obtained by the lessee by secretly and fraudulently securing control of the board of directors, and also to enjoin the lessee from voting certain stock for the ratification of such lease, since such suit does not interfere with the possession of the property by the federal court, nor with the receivers in its management, nor affect any issue which can be adjudicated under the pleadings in the creditors' suit; and the federal court is without jurisdiction to enjoin the prosecution of such suit on petition filed in the creditors' suit by the company defendant.

2. CREDITORS' SUITS—ADMINISTRATION OF PROPERTY—POWERS OF COURT.

While a court which has obtained possession of street railroad property through receivers appointed in separate creditors' suits against the lessor and lessee of such property has power to settle differences between the lessor and lessee when arising in the administration of the two estates, it has no power to compel the lessor to execute a new lease extending the term from 99 to 984 years, and materially reducing the rental during such long term; its custody of the property being temporary only, for the purpose of conserving it, if not sold, until creditors are paid.

3. FEDERAL COURTS—STAYING SUIT IN STATE COURT.

The fact that a bill filed in a state court incidentally prays for relief which, if granted, might interfere with the constructive possession of property by receivers of a federal court, does not authorize the latter court to enjoin the prosecution of the suit, where the principal relief sought therein does not trench upon its jurisdiction.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Prior to June 1, 1899, the North Chicago Street Railroad Company and the West Chicago Street Railroad Company (herein called, respectively, the North Chicago Company and the West Chicago Company) operated independent systems of surface street railroads on the North and West Sides, respectively, of the city of Chicago. On June 1, 1899, each of those companies executed a lease to the Chicago Union Traction Company (herein called the Union Traction Company) demising its property and franchises to that company for the full period of the charter of the respective lessors, and all extensions or renewals thereof. By the terms of these leases the Union Traction Company agreed to pay or renew all notes, bonds, and mortgages of the lessor companies, and to pay as rental to the lessors, respectively, amounts equivalent to annual dividends of 12 per cent. on the stock of the North Chicago Company, and of 6 per cent. on the stock of the West Chicago Company; such payments to be made quarterly. The lease further provided that, for the purpose of securing the

¶ 1. Enjoining proceedings in state court, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Granthum*, 27 C. C. A. 575.

performance of the obligations of the lease, the Traction Company should deposit with the Illinois Trust & Savings Bank of Chicago, as trustee, such amount of cash or security as should be agreed upon by the parties, which fund should be held subject to the conditions of a tripartite agreement of even date between the three parties, by which agreement the sum of \$10,000,000 in cash, or in securities of a kind and amount to be approved by the two railroad companies, was provided to be deposited; the income of the fund to be paid to the Traction Company until default in some one obligation of the lease, and upon default the income from the deposit, and so much of the principal as may be necessary, to be appropriated and applied in equal and ratable payment and discharge of the debts and obligations assumed by the Traction Company. In the event that stocks of corporations should constitute part of the deposit, the trustee should vote the same in accordance with the directions of the Traction Company, and, upon request, execute a proxy to vote such stock to such person as should be designated from time to time by the Traction Company. Under that agreement there were deposited 20,000 shares of the capital stock of the North Chicago Company and 32,000 shares of the capital stock of the West Chicago Company, which shares are now held by the trustee for the purposes of the agreement. The Union Traction Company entered into possession under the leases, and, until the receiverships hereafter mentioned, operated the roads of the two lessor companies.

On April 22, 1903, the Guaranty Trust Company of New York brought three suits in the court below—one against the North Chicago Company upon three demand notes, dated, respectively, March 20, April 17, and April 20, 1903, for the amount in the aggregate of \$563,000; one against the West Chicago Company upon three demand notes, one dated March 20, and two dated April 14, 1903, for the amount, in the aggregate, of \$270,000; and the third against the Union Traction Company upon a demand note dated March 20, 1903, for \$317,000. The notes upon which the North and West Chicago Companies were sued evidenced indebtedness which by the leases the Union Traction Company had assumed to pay or renew. Judgments by confession were entered in those suits on that day. Thereafter, on the same day, the Guaranty Trust Company filed its three separate judgment creditors' bills in the court below against the three judgment debtors, respectively, containing the usual allegations of a creditors' bill, reciting the public nature of the business carried on by the company defendant therein, describing the various actual or potential controversies alleged to exist with respect to the various franchises of the several companies, and praying for the appointment of a receiver, and, in the case of the Union Traction Company, praying for administrative relief by way of operation of the railways. In each case the judgment debtor was sole defendant. Upon the same day the three companies filed their answers to the respective bills, confessing the bills, and on the same day the court below appointed receivers in each of the suits, with authority to operate the property under the order of the court. The receivers forthwith qualified and assumed possession of the property so leased to, and in the custody of, the Union Traction Company. Following the appointment of the receivers, various petitions were filed by them, setting forth in detail the various interests and rental charges to which the various defendants were subject, and reciting various controversial questions relating to the public service, public rights, and public liabilities with various corporations. No diverse parties were brought into court by these petitions, and no relief sought therein, other than the instructions of the court with respect to the administration of the property. During the receiverships the court authorized the payment of rental accruing under the various leases, and its distribution among the stockholders, respectively, of the North and West Chicago Companies, as dividends. In this way \$265,722 on July 15 and October 15, 1903, were paid to the stockholders of the North Chicago Company, and \$374,587.50 on May 15 and October 15, 1903, were paid to the stockholders of the West Chicago Company; these payments being made with the consent of the judgment creditor, the complainant in those bills, a part of which payment was made by the receivers of the Union Traction Company by means of a loan made by them under the authority of the court.

On August 15, 1903, David A. Kohn and certain others of the appellants here, as stockholders of the North Chicago Company, filed in the state circuit

court of Cook county, Ill., their bill in their own behalf, and in behalf of all other stockholders of that company, against the Union Traction Company, the North Chicago Company, the Illinois Trust & Savings Bank, and certain other individual defendants, setting forth the incorporation, charter, and capitalization of the several companies named, the holdings by complainants of stock in the North Chicago Company, the ownership of the road, and the leases hereinbefore stated; that the indebtedness of the North Chicago Company at the date of the lease was \$2,319,000, evidenced by notes then outstanding which the Traction Company, by the lease, assumed and agreed to pay or renew; the indebtedness of the West Chicago Company, at the date of the leases, of \$1,090,000, evidenced by the notes which the Traction Company had agreed to pay or renew; alleged the deposit of securities under the tripartite agreement, the execution of the notes to the Guaranty Trust Company, as stated, and the three judgments entered thereupon—and charges that each of the three suits was begun and the judgments entered pursuant to an agreement theretofore entered into between the Guaranty Trust Company and the Union Traction Company that the proceedings should be had; that the notes upon which the judgments were entered were renewal notes executed at the request of the Union Traction Company, being indebtedness outstanding at the time the respective leases were executed, and the failure of the Traction Company to hold the railroad companies harmless therefrom; alleges the insolvency of the Union Traction Company, that it was subject to be dissolved under the laws of the state of Illinois, and that judicial proceedings had already been commenced for that purpose. The bill further alleges that since the execution of the leases the officers and directors of the North and West Chicago Companies have been designated and selected by the Union Traction Company, and that until July 23, 1903, all the directors and officers of both railroad companies were officers or persons in the service of the Union Traction Company; that at a meeting of the directors of the North Chicago and West Chicago Companies on July 23, 1903, each of the directors—one at a time, resigned—the meeting being controlled by the officers of the Union Traction Company, and a new board of the companies was elected by the remaining directors, who proceeded to elect a president; that the proceedings were secret, without prior notice of the holding of the meeting to any stockholder of either company, and that no stockholder voted, except as some of the directors may have been stockholders, and to an amount not constituting a substantial minority of the shares of stock in either company; that a majority of the officers and directors so elected were not and are not stockholders in either company, but are stockholders or in the service of the Union Traction Company, and were selected by that company, prior to their election, to serve the interests of the Traction Company. The bill then charges that, at the request and direction of the officers and attorneys of the Union Traction Company, the directors of the North Chicago and West Chicago Companies adopted a resolution authorizing the execution to the Union Traction Company of a new lease and tripartite agreement, subject to the approval of the holders of a majority of the stock of the North Chicago and West Chicago Railroad Companies, at a stockholders' meeting to be called for that purpose, and that such amendatory agreement be executed and deposited in escrow, to be delivered to the Traction Company when approved by a majority of the stockholders of each of said companies, which special meeting was called for August 18, 1903. By this amended agreement the stocks on deposit with the Illinois Trust & Savings Bank of Chicago, as trustee under the tripartite agreement of June 1, 1899, continued to be held upon certain trusts declared in the new proposed agreement; and it is charged, with respect to the 20,000 shares of North Chicago Company stock so held, and worth \$2,000,000, and the 32,000 shares of West Chicago Company stock so held, and now worth \$1,600,000, which under the former leases the lessors had the right to apply toward the payment of their claim against the Union Traction Company, that by the new agreement these rights are waived; that by the proposed amendatory lease the demised property was granted during the full term of 984 years, the rental was reduced in the case of the North Chicago Company from 12 per cent. upon the capital stock to 6 per cent., and in the case of the West Chicago Company from 6 per cent. to 4 per cent., and other changes were made, stated in the bill. The bill prayed that the shares of stock so de-

posited with the Illinois Trust & Savings Bank might be subjected to the payment of the amount due to the North Chicago Company by the Traction Company, and that the latter company might be enjoined from voting such stock, or directing how it should be voted, upon the question of adopting the proposed amendatory agreements, and that the trustee and the North and West Chicago Companies, respectively, might be enjoined from voting or permitting the shares of stock to be voted; that a receiver be appointed of such stock, "subject, however, to said rights, if any, which it may appear that any persons or receivers may rightfully have therein"; that the custodian be restrained from delivering the amendatory agreement; that the parties be restrained from modifying or changing the lease, upon the ground that the proposed leases were ultra vires the North and West Chicago Companies, respectively. On the same day the North Chicago Company filed its petition in this suit, praying the court for an injunction restraining the parties complainant and their solicitors, the appellants here, from any interference, both with the meeting so proposed to be held, and from obtaining any writ of injunction from any other court to that end, in which petition the receivers joined. And upon that day the court below entered a restraining order and order to show cause why a temporary injunction should not issue as prayed for. The matter was continued from time to time until October 9, 1903, when the court below entered an order directing that the restraining order of August 15, 1903, be continued, and "made a permanent order of injunction, to prohibit and prohibiting each and every of the respondents, according to its terms, until the final decree of the court upon a full hearing of said petition." The order so continued in force is as follows:

"It is ordered that the said respondents mentioned in said petitions, D. A. Kohn, James J. Townsend, Thomas A. Moran, Levy Mayer, Isaac H. Mayer, Carl Meyer, W. J. Buckley, and Simon Straus, and all other stockholders of the said defendant company, their attorneys, solicitors, agents, representatives, and servants, be, and they hereby are, restrained, until the hearing of the motion for the temporary injunction upon notice as hereinafter mentioned, and until the further order of this court, from in any way interfering with or preventing any other stockholder or stockholders of defendant company, or their proxy or proxies, from voting at the special meeting of the stockholders of defendant company referred to in said petitions, called by said defendant company to be held on the 18th day of August, 1903, at 2 o'clock p. m., or on such other day, if any, as may be appointed for an adjourned meeting by the stockholders attending, pursuant to such call, on the question of the approval or disapproval of each of said amendatory agreements in said petitions referred to, or from preventing or interfering with such defendant company in holding such meeting, or in permitting at such meeting each stockholder of record of said defendant company, present in person or by proxy, to vote upon the question of the approval or disapproval of each of said amendatory agreements, or in certifying the result of such vote to this court under its corporate seal, as contemplated and provided in and by the order of this court entered herein on July 28, 1903, and particularly from instituting or commencing, prosecuting, or carrying on any suits or proceedings in any other court, or from suing out or enforcing any writs of injunction from any other court, to prevent or interfere with any stockholder or stockholders of this defendant company, or his or their proxy or proxies, from or in voting at said meeting so to be held on the 18th day of August, 1903, or on such other day, if any, as may be appointed for an adjourned meeting by the stockholders attending, pursuant to the call of such meeting, upon the question of the approval or disapproval of said amendatory agreements, or either of them, or to enjoin or restrain this defendant from holding said meeting, or from permitting each stockholder of record of said defendant company, present in person or by proxy, to vote at such meeting upon the question of the approval or disapproval of each of said amendatory agreements, and certifying the result of such vote to this court under its corporate seal; and that they also be in like manner restrained from in any way interfering with the proper conduct of such meeting, or the vote of any stockholder or stockholders, or their authorized proxy or proxies, at such meeting, or with the conduct of such meeting as prescribed and directed by the said order of this court above mentioned, or with the carrying out or into

effect of any vote or action taken by said stockholders at said meeting, including the delivery of said amendatory agreements, if so approved, and that the hearing of the said motion for a temporary injunction be, and the same is hereby, set down for Monday, August 17, 1903, at 10:30 o'clock a. m."

On July 28, 1903, petitions were filed in the three creditors' suits by the respective corporations defendants, setting forth the proposed modifications of the leases as herein stated, and praying that the receivers might be instructed to join in such modification and to execute the new agreements; and on the same day the receivers filed their petitions, stating the filing of the petitions by the respective defendants, and asking for instructions. No persons were made parties to those petitions, nor was any process issued thereon; but on August 14, 1903, upon the petition of the receivers of the Union Traction Company, the court authorized the receivers to direct the issuance of proxies to vote the stock held by the trustee to the persons who had been selected by the Union Traction Company.

Under these circumstances the stockholders' meeting was held on August 18, 1903, and the action of the boards of directors of the several companies ratified and confirmed; and the court below on the same day directed the receivers to approve of and join in the execution of the new leases and new tripartite agreement.

From the order of October 9, 1903, this appeal is taken.

Levy Mayer and Thomas A. Moran, for appellants.

John S. Miller and Charles H. Aldrich, for appellees.

Before JENKINS and BAKER, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge (after stating the facts as above). The rule is axiomatic that the courts of the United States should not interfere with proceedings in the courts of the state, except so far as may be necessary to assert and protect a rightful jurisdiction. The rule is emphasized by the provisions of a statute as old as the judicial system of the United States: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Rev. St. § 720 [U. S. Comp. St. 1901, p. 581]. The rule is reciprocally recognized and generally observed by both state and federal courts, because it is essential to the maintenance of harmony and indispensable to the orderly administration of justice. The rule has been declared and its limitations established by the ultimate tribunal, and is so well recognized by the profession that but for the importance of the case under consideration, and the earnest controversy of counsel with respect to the rule, we should deem a reference to the authorities unnecessary. We need not now review the numerous decisions which have led up to the final settlement of the rule, but a brief reference to some of them may not be out of place.

In *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749, it was ruled that property held by a marshal under a writ from a federal court could not lawfully be taken from his possession by a proceeding issuing from a state court; and this upon the ground that the possession of the marshal was the possession of the court, and that no other court with merely concurrent authority could be allowed to disturb that possession. In *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257, where under similar circumstances the marshal was sued in trespass for taking the goods,

it was held that the action did not come within the principle of *Freeman v. Howe*, because the action did not seek to interfere with the possession of the property taken. As the officer must determine for himself whether the property which he proposes to seize is legally liable to be taken, he is not protected by his writ if he takes property belonging to others than the defendant in the writ, and may be sued therefor in another court of competent jurisdiction. Recognizing the rule that the tribunal which has obtained jurisdiction of a case has exclusive right to decide every question arising in the case, the court states that the rule is subject to limitations, and is confined to suits between the same parties or privies, seeking the same relief or remedy, and to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought, and does not extend to all matters which may by possibility become involved in it.

In *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981, the court reviews the various decisions, affirming the principle declared in *Buck v. Colbath*, and seems to approve the principle that "courts, for the purpose of protecting their jurisdiction over persons and subject-matter, may enjoin parties who are amenable to their process and subject to their jurisdiction from interference with them in respect of property in their possession, or identical controversies therein pending, by subsequent proceedings as to the same parties and subject-matter in other courts of concurrent jurisdiction," and also approves of a remark by Mr. Justice Miller in *Buck v. Colbath*, that:

"It is not true that a court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and in some instances requiring the decision of the same questions exactly. In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits."

In *Moran v. Sturges* the court sustains the exclusive jurisdiction of the United States District Court in admiralty over the subject-matter, and that the proceeding in the state court was an unlawful interference with the proceedings in the admiralty.

In *re Chetwood*, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. Ed. 782, the general principle stated is reaffirmed and declared to be firmly established.

In *Central National Bank v. Stevens*, 169 U. S. 432, 18 Sup. Ct. 403, 42 L. Ed. 807, the court reviews the various cases bearing upon the subject and reaffirms the rule.

In *Farmers' Loan & Trust Company v. Lake Street Elevated Railroad Company*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667, the principle is thus declared:

"The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and, for the time being, disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is not restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature."

We have had occasion not infrequently to speak to this rule, following, as we thought, the pronouncement of the ultimate tribunal with respect to its scope and limitations. *Central Trust Co. v. Grantham*, 83 Fed. 540, 27 C. C. A. 570; *Leathe v. Thomas*, 97 Fed. 136, 38 C. C. A. 75; *Baltimore & Ohio Railroad Company v. Wabash Railroad Company*, 119 Fed. 678, 57 C. C. A. 322; *McDowell v. McCormick*, 121 Fed. 61, 57 C. C. A. 401; *Woods v. Root*, Secretary of War, 123 Fed. 402, 59 C. C. A. 206; *Copeland v. Bruning* (C. C. A.) 127 Fed. 550.

In *Baltimore & Ohio Railroad Company v. Wabash Railroad Company* we stated the rule to be as follows:

"It is settled that, when a state court and a court of the United States may each take jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted. *Harkrader v. Wadley*, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399; *Farmers' Loan & Trust Co. v. Lake Street El. R. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667. We have followed this rule, declaring 'that the court which first obtains possession of the res or of the controversy, by priority in the service of its process, acquires exclusive jurisdiction for all the purposes of a complete adjudication.' *505,000 Feet of Lumber*, 24 U. S. App. 509, 517, 12 C. C. A. 628, 65 Fed. 236. The rule is not only one of comity, to prevent unseemly conflicts between courts whose jurisdiction embraces the same subject and persons, but, between state courts and those of the United States, it is something more. 'It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience.' *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390. The rule is not limited to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all suits of a like nature. *Farmers' Loan & Trust Co. v. Lake Street El. R. Co.*, supra; *Merritt v. Steel Barge Co.*, 24 C. C. A. 530, 79 Fed. 228, 49 U. S. App. 85. The rule is limited to actions which deal either actually or potentially with specific property or objects. Where a suit is strictly in personam, in which nothing more than a personal judgment is sought, there is no objection to a subsequent action in another jurisdiction, either before or after judgment, although the same issues are to be tried and determined; and this because it neither ousts the jurisdiction of the court in which the first suit was brought, nor does it delay or obstruct the exercise of that jurisdiction, nor lead to a conflict of authority where each court acts in accordance with law. *Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. 983; 8 Rose, Notes, 1010. The doctrine is lucidly stated by Judge Thayer in *Merritt v. Steele Barge Co.*, supra. Subject to the conditions stated, where jurisdiction, concurrent with the state court, exists in the federal court, parties have the right—the necessary diversity of citizenship existing—to invoke that concurrent jurisdiction, and it may not be denied them."

The difficulty lies not in an understanding of the principle of the rule, but in applying it correctly to the various cases as they arise. Bearing in mind, as stated in *Buck v. Colbath*, supra, that jurisdiction rightfully assumed does not "exclude all other courts from all right to adjudicate upon other matters having a very close connection with those before the first court, and in some instances requiring a decision of the same questions exactly," and that, in determining the question of exclusive jurisdiction, "we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits," it remains to ascertain the nature of the bill filed in the creditors' suit, the relief sought and allowable under the bill, the issues therein proper to be resolved and determined by the

court below, the parties involved and their relations to the matter, and the nature and object of the bill filed in the state court, in order to determine the question whether the latter suit is an unjust interference with the rightful jurisdiction of the court below.

The bill is a creditors' bill founded upon the judgment for \$565,-081.22, recovered April 22, 1903. It sets forth the ownership by the North Chicago Company of certain franchises and railroads, subject to the mortgage of \$3,171,000, and another mortgage of \$1,614,000, the lease of the property to the Union Traction Company of June 1, 1899, and the deposit of the shares of stock stated in the lease; that the company has no other property which could be subjected to the payment of its debts; that it has a floating indebtedness of about \$2,316,000, presently maturing, and which the Union Traction Company had by its lease agreed to pay or renew; that, if the Union Traction Company fully kept and performed the terms of the lease, there would be adequate provision for the payment of the floating indebtedness and of the interest upon the bonded debt; that the corporate life of the defendant corporation is for a term of 99 years from February 14, 1859; that the city of Chicago claims that a large number of the franchises of the defendant would expire in the year 1903, and in subsequent years (some of them on the 30th of July, 1903), and had threatened that, unless the Union Traction Company should consent to terms satisfactory to the authorities of the city, the right and privilege of transporting passengers would be sold by the city to some one other than the railroad company, with the effect, substantially, of transferring to other persons the franchises owned by the defendant corporation, and leased to and exercised by the Union Traction Company—and charged that the city, oppressively, illegally, and unreasonably, would entertain no application for the renewal of the franchise unless the defendant company would renounce, abandon, and repudiate the obligation and authority claimed to have been conferred and imposed by the Legislature of the state, and the right claimed to have been granted for the operation of certain of their railways during the period of 99 years from February 14, 1859; that that action of the city had destroyed the credit of the defendant corporation, so that it is impossible to obtain a renewal of its floating indebtedness, the credit of the Union Traction Company had been destroyed, and the company was insolvent; that, in case of default by the Union Traction Company in the performance of the condition of the lease, the only property which the defendant possesses, which could be used for the satisfaction of its debts, would be the several street railways owned by it along the routes mentioned, with their equipment and appurtenances, and 2,501 shares of the capital stock of the North Chicago City Railway Company, and that the dividend payable upon that stock under the lease would be insufficient to pay the interest upon the mortgages; that the railroads owned by the defendant corporation are incapable of being properly operated apart from the general system of railways owned by the North Chicago City Railway Company; and that the earnings of the railroads owned by the defendant corporation, if separately operated, would not suffice to pay the deficiency of interest upon the mortgage debts of the defendant. It then sets forth the tripartite agreement previously herein stated, and the

deposit thereunder of the 20,000 shares of the capital stock of the defendant; that, if the franchises and charter rights of the Union Traction Company and lessor company with respect to street occupancy are protected and preserved intact until they can be fully determined by final decree, the value of the franchises and property will be greatly augmented, and the fund for the payment of creditors greatly increased; that the corporation had not theretofore applied any of the rentals received from the Union Traction Company under the lease to the payment of any of its floating indebtedness, and does not intend so to apply the rentals. It then prays judgment as follows: First. That a receiver be appointed to take possession of all the property of the defendant corporation, and to enforce its rights in respect to the lease to the Chicago Union Traction Company, and in respect to the tripartite agreement. Second. That the complainant's rights may be ascertained, and its priority upon the income and assets of the defendant corporation be established and enforced; that the rights of all other creditors may be ascertained; and that the court will marshal the assets and administer the funds, ascertaining the respective liens and priorities, and decree and enforce the rights of all creditors as they may be finally ascertained upon interventions or applications of each such creditor or lienor. Third. That if the income of the property, and the sale of such portions of it as may be sold without detriment to the value of the remainder, shall prove insufficient for the payment of the claims, the entire property be sold, and the proceeds be applied to the payment of the debts in due order of priority, "and the surplus, if any, distributed among the stockholders in such manner as the court may direct."

The bill was confessed by the North Chicago Company, the sole defendant therein, and no issue was raised or presented for judicial determination.

The bill, it will be observed, is a creditors' bill, seeking the payment of the complainant's judgment in the first instance, and, in subordination thereto, the payment of the claims of other creditors, and, being confessed, the matter becomes one of mere administration. It was, of course, proper for the court to take into its possession, upon the bill filed against the Union Traction Company, the custody of the railroad. The North Chicago Company was not in possession and was not operating any road. Its entire property was leased to the Union Traction Company. Its entire income consisted in the rentals received from the Union Traction Company. It had no disbursements to make from that income in respect of its debts, except upon default by the Union Traction Company, for the interest upon its mortgage and floating indebtedness was to be paid by the lessee, and the principal of the indebtedness to be paid or renewed by it as it should mature. The rental was manifestly a fixed percentage of the capital stock of the North Chicago Company intended for distribution among its stockholders. So that practically all that the court below, through its receivers, could obtain from the North Chicago Company, were the rentals payable by the Union Traction Company, and these rentals could undoubtedly have been applied to the payment of the complainant's debt; but in fact, with the consent of the complainant, and under the order of the court, the receivers paid to the stock-

holders of the North Chicago Company, as dividends upon stock—except as to the stock held in trust—\$265,722 on account of rentals due July 15 and October 15, 1903.

The bill, then, being a mere creditors' bill, with possibly the right of the court in a proper proceeding to determine and assert the rights of the defendant corporation as against the city of Chicago, the duty of the court would seem to be clear, and that was to marshal assets, to collect the rentals to become due under the lease, to protect the rights of the North Chicago Company under the lease, to obtain satisfaction of the complainant's debt and of all other debts due by the company, to enforce payment of those debts from the lessee company, which had obligated itself to pay them, and if a sale were not necessary to accomplish this, and the Union Traction Company was not able to meet its obligations under the lease, to take from it possession of the leased property and return it to the lessor, for the receivership did not operate to dissolve the corporation or to suspend its corporate faculty.

We now come to the nature of the bill filed in the state court, the prosecution of which was enjoined. It was presented by certain stockholders of the North Chicago Company, on behalf of themselves and all other stockholders, against the Union Traction Company, the Illinois Trust & Savings Bank, and certain individual defendants, the receiver not being a party to the bill. It charges that the judgments obtained by the Guaranty Trust Company were recovered in collusion with the Union Traction Company, and for debts which the latter company was bound, under its lease, to pay and discharge; that the directors of the North Chicago Company were officers, attorneys, or persons in the service of the Union Traction Company; that, at a special meeting of the board of directors, held secretly and without notice, and which was controlled by the officers and attorneys of the Union Traction Company, each of the directors separately resigned, and a new board of directors was elected; that the stockholders had no voice in the selection of the directors, and were deprived of the right to vote; that the majority of the officers and directors then elected were not interested in the North Chicago Company, but all of them were interested, as stockholders or otherwise, in the Union Traction Company, and are subservient to and under the control of that company; that, at the request and by the direction of the officers of the Union Traction Company, this board of directors adopted a new lease with the Union Traction Company, subject to the approval of the holders of a majority of the stock of the North Chicago Company at a stockholders' meeting to be called for that purpose; and the agreement there adopted was deposited in escrow, to be turned over when approved by a majority of the stockholders, and when a like agreement by the West Chicago Company should be made and delivered to the Traction Company. By the provisions of the amendatory lease, the term was extended from 99 years, as specified in the original lease, to 984 years, and the rental was reduced from 12 per cent. to 6 per cent. upon the stock of the North Chicago Company, and that the rights reserved to the North Chicago Company with respect to the 20,000 shares of stock deposited under the tripartite agreement were waived; that the Union Traction Company claimed the right and threatened

to require the bank trustee to vote the shares of deposited stock in accordance with the directions of the Traction Company. It is claimed by the bill that, in the absence of legislative authority, the proposed lease is ultra vires the North Chicago Company; that, if otherwise valid, the consent of every stockholder was necessary, and that a single dissenting stockholder could enjoin its execution; that the Union Traction Company has no power of ownership over the shares of stock so deposited, and no power or right to vote that stock. The bill prayed a decree enjoining the voting of the stock upon the question of the ratification of the proposed amendatory lease, for an accounting between the North Chicago Company and the Union Traction Company, and the payment by the latter of the amount found due, in the payment of which default had been made by the Traction Company, and that the shares of stock deposited may be sold in such manner as the court may direct to satisfy the debt, "subject to such rights, if any, which it may appear that any person or receivers may rightfully have in and to any such shares of stock"; that the proposed modification of the lease or tripartite agreement may be enjoined, and for a general relief in the premises.

Does the prosecution of this suit in any way encroach upon the rightful jurisdiction of the court below? It in no way seeks to take from the receivers the possession of any physical property of the North Chicago Company. It in no way affects the receivers in the management of the property under their receiverships. It in no way affects any issue presented under the creditors' bill, or arising under any intervening petition. Under a well-recognized principle, the court below might, at the commencement of the proceedings under the creditors' bill, have directed the receivers of the Union Traction Company to disavow the lease, and to account only for a fair rental value during possession of the property by the receivers. It did not do that, but ratified the lease by directing payment of rental thereunder, and all parties treated the lease as existing. The complainants in the bill in the state court sought to prevent an extension of the term of the lease for a long period at a greatly reduced rental. That was matter which concerned the parties to it, and with which the receivers had rightfully nothing to do. There was no controversy respecting it under the creditors' bill. There could be none, for, according to the allegations of the bill in the state court, the North Chicago Company, the sole defendant to the creditors' bill, controlled by the Union Traction Company, consented to the proposed amendment, and petitioned the court, in which the receivers united, to enjoin the stockholders of the company from asserting their supposed rights with respect to the alleged wrongful action of the board of directors of the North Chicago Company. All this has nothing to do with the marshaling of the assets of the North Chicago Company, and the subjection of them to the payment of its creditors. Surely, when the Union Traction Company has assumed the payment of all of the debts of the North Chicago Company, and has failed in its obligation, and has obtained control of the directors of the North Chicago Company, so that they act solely in the interest of the Union Traction Company, it ought not to be permitted that, ex parte, without opportunity of hearing, or at all, the stockholders of the North Chicago Com-

pany should be enjoined from asserting their supposed rights in a proper forum. We do not undertake to pass upon the allegations of the bill filed in the state court. We must assume for the present purpose that they are true. We only say that the assertion of those rights in a state court neither interferes with the possession of any property in the hands of the receivers, nor with any issue raised by, or proper to be adjudicated under, the creditors' bill. But it is said that the court below had the power to direct and require the debtor to execute any instrument necessary for the protection of the res, and that, in the administration of the three estates, the North Chicago Company, the West Chicago Company, and the Union Traction Company, the court could compose and settle differences between them as matter of administration of the estate, and that the modification of the lease agreements was in the nature of settlement. We may concede that the court may require the execution by the debtor of any instrument necessary for the protection of the res, and may compromise disputes between the different estates with respect to the res before the court; but we are not prepared to say that the court, in the administration of these three estates, could compel the lessor companies, against their will, to extend the lease of their lines of railway from 99 years to 98½ years, or require them to abate for that long period the rental which had been agreed upon. The court has that property in possession temporarily, and to conserve it in the interest of the creditors, and to return it when those claims are satisfied, or to dispose of the property, as it exists, by sale. We cannot, however, believe that it can be properly within the province of the court to compel a debtor company to extend the lease of its property from 99 to 98½ years to a confessedly insolvent corporation at a greatly reduced rental. That would not be administration, but the exercise of contractual capacity lodged not with the courts, but with the parties. It might with equal propriety be said that it was within the power of the court, as an act of administration, in a suit to which the city of Chicago was not a party, to determine the right of the city with respect to the use of its streets by these railway corporations. That right might be adjudicated in an independent suit, or by an ancillary bill, to which the city should be made a party, because such a proceeding would be in protection of the res, and its possession by the receivers, under the allegation that the city is threatening and about to tear up the railway tracks. That would be judicial action, not administrative action. Without question the combination of all the railways under one management and control is an imperial scheme, possibly conducive to the public welfare, possibly beneficial to the three corporations interested, and possibly lifting the Union Traction Company out of its insolvent condition; but the property was not taken by the court to carry out grand schemes founded on supposed future benefits. It has the property simply to conserve it in the interests of creditors; caring for it, indeed, with due regard to public interests, because it is impressed with a public service. But a scheme like that proposed should be entered upon and carried out by those interested and whose money is at stake, and should not be imposed upon them in invitum through the action of the court. It is said, however, that the three corporations were consenting parties, and that

the appellant stockholders of the one corporation are bound by the act of their board of directors. That is begging the question, for their bill in the state court charges fraud in the consummation of the scheme; that, while seemingly the action of the three several boards of directors of the three several corporations, it was in fact only the action of the Union Traction Company, operating in its own interest and against the interest of the lessor companies. It is also charged that the action of the boards of directors of the two lessor companies was ultra vires the corporation, and that no such lease is authorized by law. If that be true, the stockholders are not estopped by the act of their directors. *Ward v. Joslin*, 186 U. S. 142, 22 Sup. Ct. 807, 46 L. Ed. 1093. If the suit, so far as it seeks a receiver of the stock in the hands of the trustee, may be deemed an interference with its constructive possession by the receivers of the federal court, and therefore objectionable, the appellants should not be prevented from prosecuting in the forum of their choice because they have sought too much. They would still be entitled to prosecute their suit with respect to so much thereof as attacks the action of their board of directors and the validity of the amended lease and amendatory tripartite agreement. Such prosecution would not trench upon the rightful jurisdiction of the court below.

Anxious to preserve the federal jurisdiction from improper interference by a state tribunal, we are equally desirous that there should be no improper interference with the rightful jurisdiction of a state court by a federal tribunal. We are unable to perceive that the prosecution in the state court of the suit enjoined by the decree appealed from does in any way interfere with the possession of the res by the receivers, or encroaches upon any rightful jurisdiction under this creditors' bill.

The decree or order of October 9, 1903, is reversed, and the cause is remanded, with the direction to the court below to set the same aside, and to vacate the order of August 15, 1903, and to dismiss the petition of the North Chicago Company filed August 15, 1903.

**BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO. v.
JONES.**

(Circuit Court of Appeals, Ninth Circuit. May 2, 1904.)

No. 987.

1. MASTER AND SERVANT—DUTY OF MASTER—SAFE PLACE TO WORK.

It is the absolute duty of a master to provide a reasonably safe place in which the servant shall work, having regard to the kind of work and the conditions under which it must necessarily be performed.

2. SAME—INSPECTION OF MINE—RIGHT OF MINER TO RELY ON PERFORMANCE OF DUTY BY OWNER.

It is not the duty of a miner employed to operate a drill in a mine to inspect the timbering or the condition of the rock above him, but he has the right to assume that the master has performed his duty in making the place where he is directed to work reasonably safe, and to proceed with his work in reliance on such assumption, unless a reasonably

prudent and intelligent man, in the performance of his work, would have learned facts from which he would have apprehended danger to himself.

3. SAME—ASSUMPTION OF RISK.

While a person entering voluntarily into a contract of service assumes all the risks and hazards ordinarily incident to the employment, and such as are liable to arise from defects which are patent and obvious to a person of his experience and understanding, he does not ordinarily assume risks arising out of the negligence of the master.

4. SAME—INJURY OF SERVANT—FELLOW SERVANTS.

A mine owner cannot avoid liability for the injury of a miner, arising from his failure to perform the absolute duty he owes to employés to make proper inspection, and to provide a reasonably safe place for the miners to work, by delegating such duty to one who is in another respect a fellow servant of the miner injured.

In Error to the Circuit Court of the United States for the District of Oregon.

For opinion below on motion for new trial, see 124 Fed. 675.

This is an action for damages for personal injuries sustained by the defendant in error while working in one of the mines of the plaintiff in error. It is alleged in the complaint that the plaintiff (defendant in error) was at the time of his injury, on February 13, 1902, and for some time prior thereto had been, in the employ of the defendant company in the capacity of miner and machineman; that at the time of the injury he was working as machineman in the west end of the Bodero stope of the defendant's mine, and on the floor thereof next to the top floor; that the ore and rock in the mine are loose and liable to cave, and more particularly in the roof of the stopes; that it was therefore necessary for the defendant, in working the mine, to cause timbers and lagging to be placed therein, and in the roof of the stopes, from time to time, as the work progressed, to make the same safe, and to inspect or cause to be inspected the roof of the stopes and places in and about the mine, and that it "was the duty of the said defendant mining company to cause the said place where this plaintiff was engaged, ordered, and directed to be and work to be safe, and to have the roof of said stope timbered so as to make the same safe; that, at the point where this plaintiff was engaged as aforesaid, the said defendant had theretofore excavated a large chamber, more than 40 feet in length by 10 feet in width, the roof thereof being then and there 10 feet and more from the floor of said stope, which said roof, owing to the character and condition of the rock therein, became dangerous and unsafe, and it became and was the duty of the said defendant to cause the same to be timbered and braced so that the said roof could not fall, and to inspect said roof in order to ascertain and prevent rocks and ore from falling from the roof thereof." It is further alleged that the defendant company put the plaintiff to work at the place indicated without adequately securing the roof of the stope, and without providing any protection for the plaintiff, when, without any fault or negligence on his part, and solely on account of the negligence and carelessness of the defendant, a large mass of earth, ore, and rock fell from the roof of said stope, over, against, and upon the plaintiff, and inflicted upon him serious injury, as a result of which he is, and will continue to be, lame and crippled, and unable to perform any work calling for the exercise of physical exertion.

The defendant, in its amended answer, denied that the ore and rock in the mine were loose or liable to cave; denied that the roof of the stope was or had become dangerous or unsafe, or that it had been permitted to become dangerous or unsafe through any neglect on the part of the defendant;

¶ 3. Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.

¶ 4. See Master and Servant, vol. 34, Cent. Dig. § 393.

denied that a large mass of earth, ore, or rock fell from the roof of the stope and injured the plaintiff. And for a further defense to the action the defendant alleged, among other things, that at the time and place therein stated the plaintiff was in the employ of the defendant as a miner, and was then operating a drill, and that one J. M. Davy was the shift boss of the men engaged in the work, and was a fellow servant of the plaintiff; that the face of the stope runs about two feet in advance of the timbers which were placed in the excavation to support the roof and walls, and that the machine that the plaintiff was using was placed under the timbers, which the defendant had caused to be placed there as fast as could be done in advancing the work; that the said place was perfectly safe and secure, and that no loose rock existed in the roof or walls; that the plaintiff had been directed to put his drill against the upper face of the stope, in solid rock, so as to make a hole that would be of service in extending the stope; that lower down in the face there was some rock that had been loosened by previous work, which was intended to be barred down, and was not to be drilled; that the plaintiff, instead of doing as directed, and as a miner should have done, set his drill rod against said loosened rock, though admonished by his associate miners not to do so, and proceeded to drill into the same; that such drillwork had the effect of further loosening the rock, and finally to dislodge it, and that it fell towards the plaintiff, but without injury; that no rock whatever fell from the roof of the stope, and that the rock and debris that caused the alleged injury to the plaintiff was the result of his disobedience of the orders of the foreman, and in no respect was it the result of want of care on the part of the defendant, or of the foreman in charge; that the timbering in the stope at the time was sound, safe, and perfect; and that, if the plaintiff had exercised reasonable care, no accident could have occurred. It was further alleged that the plaintiff knew at the time of the alleged injury of the condition of said stope, and the danger, if any, and assumed the risk thereof. It was also alleged that the injury to plaintiff was not incurred by reason of the matters stated in the complaint, but in consequence of a fall which occurred to the plaintiff on his way home from the mine.

The plaintiff testified that at the time he was injured he was working in a chamber next to the top in the stope; that he was set to work in that chamber on the morning of the accident by John M. Davy, the shift boss or foreman. The plaintiff had worked the day previous two floors below in the stope, but on the morning of the accident the shift boss had set him to work in this particular chamber, and showed him where to drill. He testified that the rock in front of him was solid; that he knew the face where he was drilling was solid and good. To the left there were two sets of timbers out, and his testimony was to the effect that the rock that came down, and injured him came from this untimbered section.

W. E. Wear, a mucker, who was working about 15 feet from the plaintiff at the time of the accident, testified that he saw the shift boss when he came in that morning and told the plaintiff where to put in the holes. The shift boss pointed out the places where the plaintiff was to put in the holes. He testified further that the ground seemed to be in fair condition, as far as he noticed; that the plaintiff set up his machine, and went on drilling in the face of the stope; that at about 10 or half past 10 in the morning he heard some falling ground. He saw the ground coming down. He saw the plaintiff fall, and his light was knocked out, but his machine still kept running. After the accident the witness went up on the next floor, and found that ore had been worked back too far before timbers had been put in; that it was peculiarly dangerous, from the fact that there were no stulls or sprags running from the timbers up to hold the ground in case it should slough or become air-slaked; that there should have been a sprag or a short stull put up from the timbers to the ground, to steady and support it. It was the duty of the shift boss to see that it was done. It was no part of the duty of the machinemen to see whether it was done or not. The machinemen were not supposed to be working under that ground. The witness was questioned in his direct examination in respect to the work that was being done in this part of the mine at the time of the accident. The questions and

answers were as follows: "Q. In order to do that work in a proper way, should this ground up here have been inspected before a man was put in there? A. It should have been; yes, sir. Q. Whose duty was it to do that? A. It was the shift boss' duty. Q. If he had put these timbers in here, or this square set in here, that accident would not have happened to him? A. Oh, no; it could not have happened, because the rock could not have fallen. Q. In the absence of that, if they had put these sprags in, and held that up, that injury could not have happened? A. I don't think it could. Q. If this ore had not been worked out up here too close to there, would that probably have happened? A. No; because it would have rested over on these timbers. There would have been nothing to come down." This evidence tended to show that the accident was caused by rock falling from above and to the left of where the plaintiff was working, and from ground unsupported by timbers.

The testimony on the part of the defendant tended to show that the stope where the plaintiff was set to work was completely timbered; that there was no ground near to the plaintiff that was not timbered at the time he was hurt; that there was a crack in the breast of the stope upon which he was set to work; that above this crack the stope was solid, but, below it, it was shattered and had settled down; that the plaintiff started to drill below the crack in the loose, shattered ground; that a fellow workman told plaintiff he had better bar that ground down; that he did not follow this advice, and the loose ground came down and rolled over, falling from the face of the stope in front of the plaintiff. The defendant also introduced testimony tending to show that plaintiff was not seriously hurt, but continued his work during the day; that on the next day he admitted that in returning home he fell while coming down a hill, and hurt his leg over again.

The jury rendered a verdict in favor of the plaintiff, and assessed his damages at \$9,000. A judgment having been entered upon the verdict, the case is brought here by the defendant upon a writ of error.

M. A. Folson and J. C. Moreland, for plaintiff in error.

Thomas O'Day and Robertson, Miller & Rosenhaupt, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is assigned as error that at the close of the testimony the court refused to direct the jury to find a verdict for the defendant, and that the court refused to give the following instructions:

"(1) If the jury should find that the plaintiff was injured from rock falling from above, and caused by the negligence of the shift boss in not putting up timbers, then the plaintiff cannot recover.

"(2) The shift boss is and was the fellow servant with the plaintiff, and the plaintiff is not entitled to recover.

"(3) If the jury should find that the statement of plaintiff and his witness is true—that there was a space adjoining the place occupied by the plaintiff which was not covered, and the danger arising therefrom was known to the plaintiff—he cannot recover in this action.

"(4) The plaintiff, while working in the stope, had full knowledge of the danger of working where a roof was unprotected, and of the means employed to protect him therefrom; and, when he continued his work with such knowledge, he assumed the risk incident thereto, and cannot recover, if he was so injured."

There are other errors assigned, but the foregoing present the controlling questions at issue.

The main question of fact in controversy in this case was the locality from which the rock fell that injured the plaintiff. It was con-

tended by the plaintiff that it fell from the roof of the stope, and from a point that the defendant had neglected to timber as the ore was being removed. The defendant contended that it fell from the breast of the stope into which the plaintiff was drilling at the time of the injury. The pleadings and testimony presented this main question for the jury to determine. The allegations of the complaint and the testimony on the part of the plaintiff tended to establish the fact that the rock fell from the roof of the untimbered stope. The allegations of the answer and the testimony on the part of the defendant tended to establish the fact that the rock fell from the breast of the stope into which the plaintiff was drilling, and which had been loosened from the wall by the operation of plaintiff's drilling, and that the stope above was completely timbered.

As legal propositions in support of the plaintiff's case, it was contended that it was the duty of the master to provide a reasonably safe place in which the servant was required to work. As legal propositions in support of the defendant's case, it was contended with respect to the place in which the plaintiff was set to work, first, that the danger to the plaintiff was apparent, and he assumed the risk of the employment and contributed to the result; second, that the defendant was not charged with the duty of furnishing and keeping the place in a safe condition. This defense was submitted to the jury by the court in an instruction that clearly and distinctly directed a verdict for the defendant, if the jury believed the testimony on the part of the defendant. The court said in its instructions:

"If the injury to the plaintiff was caused by rock and other substances falling upon him from the drift in which he was working, and not from overhead, your verdict must be for the defendant."

This instruction was certainly as favorable to the defendant as any instructions could be, upon the defense set up in the answer, and the testimony introduced in support of that defense. In view of this positive instruction of the court, the jury must be presumed to have found as a fact that the rock fell from overhead, and not from the drift in which the plaintiff was working.

With respect to that feature of the case, the court instructed the jury that:

"It is the duty of the master to furnish the servant a reasonably safe place and appliances with which to work, and to make such reasonable inspection of such place and appliances as to not subject the servant to unusual risks or dangers. And if you find from the evidence in this case that the defendant knew that the ground was loose and liable to cave at or near the point described by the evidence, or by a reasonable inspection could have known, and you further find that the plaintiff did not know, and it was no part of the plaintiff's duty to make an inspection for the purpose of ascertaining, the condition of said place, and you further find that the plaintiff was set to work, and, while so working, rocks came down from the upper chamber above the plaintiff, and he was thereby injured, then I instruct you that your verdict must be for the plaintiff."

This instruction was qualified by the following instructions:

"Even though you should find from the evidence that the defendant was negligent in the matters complained of in the complaint, the plaintiff cannot recover, unless you further find that the plaintiff was himself free from con-

tributory negligence which contributed directly to the injury. Contributory negligence is the failure to exercise that degree of care and diligence which an ordinarily prudent man would exercise under similar circumstances or similarly situated."

"A servant not only assumes the risks ordinarily incident to his employment, but he also assumes such increased risks as he may knowingly and voluntarily undertake; and if the plaintiff went to work in a dangerous place, and the danger was apparent, or might have been discovered by the use of ordinary intelligence or inspection, then he assumed such risk when he undertook the work, and cannot recover."

"The master is not required to be present at the working place at all times, in person or by representative, to protect a laborer from the negligence of his fellow servant, or from his own negligence in the constantly changing conditions of the work."

There is no rule of law more firmly established than that it is the absolute duty of the master to provide a reasonably safe place in which the servant shall work, having regard to the kind of work, and the conditions under which it must necessarily be performed. *Union Pac. Ry. Co. v. Jarvi*, 69 Fed. 65, 3 C. C. A. 433; *Western Coal Min. Co. v. Ingraham*, 70 Fed. 219, 17 C. C. A. 71; *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. Ed. 464. If the jury believed the testimony on the part of the plaintiff, the safety of his employment depended upon the proper timbering of the stope above and immediately adjoining the place where he was set to work. He was not employed as a timberman, but as a miner and machineman, or driller. It was no more a part of his duty to inspect the timbering above him, or the condition of the rock in the chamber above, according to the custom in that mine, than it would have been to inspect the track on the tunnel floor, or the cars in which the ore was carried out. Other men were detailed for that part of the work. The shift boss, whose orders he was obliged to obey, indicated the place in which he was to work; directed the number of holes to be drilled in the breast of the tunnel, and that the blasts should be fired at noon. He entered upon the performance of his duties, and was warranted in the assumption that the necessary precautions had been taken by the defendant to prevent the caving and falling of rock from the stope above. As was said by the court in *Railway Co. v. Jarvi*, *supra*, in comparing the relative duties of master and servant:

"Of the master is required a care and diligence in the preparation and subsequent inspection of such a place as a room in a mine that is not, in the first instance, demanded of the servant. The former must watch, inspect, and care for the stopes through which and in which the servants work, as a person charged with the duty of keeping them reasonably safe would do. The latter has a right to presume, when directed to work in a particular place, that the master has performed his duty, and to proceed with his work in reliance upon this assumption, unless a reasonably prudent and intelligent man, in the performance of his work as a miner, would have learned facts from which he would have apprehended danger to himself."

While it is a ruling principle that a person entering voluntarily into a contract of hiring assumes all the risks and hazards ordinarily incident to the employment, and liable to arise from the defects which are patent and obvious to a person of his experience and understanding, it is equally true that risks arising out of the negligence of the master

are not those ordinarily incident to the employment, and are not, therefore, assumed by the servant. *Texas, etc., R. R. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188. The risks inherent in work of the kind in which the defendant in error was engaged are well stated in *Kelley v. Mining Co. (Mont.)* 41 Pac. 273—a case wherein the plaintiff was suing for damages for injuries caused while working as a miner in drilling a tunnel. The court said:

"The plaintiff was employed at the time of the accident in running a tunnel in defendant's mine. He was doing this work under the immediate supervision and direction of John Sheehan, the foreman and manager of the mine. Sheehan was not working in the mine with plaintiff. The plaintiff was not engaged in creating a place on his own judgment and at his own risk. He assumed the risks naturally attendant upon driving the tunnel. It was the duty of defendant to keep that part of the tunnel or place already created safe, by whatever reasonable means were necessary. If the plaintiff had been injured while in the actual work of drilling or blasting in the face of the tunnel he was driving, he may have had no claim on the defendant for damages, for these were risks he assumed as a miner. But he did not assume the risk of defendant's failure to keep that part of the tunnel or place already created reasonably safe and secure. For instance, if a stone or material blasted or dug from the tunnel by plaintiff should have been blown against or should have fallen upon him, he would have had no remedy against defendant for any injury sustained thereby. This is a risk belonging to his employment, and which he assumed. But he did not, by his employment as a miner in driving the tunnel, assume the risk of the failure of the defendant to take such reasonable precautions as were requisite to prevent the caving and falling of the roof of that part of the tunnel already created, upon him, while engaged in his work. * * * He assumed the risks incident to the work in front of him, and not the risks of defendant's failure to properly care for that part of the tunnel or place behind him which he had completed and turned over to the care and control of the defendant."

In that case the injury occurred from the caving of rock behind the plaintiff, and because of the accumulation of rock and debris on the floor of the tunnel impeding his escape. In the present case the evidence on the part of the plaintiff tended to show that the rock fell from a place which was entirely under the control of the master, and which the servant was not bound to inspect. A defect apparent to one making a careful inspection of a stope in a mine might easily be unseen by a miner attending to his work as directed, and having only the aid of his candle to light up the walls of the tunnel or stope. It does not appear from the evidence that the defendant in error could have discovered that the roof of the stope was in danger of caving, without a particular inspection thereof, or that the timbering was insufficient to secure the loose rock above. It was not his duty to timber the mine, or to pay any attention to that work, unless it was obviously defective, in his understanding, in the immediate vicinity of his work. That duty belonged exclusively to the defendant, and the question whether or not it exercised reasonable care in its fulfillment was properly submitted to the jury.

With regard to the contention that the negligence, if any, causing the accident, was solely that of the shift boss, and, as he was a fellow servant of the plaintiff, the defendant was not liable for his negligence, we do not think the trial court erred in refusing to so instruct the jury. To support this contention would be to overlook the important principle that one cannot escape liability for neglect of a positive duty by dele-

gating that duty to another. It does not matter, in the present case, whether or not the shift boss be considered as the fellow servant of the plaintiff. The question is, did the defendant fail to perform its absolute duty to the plaintiff to provide a reasonably safe place in which he should perform the work given him to do? The Supreme Court of the United States, in the case of *Northern Pac. R. R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994, has stated this doctrine very clearly and decisively. It is there said:

"The general rule is that those entering into the service of a common master become thereby engaged in a common service, and are fellow servants, and prima facie the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant. There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties, and it has been held in many states that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track. If the master be neglectful in any of these matters, it is a neglect of a duty which he personally owes to his employés, and, if the employé suffer damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which in such case is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such."

The question turns, therefore, "rather on the character of the act than on the relations of the employés to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master." *B. & O. R. R. v. Baugh*, 149 U. S. 368, 386, 13 Sup. Ct. 914, 921, 37 L. Ed. 772.

We think the question of actionable negligence on the part of the defendant was submitted to the jury under the proper instructions. The judgment of the Circuit Court is affirmed.

LOUISVILLE TRUST CO. v. KNOTT et al.

(Circuit Court of Appeals, Sixth Circuit. June 27, 1904.)

No. 1,290.

1. FEDERAL AND STATE COURTS—CONFLICTING JURISDICTION—PROPERTY IN CUSTODIA LEGIS.

A corporation's franchise having expired by limitation, and its assets having been delivered to a trust company appointed as liquidator of its affairs, minority stockholders filed a bill in the state court for an inspection of its books, the ascertainment of its debts and liabilities, together with a sale and distribution of its assets, and other equitable relief. The corporation and its majority stockholders appeared in such suit, and pending a motion therein for an inspection of the books a creditor of the corporation obtained a collusive judgment in the federal court by confes-

tion, and obtained the return of an execution unsatisfied, and immediately filed a creditors' bill for the appointment of a receiver in the federal court, who, when appointed, took possession of the assets, which the federal court refused to surrender to a receiver subsequently appointed by the state court. *Held*, that the state court had first acquired jurisdiction of the subject-matter of the administration of such corporation's assets, though it had not first taken physical control thereof, and hence was entitled to their surrender by the receiver of the federal court.

2. SAME—DIVERSE CITIZENSHIP.

The fact that the plaintiff in a suit in the federal court, by reason of diverse citizenship, was entitled to sue therein for the establishment of his claim, did not entitle him to have the assets of the corporation administered in such court, since it would be presumed that full recognition would be accorded to his judgment by the state court.

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

For opinion below, see 124 Fed. 342.

The Evening Post Company, one of the appellees above named, was organized as a corporation under the laws of Kentucky with a capital stock of \$60,000, divided into 600 shares, and began its corporate life on May 1, 1878. By the terms of its charter the duration of its existence was limited to the period of 25 years, and terminated May 1, 1903. The Kentucky Statutes, 1903, § 561, however, provided that "when any corporation expires by the terms of the articles of incorporation, or by the voluntary act of its stockholders, it may thereafter continue to act for the purpose of closing up its business, but for no other purpose; and it shall be the duty of the officers to settle up its affairs and business as speedily as possible; and they shall cause notice to be published, for at least once a week for four consecutive weeks, in some newspaper printed and published in the county, if any, of the fact that it is closing up its business; and all debts and demands against the corporation shall be paid in full before the officers receive anything." On April 30, 1903, there was a meeting of all the officers and stockholders of the company, at which, against the objection and protest of the representatives of the Halde-man estate, who owned 48 shares, of \$100 each, the following resolutions were passed:

"Be it resolved:

"(1) That the Columbia Finance & Trust Company be, and it is hereby appointed, liquidator of the affairs of the corporation, with directions to operate for the use of the stockholders the affairs and business of said corporation as they have been operated, until the property can be properly advertised and sold, and the possession thereof delivered to the purchaser.

"(2) That prior to the said sale liquidator shall cause to be made for the use of the stockholders a comprehensive statement of the assets and liabilities of the corporation, and furnish each stockholder with a copy of said statement.

"(3) That the said liquidator shall in its advertisements specify the nature of the articles to be sold, and shall make such sale for cash to be paid on the delivery of possession, and shall require of the purchaser that he deposit a certified check for an amount equal to one-third of the total purchase price, which the liquidator shall hold and credit upon the purchase price when the sale is consummated, or if for any reason it shall be set aside, return to the bidder. If said bidder to whom the property is knocked down shall fail at once to deliver to the liquidator the certified check as herein provided, the liquidator shall immediately resell the property and refuse to receive bids from said former bidder.

"(4) Said liquidator may, in his discretion, employ an auctioneer or other agents necessary or proper to be used in the sale of the property.

¶ 2. Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullagham*, 27 C. C. A. 298.

"(5) Until said sale, and during the operation of said property, said liquidator is given full authority and permission to employ such agents and persons as may be necessary to properly, conveniently and economically operate the company, and keep an account of all its expenses and take vouchers therefor. And after the property has been fully administered it shall make out a comprehensive account of its actings and doings, and shall furnish a copy thereof to each of the stockholders.

"(6) The said liquidator shall, from the proceeds of the sale of the property, pay all the debts of the corporation, and the balance, if any, shall be distributed among the stockholders according to their legal rights."

On the same day the Columbia Finance & Trust Company accepted the appointment, and entered upon the discharge of the duties thereof. Shortly before this, and on April 25, 1903, the representatives of the Haldeman estate, as stockholders therein, made application to the Evening Post Company to be allowed to inspect the books and records of the company for the purpose, as they claimed, of enabling them to determine what course they should pursue in relation to its affairs. This application was refused. It was renewed after the appointment of the Columbia Finance & Trust Company, and again refused by the latter, but with the statement by it that in a short time it would make out an exhibit of the assets and liabilities of the corporation, a copy of which would be furnished to each stockholder. But this did not satisfy the applicants, and they demanded the inspection of the books themselves, which was refused them.

On May 12, 1903, those stockholders filed their bill of complaint in the circuit court for Jefferson county, Ky., against the Evening Post Company, the Columbia Finance & Trust Company, Richard W. Knott, J. M. Atherton, John R. Knott, Eugene Q. Knott, and Laura G. Boyle, stating the organization of the Evening Post Company, the limitation of its existence, its capital stock, their ownership of the 48 shares thereof, and the ownership of the rest of it by the individual defendants above named; that the individual defendants had for a long time been managing the affairs of the company in their own interests, without any meeting of stockholders or election of directors; their demands and the refusals to be allowed inspection of the books above stated; the meeting of the stockholders and the passage of the resolutions on April 30, 1903; that the complainants did not know what was the indebtedness of the Evening Post Company, or to whom it was owing, or how secured, nor what assets the company owned; that the defendants were still operating the business of the company at great loss and expense; that the individual defendants were converting to their own use the entire assets of the company, including its good will; that the limitation of the indebtedness which the company might incur was \$40,000, but that the defendants were claiming that they themselves were its creditors to the extent of \$109,000; and that an inspection of the company's books was necessary to ascertain the real state of the company's business. The prayer of the bill was that the affairs of the Evening Post Company be wound up and liquidated; that an inspection of the books be ordered and allowed; that the defendants who are the creditors of the company be required to prove their accounts; that a reference be ordered to ascertain the debts and liabilities of the company, and that its assets be sold, and the proceeds distributed to the parties entitled thereto according to their interests; that the court shall determine whether the business of the company shall be continued pending the suit; and for all proper equitable relief. Process was issued and served on all the defendants. Then, on May 19, 1903, the complainants in that suit moved for an order requiring the defendants to permit them to have access to the books, records, and documents of the company, to enable them to inspect the same. Hearing on this motion was assigned to May 23, 1903. The defendants appeared and opposed the granting of the motion. The hearing was not completed on that day, and was postponed to May 25th, and again to May 30th, when the hearing was completed. On June 4th the court filed its opinion granting the motion. The defendants on May 23, 1903, filed their answer to the bill. While the motion for the production of the books was pending, and on May 26, 1903, Stuart R. Knott claiming to be a creditor of the Evening Post Company in the sum of \$6,000, brought suit against it in the Circuit Court of the United States, and

on the same day, by consent of the company, obtained a judgment for that sum, with interest. On the day following he took out an execution, which was immediately returned nulla bona. Thereupon he filed a creditors' bill in that court, making the Evening Post Company, the Columbia Finance & Trust Company, and other parties, stockholders and creditors, who were also defendants in the case in the state court, defendants. This bill was filed in behalf not only of the complainant therein, but of all other persons similarly interested, and who were creditors of the Evening Post Company. It prayed, among other things, that a receiver might be appointed, and that he be directed to take into his possession and control all the property of the Evening Post Company, its books of account, its records, its circulation lists, and everything else pertaining to its business; that all the property of the company, including its good will, should be sold; that the court determine the means by which the publication of the Evening Post should continue pending the suit; that the debts of the company and their rank be ascertained; and that its property be sold, and the proceeds brought into court for distribution among its creditors. On the day of the filing of this bill, the complainant made a motion for the appointment of a receiver, and the court entered the following order:

"Pending the hearing of said motion, it is ordered by the court that the said Columbia Finance & Trust Company be, and it is, restrained from disposing of any part of said property, and from delivering possession of any part thereof to any person or officer, otherwise than in such manner as may be approved by this court."

All the defendants filed answers consenting to the appointment of a receiver, and on the next day, May 28th, the court appointed L. C. Humphrey, one of the appellees, receiver, who immediately took possession of the property of the company, including its books and papers. Subsequent to these proceedings in the Circuit Court of the United States, and on June 27, 1903, the state court, on motion of the complainants in the suit there pending, appointed the Louisville Trust Company receiver, and directed it to take possession and charge of the entire estate of the Evening Post Company. It having already been taken into the possession of the receiver of the United States court, the state court directed its receiver to apply to the United States court by petition asking that the assets, books, and papers of said company be surrendered to the receiver of the state court. The Circuit Court of the United States allowed the petition to be filed, but refused to grant it. From the order refusing the petition, the receiver of the state court has appealed.

John L. Dodd and David W. Baird, for appellant.

Alexander Pope Humphrey and James P. Helm, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge, having stated the case as above, delivered the opinion of the court.

The ground on which the Circuit Court refused the petition of the receiver of the state court for the surrender to him of the assets of the Evening Post Company was that the state court had not the possession or control of the property of the company at the time when the receiver of the Circuit Court of the United States took possession thereof under the order of the latter court. The learned judge conceded what has so often been decided—that, the suit in the state court having been first commenced, if that court had taken actual possession of the property, it could not lawfully have been dispossessed by the order of the federal court. It is unnecessary to fortify the ground conceded. It has long since ceased to be debatable. The question is whether, upon the facts as they were presented to the court below, it was essential that the state court should have actually exercised its dominion over the property, in order to render the seizure thereof by

the federal court unlawful. And we think it was not essential. The reasons which support the doctrine of the conceded rule are not all the same as those which apply to the question here, but those here applicable are equally potent and persuasive to establish a similar rule for judicial action, when the power of the court over the assets has not yet been exercised, but the right to do so is essential to the objects of the suit. The corporate life of the Evening Post Company had ended for all purposes except for winding up its affairs, and it had become subject to the statutory regulations prescribed for closing up its business and disposing of its assets. A majority of its stockholders were pursuing a course of conduct with reference to the assets which, as the minority contended, was intended to further the private interests of those in the majority, was not authorized by the statute, and was in derogation of the rights of the minority. The latter filed their bill in the state court to prevent this, and to obtain a proper settlement of the company's affairs, and the court entertained it. The contention of the appellees that the bill presented only a controversy over the question of right to inspect the books of the company is not tenable. That was a mere incident. The averments of the bill were ample to present a case for the settlement of the affairs of the company and the disposition of its assets, and this was the general relief prayed. The company and the majority stockholders were made defendants, and they appeared and submitted to the jurisdiction of the state court. While a motion was pending in that case, and before a judgment thereon was rendered, a collusive judgment in the federal court was accorded to a creditor against the company by the majority who were in control of its affairs. A creditors' bill was immediately filed, the object of which was much the same as that of the suit in the state court, a receiver was appointed, and the property seized into his possession. When the state court came to decide the pending motion, which was for the production of the books and records, it found itself deprived of all power to make any effective order or decree in the case. The subject-matter of the suit, the res which its jurisdiction had been invoked to administer, and which it had undertaken to administer, had been removed by another court of co-ordinate jurisdiction and taken under its own control for administration in a suit brought subsequently for that purpose. Any decree of the state court made for the purpose of effecting the objects of the suit would be mere *brutum fulmen*, to use the language of Mr. Justice Grier in *Orton v. Smith*, *infra*, in describing such a situation. It is clear that such a result is not only contrary to the purpose and spirit of any orderly system of jurisprudence, but is one extremely likely to provoke a conflict, tending to discord and mischief. To avoid such conflict, most liable to arise between the federal and state courts, it has come to be settled, as we think, that, wherever a state or federal court has lawfully taken jurisdiction of a case for the purpose of subjecting assets within its territory to the charge or disposition which the law applicable to the case requires, such assets are thereby brought in *custodia legis*, subject to the power and control of the court, and that no other court of co-ordinate jurisdiction can, in a suit commenced while the assets are in that situation, lawfully deprive the court, which has already acquired the right of control, of the pos-

session of them. This because the possession of the res is indispensable to the exercise of its jurisdiction by the court to the end that it may be impressed by its decree. It does not seem to us important that a receiver had not actually been appointed. An appointment of a receiver would rest upon considerations of convenience, and might be made at any time during the progress of the case if occasion should arise. The conversion of the assets might be made without the employment of a receiver at all. Besides, the appointment goes upon the ground that the court has acquired control of the assets. He is a mere agent of the court. The possession is that of the court, and not his own. It is quite true that in many cases the rule has been stated in terms no broader than to include an actual possession by the court consequent upon a seizure. But it is seen that generally in such cases the exigency did not make it necessary to go beyond that limit. When the question we are now considering has been actually presented, the decisions have been quite uniformly in accord with the rule which we have indicated as the correct one. *Wallace v. McConnell*, 13 Pet. 136, 10 L. Ed. 95; *Orton v. Smith*, 18 How. 263, 15 L. Ed. 393; *Chittenden v. Brewster*, 2 Wall. 191, 17 L. Ed. 839; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768; *Farmers' Loan, etc., Co. v. Lake St. R. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667, where Mr. Justice Shiras, expressing the opinion of the court upon this subject, said:

"Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to federal and state courts."

This subject has been much discussed in two cases in this circuit, which are canvassed in the briefs of counsel here (*Powers v. Blue Grass Building & Loan Association* [C. C.] 86 Fed. 705, and *Phelps v. Mutual Reserve Fund Life Association*, 112 Fed. 453, 50 C. C. A. 339, 61 L. R. A. 717), in both of which cases Judge Lurton delivered the opinion, in the first at the circuit, and in the latter for this court. The facts in neither of these cases presented the very question we now have before us, for in the *Powers Case* the state court was acting as an adviser of an assignee, and was not proceeding for the purpose of affording relief to a plaintiff. The assignee was not an officer of the court, and the possession of the res by the court was not necessary to the object of the application. It was held there was no impediment to the proceeding which the Circuit Court of the United States proposed to take with reference to the assigned property. In the *Phelps Case* a receiver had actually been appointed by the state court in proceedings supplementary to the judgment, and for the satisfaction thereof. The order appointing the receiver impounded the debts due to the association, and directed him to collect them. Upon a bill in equity filed in the United States Circuit Court, denying the jurisdiction of the state court to render the judgment mentioned or to appoint the receiver, the federal court granted an injunction restraining the

plaintiff and the receiver in the state court from executing the order of the latter for the impounding and collection of the assets of the association. Finding, as we did, that the state court did not lack jurisdiction, we held that this action of the federal court was an unlawful interference with the right and power of the state court. The difference between the Phelps Case and this is that in the former the state court had taken action toward the appropriation of the assets to the object of the suit by seizure, while in the present case that step had not yet been taken. In both of the cited cases the doctrine is announced in terms broad enough to cover a case where actual possession may not have been taken by the court which first acquired jurisdiction.

The following cases in other Circuit Courts of Appeals are directly in point: *Merritt v. American Steel Barge Co.*, 79 Fed. 228, 24 C. C. A. 530, 49 U. S. App. 85; *Adams v. Mercantile Trust Co.*, 66 Fed. 617, 15 C. C. A. 1, 30 U. S. App. 204; *Zimmerman v. So Relle*, 80 Fed. 417, 25 C. C. A. 518; *Memphis Sav. Bank v. Houchens*, 115 Fed. 110, 52 C. C. A. 176; *Baltimore & O. R. Co. v. Wabash R. Co.*, 119 Fed. 678, 57 C. C. A. 322, certiorari denied 187 U. S. 650, 23 Sup. Ct. 848, 47 L. Ed. 349. And see 2 Bates, Fed. Procedure, § 613.

In harmony with it, and designed to give it full operation, is another rule, which is that whenever in such case a third party claims some interest in the property which has been subjected to the control of the court, he may intervene in the pending case, and become a party thereto, for the protection of his interest, as explained in *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; *Gumbel v. Pitken*, 124 U. S. 143, 5 Sup. Ct. 616, 28 L. Ed. 1128, and numerous other cases of like character decided by the Supreme Court, or, if that interest be such that it survives the exercise of the jurisdiction in the pending case, he may stand aloof and pursue his remedies after the property has been discharged by the court which has had it under its control. We are not now concerned with suits in personam, in regard to which other reasons may prevail to a different result. The case of *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981, though at first blush it might seem to the contrary, is not in conflict with the current of modern decisions. In that case the claim of the plaintiff was of a maritime nature, of which the federal court alone had jurisdiction. The state court did not have power to deal with it. The two courts were not of concurrent jurisdiction. The plaintiff could not by intervention confer upon the state court a jurisdiction which it did not by law possess. The authority of the federal court was paramount and exclusive.

It does not matter that the plaintiff in the present case was not a party to the case in the state court, or that by reason of his citizenship he had a constitutional right to bring his suit in the federal court. Perhaps he might have maintained it there for the purpose of establishing his claim. He could then go into the state court which had the control of the assets of his debtor, and secure the recognition of his right thus established. *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867. The presumption must be that such recognition would be given by the state court, and his lawful rights duly accorded to him. It is not even charged in his bill that any one is

attempting to defraud the plaintiff, or is proceeding without right, or to the prejudice of any right of the plaintiff; and, on the whole record, we see no other hindrance to the plaintiff by the suit in the state court than such as is ordinarily incident to legal proceedings.

The state court took the proper course when it directed its receiver to apply to the court below for the surrender to it of the assets of the company, and we think there was error in refusing the application when the facts were made known to the latter court.

The order appealed from must be reversed, with costs, and the cause remanded, with a direction to grant the petition of the receiver of the circuit court for Jefferson county.

McMILLAN v. GRAND TRUNK RY. CO. OF CANADA.

(Circuit Court of Appeals, First Circuit. July 6, 1904.)

No. 511.

1. MASTER AND SERVANT—DEATH OF SERVANT—RAILROADS—INEXPERIENCED SERVANT—FAILURE TO INSTRUCT—EVIDENCE.

Where plaintiff's intestate, a boy 17 years of age, who had gone into defendant's railroad yard with an experienced servant for the purpose of receiving instructions as to the manner of coupling cars, was killed between two cars, proof that the servant who was with deceased was himself young, coupled with the mere fact that deceased was injured, without evidence as to how the injury occurred, or that there was in fact a failure to instruct, was insufficient to establish defendant's negligence.

2. SAME—VIOLATION OF ORDERS.

Where deceased was ordered to accompany an experienced servant into a railroad yard, to receive instructions as to coupling cars, by defendant's superintendent, and who yet did not comply with the instructions of the engineer with whom he was working, that he should not go between the cars, but that he should watch his instructor in the work, and who received the injuries from which he died while between two cars which were being coupled—the engineer being without knowledge of his position at the time—defendant was not liable for his death.

Aldrich, J., dissenting.

In Error to the Circuit Court of the United States for the District of Maine.

Benjamin Thompson, for plaintiff in error.

Clarence A. Hight (Leroy L. Hight, on the brief), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This writ of error involves a claim for damages arising out of the death of a boy employed by the defendant corporation, who, as the plaintiff alleges, was set to work coupling freight cars, and was fatally injured while coupling them. The learned judge in the Circuit Court directed a verdict for the defendant, to which the plaintiff below, now the plaintiff in error, excepted, and thereupon brought her case to us. In addition to the other issues

which we will state, the plaintiff alleged in the Circuit Court that the defendant, and the cars in use at the time the injury occurred, were each engaged in interstate commerce, and that the cars were not provided with automatic couplings as required by the statutes of the United States. This, however, has disappeared from the case as presented to us.

The plaintiff's case was perhaps deficient in some respects other than in those which we will particularly consider. With reference thereto, however, we are not to be understood as expressing any opinion. The intestate was John McMillan, aged 17 years. He was to relieve temporarily another boy, John Parker, who was about to take a vacation, and Parker had been directed to instruct McMillan in reference to his expected duties. The plaintiff's evidence describes the automatic couplers and their operation, although not very clearly—probably in consequence of the fact that, as the record shows, a coupler was produced in court, and its operation exhibited. However, we are bound to assume, as claimed by the plaintiff, that, under the circumstances involved in the issue before us, it was necessary or desirable that whoever was attending the coupling should sometimes go between the cars for opening up what is known as the "knuckle." It must also be assumed that coupling any cars which are being switched is of such a character that a boy of tender age should be instructed or cautioned in reference to it before being permitted to undertake it. It is not questioned that the deceased stood as a servant. *Huntzicker v. Illinois Cent. R. Co.* (C. C. A.) 129 Fed. 548.

It is claimed by the plaintiff that there was sufficient to justify the jury in finding that the method in which the injury occurred was as follows: The track on which the cars were being switched was inclined to such an extent that they would sometimes start unless the brakes were set. At the time the locomotive was pushing two cars, and endeavoring to couple on a third, the locomotive being headed towards the cars. The third car did not couple, but, instead, was pushed up the track a short distance. The car which had not been coupled came back on the track, and either struck the second car ahead of the locomotive, or came within a few inches of it; and in consequence thereof the plaintiff's intestate, who was between the cars with Parker, helping to open up the coupling, was caught and injured. The particular fact to which we call attention in this statement is that McMillan was between the cars, helping Parker, when he was injured.

The pleadings are of a confused character. It is difficult to ascertain precisely on what points they rest. However, as the case is presented to us, everything sifts out, except the proposition that the defendant was in fault for not causing McMillan to be properly instructed before he went between the cars, as claimed by the plaintiff, for the purpose for which he is said to have gone there. The declaration should have been properly purged on demurrer, but, not having been, and there being in the record no ruling or opinion of the learned judge who presided in the Circuit Court showing on what grounds the case proceeded, we are compelled to resort to the propositions made by the plaintiff at bar in order to ascertain wherein the defendant is claimed to have been chargeable.

Each count alleges that the plaintiff's intestate was caught between two cars, which we have already said the plaintiff makes an emphatic element of her case, as stated to us on this appeal. Passing by the plaintiff's propositions which it is not necessary to contravene—first, that we should not give particular weight to the peremptory ruling of the court below; second, that Vliet, the superior representative of the defendant with reference to the work to be done, knew that the plaintiff's intestate was to assist in shifting during Parker's absence, and was to be taken out into the yard by Parker for instruction, and that he was out there for that purpose; third, that, if the defendant makes any claim of contributory negligence on the part of McMillan, the burden is on it with reference thereto; and, fourth, that the case presents some questions peculiarly within the province of the jury—we are left only three questions. One seems to be based on the sweeping assertion that, in any event, Vliet was guilty of negligence in employing McMillan as a substitute for Parker. One count does apparently contain an allegation that the plaintiff's intestate was "carelessly, negligently, and improperly ordered and directed to go out into the yards and assist in the shackling"; but it fails to state wherein the negligence consisted, as does also the like proposition made at bar by the plaintiff. However, the evidence fails to show that McMillan was sent out into the yard to "assist" in shackling. On the other hand, it shows that, if he was sent out at all, it was for instruction. The exact expression was, "Break him in."

In this connection the plaintiff relies on *Railroad Company v. Fort*, 17 Wall. 553, 21 L. Ed. 739. There the boy who was injured, and who had been put to work by his father, was employed in what was not dangerous, and was suddenly ordered to engage at once in work among rapidly revolving machinery. It was held, at page 558, 17 Wall., 21 L. Ed. 739, that this was not what his father engaged he should do, and that one of his age could not be understood to know the peril thereof. The case is essentially unlike that at bar, in the fact that the injured boy was not sent out for instruction, but to do immediately a piece of work of a dangerous character. There is nothing in the record, or in facts of common knowledge, which would justify a jury in finding that a boy of McMillan's age might not properly be instructed so as to do with safety this switching, which was of a purely incidental character. On the whole, this does not represent any true issue in the case.

The remaining propositions are essentially alike: First, that the duty of instructing a green and inexperienced servant was a personal obligation on the part of the defendant, and that, if Parker was delegated to perform that duty, and failed to instruct, or was incompetent to do so, his negligence or incompetence was the defendant's negligence, which we do not question; and, further, that the plaintiff's intestate was in fact set to work without instruction, and that Parker was incompetent to instruct, and did not, in fact, instruct. The case refers to the fact that the track where the switching was being done was not wholly at grade, but in this there was nothing unusual. Neither is it made the basis of a substantial claim. It, of course, increased the necessity of instructing or cautioning McMillan, and nothing more.

Before proceeding further, we desire to make some observations with reference to a conversation which occurred immediately after the accident, put into the case by the plaintiff, apparently under objections by the defendant. This conversation was participated in by all who were present at the time of the injury, including the engineer, Sloane, to whom we will refer again, and Parker, who was the only one who really knew how it occurred. Parker deceased without his evidence being taken. On what ground and for what purpose the plaintiff was allowed to put in this conversation is not disclosed. It was first objected to without any ground of objection being stated, which, of course, was insufficient. After some conversation between the court and counsel, both retired to chambers, and, after consultation there, the evidence was admitted. The record contains no statement on the part of the plaintiff why he claimed to introduce the evidence, except, in a general way, that it was a part of the *res gestæ*, or why the defendant objected thereto, and no ruling by the court which enables us to comprehend its position. We are not certain, therefore, whether we would be able to regard this conversation if it became essential. In our view of the case, however, it did not, because all it covered was two facts—a statement by Parker that McMillan was in the yard with him while he was switching, and that Vliet was told that McMillan had been taken out into the yard, and Vliet did not remonstrate. In our view of the case, the first fact, as claimed by the plaintiff, is immaterial, and the second is both immaterial and inconsequential, for the following reason: The question put to Vliet by the plaintiff was in the following form: "Did you make any objection at that time to Mr. Sloane for taking him out?" This was admitted under a general objection taken by the defendant, and an exception allowed. The record, however, shows that Sloane had no connection with taking the McMillan boy into the yard, and did not even know that he was there.

In order to understand the bearing of the plaintiff's propositions which we have referred to, we must develop her statement of the case further. The day before the accident, the boy Parker asked Vliet for leave to go on a vacation, and finally suggested McMillan to fill his place in his absence. Vliet consented, but told Parker to take him out the next morning, which was Saturday, and "break him in." Parker's vacation did not commence until the following Tuesday or Wednesday, so that there were three or four days for instructing McMillan. The work of switching and shifting was on a siding connected with the roundhouse, and related mainly to cars of merchandise and coal for use therein, cars loaded or to be loaded with cinders, and all sent in from the main track. About 7 o'clock on Saturday morning there was occasion to shift out a car of oil and an empty box car, and Parker had McMillan with him. After this work was finished, which took from 35 to 40 minutes, McMillan went back to his work in the roundhouse, where he had been employed for a few weeks as a cleaner of locomotives. About half an hour later, Parker told Sloane, the engineer, that a cinder car needed to be shifted, and about five minutes afterwards Sloane took his engine out for that purpose. In making this second shift, he never saw McMillan until after the injury. He, however, communicated with Parker while shifting. He had coupled to two

cars, toward which his locomotive headed. The purpose was to couple the cinder car at the tail of the other cars. He called out to Parker: "Frank, how are you fixed?" Parker replied: "All right, Jim; come ahead!" Sloane came ahead, and, when the second and third cars came together, they did not couple. The third car went up the track a short distance, and then Parker disappeared between the cars which failed to couple, and Sloane lost sight of him. Parker came out from between the cars, and afterwards again disappeared from Sloane's view; and at that time the third car, which had failed to couple, came back, and either struck the second car, or came within a few inches of it. At this time the engineer saw an ash-pit man named Johnson give a signal. He immediately stopped his engine, stepped to the fireman's side of the locomotive, and saw Parker on the left-hand side of the track, between the cars that failed to couple, leaning over McMillan. This was the first that Sloane knew that McMillan was there, and is all the evidence which the case discloses with reference to the manner in which McMillan came there, except so far as the conversation with Vliet, already referred to, stated that he went out with Parker; and this, moreover, is all the evidence as to the way in which the injury happened.

These statements are drawn almost entirely from the plaintiff's proofs, and all of them are in harmony with the position which the plaintiff takes. She calls our attention to no facts tending to support any essential allegations beyond those which we have related. Of course, the plaintiff's propositions involve the necessity of proving that McMillan, the plaintiff's intestate, was injured in consequence of a failure to properly instruct him. The mere fact that Parker was himself young, coupled with the other mere fact that McMillan was injured, leaves a gap which the plaintiff has utterly failed to fill, because, notwithstanding all that, she must show that there was in fact this failure to instruct. The plaintiff does not prove incompetence on the part of Parker to instruct, nor inexperience. On the other hand, the record shows beyond dispute that Parker was experienced, and that he was trusted by his employers in and about this work. Indeed, the only evidence with reference to Parker's qualifications is that he was apt. The record fails to show any inexperience or lack of competence to instruct on the part of Parker, or any other fact to justify the jury in undertaking to assume a failure on his part to instruct. Therefore the verdict for the defendant might be sustained because this gap was not supplied, if for no other reason.

However, we can put the case on a proposition which perhaps will appear more just, because it leaves nothing to mere presumption one way or the other, but is direct and conclusive to the point that McMillan was instructed, whatever Parker did or failed to do. Sloane, the engineer, was called by the plaintiff, and no effort was made to impeach his character or his testimony, and there is no suggestion that this could have been done. He testified with reference to the first switching in the early morning of Saturday:

"Q. When you went out on the 14th of June, 1902, who went with you? A. Frank Parker.

"Q. Anybody else? A. This boy, McMillan.

"Q. Did they both get into the cab with you? A. No, sir.

"Q. How? A. Parker jumped on the front of the engine, and I stopped. The first thing I said, I says, 'Parker, where is that boy going to?' His place was in the shop, and I knew that. He says, 'He is going to take my place.' I says, 'Where you going?' He says, 'Going to Boston.' I says, 'When?' He says, 'Tuesday or Wednesday of next week.' I says, 'Young man, come here.'

"Q. Now, before you go on, is that all the conversation you had? A. Up to that time. I says, 'Don't you attempt to make a coupling.' I says, 'You come on the yard and watch Parker, how the work is done.'

"Q. At that time, did you have any talk with him, as to whose orders he came out there on? A. I says to Parker—when I says, 'Whose orders?' he says, 'The boss's.'

"Q. What did you do then? A. I jumped on my engine, and went out to the side track and coupled on a car of kerosene oil and an empty box car; and before I started to move I told this boy the second time, I says: 'Don't you attempt to go in between those cars at all. You see Parker do the work for three or four days.' I left then, those two cars—placed one on one track, and one on the other, to transfer nine barrels of kerosene oil to be shipped away. I told the boy to go back in the shop after he was done, probably for an hour or two."

Therefore, whatever McMillan received or failed to receive from Parker, he had these positive instructions from the engineer, who was the superior on the ground. These, if obeyed, would have prevented the accident, which, in accordance with the statement made by the plaintiff at bar and in her brief, as well as in her pleadings, to which we have already referred, occurred by his being caught between the two cars. There is no way of meeting this, looking at the well-known authority of such an engineer over those who are working with him, and his well-known right to command them; and there can be no question that McMillan was bound to obey these instructions. These instructions were sufficient as against every danger, including that arising from the grades of the track; and, coming as they did from the representative of the defendant corporation on the ground, they meet and avoid every suggestion of negligence.

It may be thought that McMillan might assume that Vliet was the superior over all, and therefore might regard his instructions to Parker to "break him in" as superior to the order given him by Sloane, but it is to be remembered that the record nowhere shows that McMillan knew what Vliet's orders were. They were communicated to Parker, and not to him. However, the reasonable view of any suggestion of that character would be that, whatever orders Vliet might have given were necessarily and clearly of a general character, subject to be supplemented or modified by the person in charge on the ground where the work was being done, as there was occasion therefor. The plaintiff herself makes no suggestion of the kind we have last referred to; nor does she make any suggestion with reference to the orders which Sloane gave McMillan, except a general one that the jury was not bound to accept the testimony of any one witness. She cites some authorities on this latter proposition, none of which would be questioned, and all of which are remote from the case at bar; but she fails to criticise Sloane's testimony in any particular, or point out anything in it which would justify the jury in rejecting it, or would excuse the court from setting aside the verdict if it had done so, or anything whatever, except, as we have said, the citation of some decided cases, without any attempt to show how they apply to the facts before us.

Independently of other propositions, we are clear that the judgment of the Circuit Court should be sustained by reason of those on which we have enlarged.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers its costs of appeal.

ALDRICH, J. (dissenting). I incline to the view that the plaintiff should have been permitted to go to the jury upon the third count of the declaration, which alleges that the track was constructed on such a grade that cars would move by gravitation, unless trigged, the brakes set, or some other provision made to prevent such movement, and that an inexperienced boy, sent to perform work in a dangerous place without suitable instructions as to the manner in which the dangers were to be avoided, was caught between two cars which came together by reason of such faulty construction and grade.

The McMillan boy, who was an inexperienced youth, was sent by a foreman and superintendent into the railroad yard, or a place for hauling, shackling, shunting, and moving cars, to be broken in by a Parker boy, who had had some experience. It is true, the engineer testifies that he told the McMillan boy not to attempt to make a coupling, but to watch Parker and see how the work was done; but, taking the instructions altogether, they were, from the superintendent, that he should go into the yard to be broken in by the Parker boy, and from the engineer, not to attempt to make a coupling, but to watch how the work was done.

Although it is admitted by the defendant's witnesses that the track was so constructed that cars kicked back or knocked ahead would, unless trigged, sometimes return of their own motion, there is no evidence that the deceased boy knew of, or was cautioned against, such danger. It appears from the evidence of Sloane that cars attached to the engine were thrown against a car which did not couple, and which was thrown back a few feet, and, recovering from the force, moved back toward the train of its own motion; and, although the witness says that on its return it did not strike the other car, it did come within three or four inches—sufficiently near to crush the boy and cause the injury complained of. It is quite evident that the McMillan boy was not killed between the cars where the Parker boy was coupling, but between cars that failed to shackle and came back again. This appears from the evidence of Sloane, in his answers to interrogatories 95, 96, and elsewhere.

The oral evidence as to the particular manner in which the injury was sustained is very meager, but there is nothing in the case to show that the boy was killed while disobeying the instructions of the engineer. The injury and the dangerous condition of the tracks being conceded, I think the plaintiff was entitled to go to the jury upon the question whether the injury was caused by a creeping car on an inclined track while the boy was watching how the work was being done. Indeed, I think it highly probable that the boy was crushed by a car which quietly came down the track and caught him unawares while watching the work, the operations, and the movements of the train in

coupling. The whole situation tends to establish that beyond reasonable question.

The third count is evidently constructed upon the theory that the boy was caught between two cars which came together by reason of the faulty and inclined condition of the track. It is true, the count in question alleges that the boy was caught while coupling cars; but, I take it, recovery could be had upon a count so constructed if the evidence should disclose that he was injured by the fault of the defendant while not in the act of coupling, but while watching the work which he was learning how to do under instructions to that end.

Contributory negligence being a defense rather than an element of the plaintiff's case, the plaintiff was entitled to go to the jury upon the question whether the injury resulted from the boy's being involved in a faulty and dangerous situation, about which he had not been properly warned.

LAZIER GAS ENGINE CO. v. DU BOIS.

(Circuit Court of Appeals, Third Circuit. July 5, 1904.)

No. 38.

1. TRIAL—EVIDENCE—WITHDRAWAL—CURING ERROR.

In an action for breach of contract the erroneous admission of irrelevant evidence respecting certain profits sued for was cured by a positive instruction directing the jury not to consider it.

2. SALES—MANUFACTURED ARTICLES—BREACH OF CONTRACT—PROFITS—DAMAGES.

Where, in an action for breach of a contract to manufacture and sell certain machinery, plaintiff showed that the average profits made during the 16 months in which the contract was performed was \$911 per month, a verdict allowing plaintiff profits at that rate during the 8 remaining months of the contract period after breach was not objectionable on the ground that such profits were remote and speculative.

3. SAME—NEW TRIAL—INSTRUCTIONS—NONCOMPLIANCE.

Where a verdict on the whole was just, and certain instructions as to the measure of damages given by the court, and apparently disregarded by the jury, were erroneous, the court was not bound to grant a new trial on the ground that the jury disregarded such instructions.

4. SAME—REVIEW.

Neither the verdict of a jury nor the exercise of the trial court's discretion in refusing a new trial may be reviewed on appeal to the Circuit Court of Appeals unless the court's discretion in denying a new trial was abused.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

W. B. Rodgers, for plaintiff in error.

E. L. Adams, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and KIRKPATRICK, District Judge.

¶ 2. Contracts for sale of articles to be produced or manufactured, see note to *Star Brewery Co. v. Horst*, 58 C. C. A. 363.

GRAY, Circuit Judge. The action in this case was brought to recover damages for the breach of a written contract between the parties, dated June 28, 1900. The plaintiff in error was the defendant below. The plaintiff recovered a verdict for \$34,250, of which amount \$2,500 was remitted, and judgment was entered for \$31,750. The parties here will be spoken of as plaintiff and defendant, as they appeared in the court below. By the contract sued upon, the defendant, who was the owner of a plant for the manufacture of machinery of all descriptions, agreed to manufacture gas and gasoline engines, of various sizes, for the plaintiff at fixed prices. The contract contained the usual stipulations, that the engines should be manufactured in a first-class manner, of first-class materials, and be thoroughly inspected and tested by defendant, who was to have the exclusive right to manufacture said engines during a period of three years, the plaintiff being required to order not less than 125 engines in each year. The plaintiff agreed to furnish all patterns and blue prints, which defendant was to keep in repair and return to plaintiff at the expiration of the contract, and to pay for all engines on the 15th of the month following the month of shipment. On October 20, 1902, defendant refused to proceed any longer under his contract, alleging as a reason therefor, certain conduct on the part of the plaintiff.

The claim of the plaintiff in the suit was for damages for non-delivery of engines under the contract, and for defective construction in some of those that were delivered, and the outlay and expense occasioned thereby to the plaintiff. Proof was offered and admitted, of profits actually lost on 215 engines, ordered but not delivered, which amounted to \$21,865.81. Proof also was offered as to profits which could have been made upon engines neither ordered nor delivered, by reason of the repudiation of the contract by the defendant, on October 20, 1902. Such profits, based upon the average monthly profits on the engines actually delivered, were estimated variously at \$7,288 and \$14,400. Loss resulting from repairs to defective engines was estimated at \$3,000. Proof of loss to a large amount, resulting from expenditures of various kinds incurred by plaintiff, as it was claimed under the contract, for advertising, establishing agencies, and promoting in other ways the sale of the engines, was offered and admitted, over objection by the defendant.

Upon further consideration, and in his charge to the jury, the learned judge expressly withdrew from their consideration all the proofs of loss above mentioned, except that relating to profits that would have accrued on engines ordered and not delivered, and the \$3,000 expended for repairs on engines that were delivered, thus confining their attention to proofs showing an aggregate loss of about \$25,000. The verdict, as before stated, was for \$34,250. A motion for a new trial was made by the defendant, which, after argument and for reasons stated in the opinion of the learned judge, was refused upon the plaintiff's agreeing to file a remittitur for \$2,500, and judgment was accordingly entered for the sum of \$31,750. A writ of error was accordingly sued out by the defendant, and the case brought here on thirty-two specifications of error, all of which charge an improper admission or exclusion of evidence, except one, which relates to an

incidental charge of the court, and which is not referred to in the brief of counsel.

As nearly all the evidence admitted over the objection of the defendant, and to which the bills of exception relate, was afterwards withdrawn from the consideration of the jury, who were expressly instructed not to regard the same in making up their verdict, the plaintiff in error devoted his argument to the propositions, that it was too late for the court, after having admitted the testimony objected to, to withdraw the same from the consideration of the jury in its final charge, and that the court transcended its power in allowing a verdict to stand for a larger amount than was warranted by its instructions to the jury. We are therefore relieved from the consideration in detail of the numerous specifications of error, and discussions of the relevancy of testimony offered and admitted, and afterwards withdrawn, by this succinct statement of the question involved, made by plaintiff in error in the opening of his brief:

"Statement of Question.

"(1) The admission of evidence as to damages claimed to be irrelevant, and if irrelevant, was it cured by the instructions of the court in the charge?

"(2) The act of the court in allowing damages to plaintiff upon a claim not submitted to the jury."

An understanding of the merits of the question thus concisely stated, will be promoted by considering, first, the following extract from the opinion of the court below, in refusing the motion for a new trial:

"This was a suit brought by the Lazier Gas Engine Company against John E. Du Bois to recover damages for breach of a contract made by him to manufacture gas engines. The case was largely one of fact and involved intricate questions of the character of work done in the manufacture of engines, repairs, reshipments and a general accounting. The jury was sworn on May 13, 1903, and after a protracted trial covering more than three weeks, and sessions each day of more than the usual length, resulted in a verdict for the plaintiff for \$34,250. The trial was expensive to both parties, not only because a number of the witnesses were high-priced men, but from the fact that five counsel of large practice took part in the protracted sessions. A new trial is now sought on the grounds, first, that the verdict was excessive, and second, that it was not justified by the charge of the court.

"In view of the great expense involved to all parties in a retrial, the loss of time to counsel and court spent in fruitless work if this verdict is disturbed and of the effect so protracted a case has on the rights of other suitors in practically monopolizing an entire term, we are exceedingly loath to grant this motion. And our unwillingness to do so is increased by the consideration that the jury which passed on this case was made up of men of unusual capacity. A number of them were men of affairs, and after an unusually patient and attentive hearing of the proofs, their verdict shows they found for the plaintiff on all the underlying and fundamental facts on which the case must eventually turn on a retrial. The finding of such a jury, especially when its members had opportunity to give full and deliberate consideration, afforded by the long trial, to the acts of both parties under the contract is to that extent an index of the common judgment of fair-minded men upon the facts of this case and of the possibly fruitless result to the defendant of any ultimate change of finding touching the fundamental facts if a retrial was granted. An analysis of the verdict, as stated in the defendant's brief on this motion, shows that included therein were the following items of damage: Profits on 90 engines not delivered during the first year of the contract, \$8,-

\$52.09; on 125 engines during the second year, \$13,000; plaintiff's repair bill of defective engines, \$3,000. The verdict was for \$34,250, being an excess of some \$9,400 over and above this claim. Deducting the eight months' interest, or allowance in the nature of interest, which the jury would naturally allow, we have a net amount of about \$8,000, which it is contended is an unwarranted excess under the instruction of the court. This excess is for a claim made by the plaintiff for the value of the contract in profits for its last eight months, which profits, under the instructions of the court, the jury were instructed not to allow. All the relations between the parties were severed about October, 1902, and the defendant then announced his intention of doing nothing further under the contract. It therefore appears that to the extent of some \$8,000 the jury disregarded the instructions of the court in rendering their verdict, and if a clear and unwarranted disregard of instructions were all that was involved in the case, our duty to grant a new trial would be clear. But it would further seem that when substantial justice has been done by a verdict, a new trial will not be granted on account of the jury's disregard of instructions, unless there has been an abuse of discretion. *Christy v. Holmes*, 57 Ind. 314. And to this principle may be added the analogous one that if a court errs in its statement of the law in instructing the jury, a verdict based on a disregard of such instructions should not be set aside. *Armstrong v. Keith*, 3 J. J. Marsh. 154 [20 Am. Dec. 131]. Such being the case it becomes our duty to review our instructions to the jury that the plaintiff's recovery was limited to the profits upon the 215 engines ordered and not delivered during the working part of the contract and that they were not entitled to recover any loss of prospective profits during the eight months of the contract remaining after the break. Whether our instructions were misunderstood by the jury, or whether they felt such instructions were contrary to their sense of right is not material to inquire; for some reason they have allowed the plaintiff for its remaining claim, viz., profits for the eight remaining months of the contract, or in other words for its value. An examination of the proofs shows that the data for assessing such damages substantially to the amount allowed by the jury existed in the case. Deducting the three months' leeway provided by the contract for preparation it was shown that the defendant failed during the first year to deliver 90 ordered engines, on which the profits would have been \$8,852.09, and during the remaining working months of the contract, 125 ordered engines, on which plaintiff's profits would have been \$13,013.72, or a total profit of \$21,863.81, during the 24 delivery months of the contract, that is, a monthly profit of about \$911. Based on this ascertained monthly profit of \$911, the jury had facts from which they could assess \$7,288 of profits for the remaining eight months. It will thus be seen that if such facts and proof afford in law a sufficiently certain basis for the assessment of damages the jury were to that extent warranted in their action and no injustice was done by their verdict. The question of what damages are recoverable for breach of contract is most troublesome and by no means clear under the authorities in application to the facts of each particular case. A more careful examination of the subject than the pressure of the closing day of this trial afforded satisfies us that the practical sense of this jury, in ascertaining the damages, not only made a wise application of this contract to the facts in evidence, but that their view is well supported by the adjudicated cases."

An examination of the record, in connection with this statement by the court below, brings us to the conclusion, that the first branch of the question, as stated by the plaintiff in error, to wit, whether the admission of irrelevant testimony by the court was cured, by its instructions to the jury to disregard the same, must be answered in the affirmative. We cannot see what injury to the plaintiff was done by the admission of any of this testimony that could not be cured by such positive instructions. In the hurry of a jury trial, it must often happen that the court is required to pass upon questions of the admissibility of evidence, without opportunity for the mature considera-

tion that is desirable. In such cases, a prudent judge will admit the testimony *de bene esse*, subject to its being withdrawn from the consideration of the jury, upon fuller examination. In no other way can these questions receive the attention due as well to the litigants as to the administration of justice. If the evidence should be excluded in the first instance, there is no opportunity afterwards to introduce it, should it be considered admissible. Sound policy requires that the conservative exercise of this right on the part of the trial judge should not be interfered with.

There was nothing in the testimony admitted in this case over the objection of the defendant, and afterwards withdrawn by the judge, that tended to appeal to the passions or prejudices of the jury. It was evidence, that in this respect was colorless and indifferent, such as that relating to the expenditure of money by plaintiff, for the purpose of advertising the engines to be furnished by defendant, and of constituting agencies in different parts of the country for the sale of the same. Mr. Justice Harlan, in delivering the opinion of the Supreme Court, in *Pennsylvania Company v. Roy*, 102 U. S. 451, 458, 26 L. Ed. 141, states the rule in this regard so clearly and persuasively, that we here quote his language:

"Notwithstanding this emphatic direction that the jury should exclude from consideration any evidence in relation to the pecuniary condition of the plaintiff, the contention of the defendant is, that the original error was not thereby cured, and that we should assume that the jury, disregarding the court's peremptory instructions, made the poverty of the plaintiff an element in the assessment of damages; and this, although the record discloses nothing justifying the conclusion that the jury disobeyed the directions of the court. To this position we cannot assent, although we are referred to some adjudged cases which seem to announce the broad proposition that an error in the admission of evidence cannot afterwards be corrected by instructions to the jury, so as to cancel the exception taken to its admission. But such a rule would be exceedingly inconvenient in practice, and would often seriously obstruct the course of business in the courts. It cannot be sustained upon principle, or by sound reason, and is against the great weight of authority. The charge from the court that the jury should not consider evidence which had been improperly admitted, was equivalent to striking it out of the case. The exception to its admission fell when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence. Any other rule would make it necessary in every trial, where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury, and commence anew. A rule of practice leading to such results cannot meet with approval."

We think the action of the court, in refusing the motion for a new trial, and allowing the verdict to stand, upon the remittitur of \$2,500 by the plaintiff, is not open to adverse criticism. An analysis of the verdict, convinced the court that the jury had disregarded its instructions, in regard to the allowance of estimated profits that would have accrued to the plaintiff during the eight months the contract had to run, had not the same been wrongfully repudiated by the defendant. The basis for this allowance was the average profit per month made on the

engines manufactured and delivered under the contract. This was a sufficiently certain basis upon which the jury could assess damages which undoubtedly accrued to plaintiff, and must have been within the contemplation of the parties to the contract. Such profits are not remote or speculative, but are the direct fruit of the contract itself. *U. S. v. Behan*, 110 U. S. 339, 344, 4 Sup. Ct. 81, 28 L. Ed. 168; *Howard v. Stillwell & Bierce Mfg. Co.*, 139 U. S. 199, 206, 11 Sup. Ct. 500, 35 L. Ed. 147; *Anvil Mining Co. v. Humble*, 153 U. S. 540, 549, 14 Sup. Ct. 876, 38 L. Ed. 814.

Where the court is convinced and is able to demonstrate that the verdict on the whole was a just one, and that certain instructions as to the measure of damages given by the court to the jury, and apparently disregarded by them, were erroneous, and that the verdict did not substantially exceed an amount that would have been just and right had proper instructions been given, it would be a sacrifice of justice for no good purpose to set aside such a verdict on the ground that the jury had disregarded the instructions of the court in rendering it.

But we are not required in this case to scrutinize the grounds upon which the judge below proceeded in refusing the motion for a new trial. Neither the verdict of the jury, nor the exercise by the trial judge of his discretion in refusing a new trial, are subject to review by this court, unless, in the latter case, that discretion has been abused. So far from having been abused in this case, we think that it has been properly exercised, and the judgment of the court below is therefore affirmed.

HOPKINS, U. S. Marshal, et al. v. FACHANT.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1904.)

No. 1,003.

1. ALIENS—DEPORTATION—POWERS OF ADMINISTRATIVE OFFICERS.

The Alien Immigration Act of March 3, 1903, c. 1012, § 21, 32 Stat. 1218 [U. S. Comp. St. Supp. 1903, p. 180], does not confer authority on the Secretary of the Treasury to arbitrarily order the deportation of an alien who has entered this country and become a part of its population without giving such alien an opportunity to be heard on the questions involving his or her right to be and remain in the United States in such manner as is consistent with the principles that inhere in due process of law.

2. SAME—MARRIAGE OF ALIEN TO CITIZEN—RIGHT TO DISCHARGE FROM CUSTODY.

Where an alien woman, who has come into this country, pending proceedings for her deportation under the immigration laws, marries a citizen of the United States, she at once takes the status of her husband, and, unless released from custody, is entitled to be discharged on a writ of habeas corpus.

Appeal from the District Court of the United States for the Northern Division of the District of Washington.

Appellants take this appeal from an order made by the District Court discharging appellee from custody upon habeas corpus. Her petition for the

¶ 2. Citizenship under state and federal laws, see note to *City of Minneapolis v. Reum*, 6 C. C. A. 37.

writ of habeas corpus is very lengthy, but the essential points therein may be briefly stated. In said petition it is alleged that Alexander Fachant was born in the republic of France, "but is now, and during all the times herein mentioned was, a naturalized citizen of the United States of America, and has been domiciled in the United States of America for about eighteen years last past, and is now, and during all the times herein mentioned was, a bona fide citizen and resident of the district of Washington"; that in April, 1903, at Paris, this petitioner, at the request of Alexander Fachant, entered into a contract of marriage with him, and that she agreed with him to come to the United States for the purpose of the consummation of such marriage relation; that upon her arrival in the city of Walla Walla, Wash., the said Alexander Fachant refused to make her his lawful wife; that she thereafter brought suit against said Fachant to recover \$15,000 damages for the breach of said marriage contract; that said Alexander Fachant made default, but that for reasons stated she had been unable to have a jury trial in order to assess the damages to which she was entitled. It then sets forth the facts in regard to her arrest for the purpose of being deported under the immigration laws of the United States, and alleges that her deportation would be "in violation of the existing treaties between the United States of America and the republic of France," etc.; and she prays upon the hearing of her petition to be released from custody and restored to her liberty. The order of discharge, as made by the court, after a preliminary statement of the appearance of the respective parties, states that appellants herein "having made return ore tenus on behalf of the said respondents, and each of them, to the effect that the said Blanche Masclez had been held and retained in custody by the said Charles B. Hopkins, United States Marshal for the District of Washington, as a detained witness in the case of the United States vs. Alexander Fachant, pending in the District Court of the United States for the District of Washington, Northern Division, in pursuance of a commitment duly issued by United States Commissioner H. B. Strong, and that the said Blanche Masclez had been held and was being held by the respondents, Thomas M. Fisher and J. H. Sargent, immigration officers of the United States, and the Mother Superior of the House of Good Shepherd, as an alien immigrant unlawfully within the United States, and as such subject to deportation to the republic of France, the country whence she came, and under and by virtue of a certain warrant of deportation duly issued by the Secretary of the Treasury of the United States, on the 28th day of May, 1903, directed to the said Thomas M. Fisher, Chinese and immigrant inspector, wherein it is found by the said Secretary of the Treasury that the said Blanche Masclez is an alien immigrant, who landed in the United States at the port of New York, N. Y., on the 2d day of May, 1903, and came into the United States from the republic of France, contrary to the immigration laws of the United States, and commanding him, the said Thomas M. Fisher, as such immigrant inspector, to take into his custody the said Blanche Masclez as such alien immigrant, and return her to the country whence she came, which said warrant of deportation is still in force; and said respondents, in making return to the said writ of habeas corpus, having denied the allegations set forth in said petition herein as to the rights of the said Blanche Masclez to be and remain in the United States. And the court having taken into consideration the evidence admitted upon the trial of the case of the United States vs. Alexander Fachant, together with the fact of the marriage of the said Blanche Masclez to the said Alexander Fachant subsequent to the issuance of the writ herein, and being fully advised in the premises, and having found from a consideration of all the foregoing facts that the said Blanche Masclez is entitled to be and remain in the United States, and therefore not subject to deportation under the writ of deportation heretofore issued by the Secretary of the Treasury of the United States, but entitled to her full liberty: Now, therefore, it is hereby ordered that the said Blanche Masclez, petitioner above named, be, and she hereby is, discharged from the custody of the respondents herein, and restored to her full liberty."

Jesse A. Frye, U. S. Atty., and Edward E. Cushman, Asst. U. S. Atty., for appellants.

Silas M. Shipley, Will H. Morris, and Frank S. Southard, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after making the foregoing statement). Appellee moves that the appeal herein be dismissed upon the grounds that this court is without jurisdiction to hear and determine the matters involved upon this appeal, for the reason and upon the ground that the determination of the case involves the construction and application of the Constitution of the United States and the constitutionality of the law of the United States passed March 3, 1903, c. 1012, 32 Stat. 1213 [U. S. Comp. St. Supp. 1903, p. 170], being "An act to regulate the immigration of aliens into the United States," and also the construction of the treaty existing between the United States and the republic of France, and the rights of appellee thereunder; and, further, that the right to hear and determine the matters involved upon this appeal is by statute vested in the Supreme Court of the United States exclusively.

It is questionable, to say the least, whether, in the face of all the facts set out in the petition for habeas corpus, especially after her marriage to Alexander Fachant, appellee is shown to have any property rights which would involve any construction of the treaty referred to. But be that as it may, the determination of this case also depends upon other questions, which have no relation whatever with the provisions of the treaty. It is claimed by appellants that the only question involved in this case is, "Did the court below exceed its authority and jurisdiction in interfering with the Secretary of the Treasury in his administration of the immigration laws?" In view of all the facts stated in the petition and contained in the record of the case on appeal, we are of opinion that the motion of appellee to dismiss should be, and is, denied.

Upon the merits of this case appellants contend that Congress, by the act of March 3, 1903, has committed to the Secretary of the Treasury the execution of the law in question, without the aid or intervention of the courts, and has given to the Secretary of the Treasury of the United States power, not only to finally determine what aliens are excluded by the law, and to refuse such a landing, but also the authority to arrest and investigate and send out of the country, within the specified time, any alien immigrant who has secured entrance into the United States in violation of law; and cites the following cases in support of this contention: *United States v. Yamasaka*, 100 Fed. 404, 40 C. C. A. 454; *Nishimura Ekiu v. United States*, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; *Fong Yue Ting v. United States*, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; *Lem Moon Sing v. United States*, 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082; *Wong Wing v. United States*, 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140; *Fok Yung Yo v. United States*, 185 U. S. 296, 22 Sup. Ct. 686, 46 L. Ed. 917; *The Japanese Immigrant Case*, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721. Appellants claim that the court below, under these authorities, should

have denied the writ, and remanded appellee to the custody of appellant Fisher for deportation in pursuance of the warrant of deportation issued by the Secretary of the Treasury. It nowhere appears from the record that appellee has been given an opportunity to be heard before any officer or tribunal, either executive or judicial. The rigid construction of the act suggested by appellants is not justified by any of the decisions cited. In *The Japanese Immigrant Case*, 189 U. S. 86, 99, 100, 23 Sup. Ct. 611, 47 L. Ed. 721, the question herein involved was fully discussed. In the course of the opinion the court said:

"It has been settled that the power to exclude or expel aliens belonged to the political department of the government, and that the order of an executive officer, invested with the power to determine finally the facts upon which an alien's right to enter this country or remain in it depended, was 'due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency.' *Fong Yue Ting v. United States*, 149 U. S. 698, 713, 13 Sup. Ct. 1016, 37 L. Ed. 905; *Nishimura Ekin v. United States*, 142 U. S. 651, 659, 12 Sup. Ct. 336, 35 L. Ed. 1146; *Lem Moon Sing v. United States*, 158 U. S. 538, 547, 15 Sup. Ct. 967, 39 L. Ed. 1082. But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law,' as understood at the time of the adoption of the Constitution. * * * It is not competent for the Secretary of the Treasury, or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized. This is the reasonable construction of the acts of Congress here in question, and they need not be otherwise interpreted. In the case of all acts of Congress such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution."

In the recent case of *Gonzales v. Williams*, U. S. Commissioner of Immigration, 192 U. S. 1, 15, 24 Sup. Ct. 177, 48 L. Ed. 317, which was an appeal by Isabella Gonzales from an order of the Circuit Court of the United States for the Southern District of New York dismissing a writ of habeas corpus issued on her behalf and remanding her to the custody of the United States Commissioner of Immigration at the port of New York (118 Fed. 941), the court, among other things, said:

"As Gonzales did not come within the act of 1891, the commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary; and she was not obliged to resort to the superintendent or the secretary. Our conclusion is not affected by the provision in the sundry civil act of August 18, 1894, c. 301, § 1, 28 Stat. 372, 390 [U. S. Comp. St. 1901, p. 1303] in relation to the finality of the decisions of the appropriate immigration or custom officers, or the similar provision in the act 'to regulate the immigration of aliens into the United States,' approved March 3, 1903, c. 1012, 32 Stat. 1213 [U. S. Comp. St. Supp. 1903, p. 170]."

Did the court err in discharging appellee from custody? It will be observed by reference to the statement of facts that no particular ground upon which the court below based its order for discharging her is stated; but it does affirmatively appear that pending the application for her release under the writ of habeas corpus she was married to

Alexander Fachant, who is stated in the petition for the writ to be "a naturalized citizen of the United States of America." It is claimed by appellants that this statement was denied by their return to the writ *ore tenus*, and that no testimony was offered by either of the parties upon the question of his naturalization. But an examination of the facts shows that appellants did not deny this fact in their return to the writ. Their denial was confined to "the allegations set forth in said petition herein as to the rights of the said Blanche Masclez to be and remain in the United States." Her rights to be and remain in the United States under her petition were based solely upon the fact that she had brought suit against Alexander Fachant, who was a man of wealth, for damages for a breach of his promise to marry her, and that he had made default, and that her deportation under those circumstances would deprive her of substantial rights, and be "in violation of the existing treaties between the United States of America and the Republic of France." The court had the right to take the fact alleged in the petition, and not denied by the return, to be true. The rule is well settled that her marriage to a naturalized citizen of the United States entitled her to be discharged. The status of the wife follows that of her husband. *Rev. St. § 1994* [U. S. Comp. St. 1901, p. 1268]; *Leonard v. Grant* (C. C.) 5 Fed. 11; *Kelly v. Owen*, 7 Wall. 496, 19 L. Ed. 283; *United States v. Kellar* (C. C.) 13 Fed. 82; *Ware v. Wisner* (C. C.) 50 Fed. 310; *Broadis v. Broadis* (C. C.) 86 Fed. 951. And by virtue of her marriage her husband's domicile became her domicile. *Tsoi Sim v. United States*, 116 Fed. 920, 54 C. C. A. 154. Upon all the facts of this case, it is apparent that the court did not err in discharging appellee from custody.

The judgment of the District Court is affirmed.

WRIGHT, Internal Revenue Collector, v. MICHIGAN CENT. R. CO.

(Circuit Court of Appeals, Sixth Circuit. June 16, 1904.)

No. 1,297.

1. INTERNAL REVENUE—STAMP TAX ON BILLS OF LADING—DUPLICATES.

In paragraph 6 of Schedule A of the war revenue act of June 13, 1898 (30 Stat. 458, c. 448 [U. S. Comp. St. 1901, p. 2304]), which requires a stamp to be affixed to each bill of lading, manifest, etc., "and to each duplicate thereof," the word "duplicate" is to be defined in accordance with the meaning given it generally in business, as one of two instruments, each of which is original, and intended to have the force of an obligation irrespective of the other, and not as meaning merely a copy.

2. SAME.

A railroad company issued bills of lading marked "Original," to each of which was attached a detachable copy, marked as such, and containing a statement thereon that it was not an original bill of lading, but merely a memorandum for filing, as an acknowledgment that a bill of lading had been issued for the goods described. *Held*, that such copies were not duplicate bills of lading, within the meaning of paragraph 6 of Schedule A of the war revenue act of June 13, 1898 (30 Stat. 458, c. 448 [U. S. Comp. St. 1901, p. 2304]), and were not required to be stamped; nor were they

rendered such by the fact that in some instances the company recognized them in making deliveries to the consignee, waiving the production of the original.

3. EVIDENCE—EXPERT TESTIMONY—CONSTRUCTION OF INSTRUMENT.

The question whether a written instrument is a duplicate of another, within the meaning of a statute, is not one upon which expert testimony is competent, but is one for the court.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Wm. D. Gordon, U. S. Atty., and James V. D. Willcox, Asst. U. S. Atty., for plaintiff in error.

O. E. Butterfield (Henry Russel, of counsel), for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This writ of error brings up the record of a case wherein the Michigan Central Railroad Company brought suit against the plaintiff in error to recover the sum of \$6,838.12, which had been levied against the company as an internal revenue tax by the Commissioner of Internal Revenue, and paid by it under protest.

Between July 1, 1898, and June 30, 1901, during which period the internal revenue act of June 13, 1898, c. 448, 30 Stat. 448 [U. S. Comp. St. 1901, p. 2286], was in force, the railroad company issued 683,812 bills of lading marked "Original" to shippers of freight over its lines, to each of which was detachably annexed a copy (or duplicate) thereof, marked "Copy," and containing transversely along the left-hand margin thereof the following words:

"Take notice, that this is only a copy of a bill of lading or shipping receipt issued for the property herein described or referred to, and it is not itself to be regarded or considered as a bill of lading or contract of any kind under any circumstances, but merely an acknowledgment that a bill of lading or shipping receipt for said property has been issued."

This was the general form as prepared for use. But as each was issued the following words were inserted in the body of the instrument by a rubber stamp:

"This is not the original bill of lading or shipping receipt, nor a copy or duplicate covering the property named hereon. It is intended solely for filing or record as a memorandum acknowledgment that a bill of lading or shipping receipt has been issued."

A form of shipping order to be filled in by the shipper was also in like manner annexed, and all three were arranged side by side, so as to be folded together, and a carbon interleaf inserted to impress the special matter, such as the name of the shipper, description of the articles, destination, etc., upon the other instruments; the whole being a patented form and arrangement of such instruments. The shipping order was signed by the shipper and retained by the company, and the original bill of lading was signed by the company, and, together with the copy or duplicate, which bore a copy of the company's signature, was given to the shipper. The company put upon each of the instruments, which, for distinction, we will now call the

original, a one-cent stamp, but put none upon the copy or duplicate. And the failure to do this is the cause of action. The case was tried by a court and a jury. Evidence was given to prove the above-stated manner of doing business as between the company and the shipper, which was not disputed, and there was also evidence that in some instances the shippers sent to their consignees the copy or duplicate of the bill of lading, instead of the original, and that the company recognized the same in making delivery; and a witness, who was an internal revenue agent, but had formerly been employed as an official in railroad business, testified, under objection of the plaintiff in that court, that, in his opinion, the copy was a duplicate bill of lading, and performed all the functions of the other. At the close of the testimony, counsel for the respective parties requested peremptory instructions to the jury to render a verdict in favor of their party. The court refused the instruction prayed by counsel for the defendant, and granted that prayed for the plaintiff. A verdict was rendered accordingly, and, judgment having been rendered thereon, this writ of error was sued out by the collector.

The statute under which it is sought to charge the company reads as follows:

"Express and Freight: It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation, or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached and canceled, as in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: provided, that but one bill of lading shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest, or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, express company, or corporation or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid." 30 Stat. 459 [U. S. Comp. St. 1901, p. 2304].

The decisive question in the controversy, and the one to which the argument of counsel has been mainly directed, is that of the construction to be given to the word "duplicate" in this paragraph. For the company it is insisted that, as here used, it means another original bill of lading—one having the same legal effect as the other original. The construction contended for in behalf of the government is that stated in an opinion given by the Commissioner of Internal Revenue, which is here transcribed:

"The act does not make it obligatory that the technical bill of lading should be issued in any case. * * * It is not a duplicate bill of lading that is referred to alone, but equally a duplicate manifest, duplicate memorandum, or a duplicate of any other instrument of writing which should contain evidence of receipt and forwarding. The question of tax turns upon the meaning of the word 'duplicate.' Webster's Dictionary, the accepted authority of this department in the definition of words, gives the following—the first being the ordinary meaning, and the second the technical meaning: 'Duplicate. (1) That which exactly resembles or corresponds to something else. Another: Correspondent to the first. (2) Law. An original instrument repeated. A

document which is the same as another in all essential particulars, and differing from a mere copy in having all the validity of an original.' It will be seen that the ordinary meaning of the word 'duplicate' is a copy, and it has been the rule of this office to construe words in statutes according to their ordinary meaning and acceptation, unless the intent of the statute imperatively requires that a technical significance should be given them. * * * I therefore rule that the word 'duplicate,' as used in the paragraph of Schedule A, 'Express and Freight,' includes all copies, and every copy of any instrument evidencing the receipt and forwarding of goods issued by the carrier or his agent must bear a one-cent stamp, and any memorandum made on the same, that it is 'merely a copy,' 'not a bill of lading,' 'not a duplicate,' 'not a contract,' 'not negotiable,' 'merely an acknowledgment,' etc., will have no effect to exempt the copy from taxation as a duplicate." Treasury Dec. Int. Rev. Dept. 1900, pp. 88, 89.

The opinion of the Circuit Court was in accord with the insistence of the company, apparently not accepting the ruling of the Commissioner of Internal Revenue as a correct interpretation of the statute. And with great respect for the opinion of the commissioner, we are notwithstanding constrained to think the ruling of the Circuit Court was right. We cannot help thinking that in the business world there is a plain distinction recognized between a duplicate and a copy, and that the former is understood to be one of two instruments, each of which is original, and intended to have the force of an obligation irrespective of the other, and that a copy is understood to be a transcript of an original; having the form, but not the essence, of an obligation. As the law is addressed to business men and business matters, we may well suppose that Congress intended the word to bear the meaning given it in the sphere of its operation. It is true that in a loose sense the word "duplicate" is sometimes used with the meaning of "copy," but that is only by a license quite common in the use of language. As a rule, the language of a statute is chosen with regard to its fitness for expression. The meaning of the word in legal phraseology is the same as that in its use among business men. It is tersely and correctly stated in 10 Am. & Eng. Encycl. of Law, 318, as follows: "'Duplicate' is defined as a document which is the same in all respects as some other instrument, from which it is indistinguishable in its essence and operation." And many authorities are there cited in confirmation. A substantially like definition is given of the word in all the law dictionaries in common use. In Burrill's Dictionary, verbum "Duplicate," is given the following ample definition:

"A duplicate is sometimes defined to be a copy of a thing, but, though generally a copy, a duplicate differs from a mere copy, in having all the validity of an original. Nor, it seems, need it be an exact copy. Defined also to be the counterpart of an instrument; but in indentures there is a distinction between counterparts executed by the several parties, respectively, each party affixing his or her seal to only one counterpart, and duplicate originals, each executed by all the parties."

It is the privilege of contracting parties to determine what instrument shall be the repository of their agreement, and that another shall not be. If the original is lost, a copy is admissible in evidence, not because it imports the engagement, but to make proof of an original which did. In the case of duplicates, each is original evidence, and the loss of the other need not be shown. *Totten v. Bucy*, 57 Md. 450.

If these reasons and authorities were not sufficient, and the matter were still in doubt, we might refer to the rule applicable to this subject, that in such case the statute will be construed favorably to the taxpayer, "because it is fairly and justly presumable that the Legislature, which was unrestrained in its authority over the subject, has so shaped the law as, without ambiguity or doubt, to bring within it everything it was meant should be embraced." In *United States v. Mullins*, 119 Fed. 334, 56 C. C. A. 238, we applied this rule to another provision of the internal revenue laws, upon the sanction of numerous authorities there cited.

We do not think the reasons which lead to the conclusion already indicated are much affected by the circumstance that upon some occasions the company has recognized these so-called copies in making deliveries to the consignees. Undoubtedly they amounted to acknowledgments that bills of lading of the character recited had been issued, and the company might in some circumstances think it reasonable to waive the production of the actual bill of lading. We agree that if the transaction involved the use of duplicate bills of lading, or of instruments of equivalent legal character, though of slightly different language, the company could not escape the tax by protesting that the instrument was not in fact a bill of lading. And on the other hand, it must be admitted that the company had the right to adopt an otherwise lawful method of doing business, whereby it would not fall under the obligation to pay the tax on a duplicate. The question in every such case would be, what is the essential character of the instrument employed—is it a duplicate, or is it a copy?

Nor do we think the opinion of an expert is competent to determine the construction to be put upon such an instrument. It is for the court to construe it and define its character, and thereupon compare it with the statute.

The views which we have expressed lead to the conclusion that the judgment should be affirmed. It is so ordered.

PENNSYLVANIA R. CO. v. BURR et al.

(Circuit Court of Appeals, Second Circuit. April 5, 1904.,

No. 164.

1. SHIPPING—LIABILITY FOR DAMAGE TO CARGO—CONTRACT GIVING CARRIER BENEFIT OF INSURANCE.

A bill of lading provided that, in case of loss or injury of the goods, the damage should be adjusted on the basis of their value at the place and time of shipment, and that the carrier should have the benefit of any insurance effected by the shipper. He insured the goods for their value at the port of destination, but the policy contained a provision that in case of any agreement between the assured and any carrier whereby, in case of loss for which the carrier would be liable, he should have the benefit of the insurance, there should be no liability on the policy beyond the amount which was not recoverable from the carrier, and to make good the loss temporarily by advancing money pending delay in collecting from the carrier, which should not affect the final liability of the insurer. The goods were damaged in shipment, and the insurer advanced a sum to the owner; taking a receipt by which he agreed to prosecute his claim against

the carrier, and to refund to the insurer the amount collected. *Held*, that such advance was strictly within the terms of the policy, and did not constitute a payment of the loss, whereby the carrier could claim the benefit under the bill of lading as a set-off in an action by the owner to recover the damages.

2. *SAME.*

Where a bill of lading limited the liability of the carrier, in case of loss or damage, to the value of the goods at the time and place of shipment, a further provision that he should have the benefit of any insurance effected by the owner is valid only as to such insurance, or so much of the insurance as represents the goods, and the value for which, in case of loss, the carrier is liable; and he cannot claim the benefit of insurance covering the increased value of the goods at the port of destination, which the owner had the right to effect for his own protection.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the Circuit Court, Southern District of New York, against plaintiff in error, who was defendant below. The judgment was entered upon a verdict directed by the court. The action was upon a bill of lading, to recover for injury to certain straw braid damaged by the carelessness of defendant during transportation from China to New York.

Henry G. Wood, for plaintiff in error.

Wilhelmus Mynderse, for defendants in error.

Before LACOMBE and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. The bill of lading contains the usual clause that in case of loss, either partial or total, damage shall be ascertained and adjusted on the basis of the cash value of the goods at the original port of shipment at the time of shipment, and the further clause:

"In case of loss or damage of any of the goods named in this bill of lading for which the [company] may be liable it is agreed and understood that it may have the benefit of any insurance effected by or on account of the said goods."

It was held in *Phoenix Ins. Co. v. Erie Transportation Company*, 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873, that such a clause is valid, and limits the right by way of subrogation of the insurer, upon paying to the assured the amount of a loss occasioned by the carrier's negligence, to recover over against the carrier.

The cash value at port of shipment was \$9,569.30; the damaged value at New York was \$4,820.44; verdict was directed for the difference, \$4,748.86, with interest; and there is no dispute as to the correctness of the verdict, except that defendant claims the benefit of certain insurance. The sound value of the goods at New York was \$11,537.20, and they were insured for that amount with the British & Foreign Marine Insurance Company. The amount due from the insurers to the insured was the difference between sound value and damaged value at New York, \$6,716.76, and the sole question in the case is as to the effect of a certain clause in the policy, which reads as follows:

"In case any agreement be made or accepted by the assured with any carrier by which it is stipulated that such or any carrier shall have, in case of any

loss for which he may be liable, the benefit of this insurance, or exemption in any manner from responsibility grounded on the fact of this insurance, then and in that event the insurers shall be discharged of any liability for such loss hereunder, but this policy in these and all cases of loss or damage by perils insured against shall be liable and owe actual payment for (only) what cannot be collected from carrier * * * but also shall be chargeable with the direct pecuniary consequence to the assured temporarily arising from delay in collection from said carrier * * * and the advancing for this purpose only of funds to the assured for his protection pending such delay shall in no case be considered as affecting the question of the final liability of this insurance, and as soon as collection is made from the carrier the title of the insured to hold the funds so advanced by the insurer shall discontinue, and a portion thereof equal to the sum collected from the carrier shall be repaid to the insurer; but in case of final failure to collect from carrier, a portion of the sums advanced by the insurers equal to the sum short collected from the carrier may be retained and applied in settlement of the actual liability of this insurance thereby established (provided always the loss shall constitute in other respects a claim under this insurance)."

A somewhat similar clause was before the court in *Inman v. South Carolina Ry. Co.*, 129 U. S. 128, 9 Sup. Ct. 249, 32 L. Ed. 612. The court said:

"By the terms [of the bill of lading] the plaintiffs were not compelled to insure for the benefit of the railroad company; but if they had insurance at the time of the loss, which they could make available to the carrier, or which, before bringing suit against the company, they had collected, without condition, then, if they had wrongfully refused to allow the carrier the benefit of the insurance, such a counterclaim might be sustained, but otherwise not. * * * Recovery upon neither of the policies could have been had except upon condition of resort over against the carrier, any act of the owners to defeat which operated to cancel the liability of the insurers. They could not, therefore, be made available for the benefit of the carrier. * * * Under the terms of these policies, payment itself would have been subject to such conditions as the companies chose to impose. * * * These insurers could require the owners to pursue the carrier in the first instance, and decline to indemnify them until the question and the measure of the latter's liability were determined."

Under this authority, unless the insurer has made an unconditional payment of the loss to the assured, the carrier cannot enforce any claim to benefit of the insurance.

On March 17, 1898, the insurance company gave to the plaintiffs \$6,000, in receipt of the following agreement signed by them: *

"In consideration of your advancing us the sum of \$6,000 S. S. Belgic on the undermentioned goods we hereby agree to put forward a claim against the carrier in whose hands the same received damage and on receiving payment from them we undertake to refund you the same. It is further understood that you are to be responsible for all costs incurred in connection with the claim."

The defendant contends that this was really a payment of the loss under the policy, thus waiving the benefit of the clause, and reference is made to *Roos v. Railroad Co.*, 199 Pa. 378, 49 Atl. 344. In that case an insurance company had insured \$2,000 on property worth \$4,200, and there had been a loss of \$1,700. The amount of claim against the company was \$809.50. That sum of money was turned over to the assured upon a written acknowledgment that it was "borrowed and received from the insurer, being a loan pending the investigation and determination whether the loss was one for which the carrier should

be held liable; * * * and if the carrier should be held liable, the undersigned agrees to return the amount thus loaned, when and to the same extent same shall be recovered from the carrier." The court held that it was properly left to the jury to determine whether this was a bona fide loan, or an adjustment of the loss, and a finding that it was not a bona fide loan was sustained. What operated upon the jury's mind in that case, we do not know, but it may be noted that the report contains no statement of what the policy contained. Whether or not there was any clause providing for a loan, does not appear. In the case at bar we have only two written documents, and no other evidence bearing upon their construction. The one provides for the making of a loan under certain contingencies, and the other indicates that such loan is made. Unless we are prepared to hold, as we most emphatically are not, that the clause in the policy providing for a loan under the conditions therein specified is void, we can reach no other conclusion than that the \$6,000 was turned over to the assured as a loan, and not as an adjustment.

The defendant further contends that the verdict is excessive, because the defendant was entitled to the benefit of the excess of insurance, \$11,537.20, over the cash value of the goods at the port of shipment, \$9,569.10, which was the extent of its liability, viz., \$1,967.90. The assured could, at the utmost, recover against the carrier \$9,569.10. To that extent only could the insurer be subrogated. But the assured would be entitled to recover \$1,967.90 more from the insurer. That amount of insurance was good, and not discharged by any agreement with the carrier as to benefit of insurance. Therefore, as defendant contends, to that extent there was a payment of loss under the policy, and not a loan, and the carrier under bill of lading should have the benefit of it.

While technically the clause in the bill of lading may be open to such construction, we agree with plaintiff's counsel in the conclusion that, if it were thus construed, it would not, in the language of the opinion in *Railroad Co. v. Lockwood*, 11 Wall. 357, 21 L. Ed. 627, be "just and reasonable in the eye of the law," and would therefore be invalid. By refusing to respond in any event for more than the value at port of shipment, the carrier compelled the owner of the goods to take the risk of loss not only of all the profit he might have made, but also of freight and landing charges, and the value of all burdens and risks of the adventure. He seeks, as he is entitled to, to secure himself against such risk of loss by insuring his goods at their value here, with the additional items of increase included. In this way only can he secure complete reimbursement in case of loss. For example, in the case at bar, if he receives damaged value \$4,820.44, carrier's liability \$1,748.86, and insurer's liability \$1,967.90, he gets back \$11,537.20—just sufficient to reimburse him the full value of the goods. In *Inman v. South Carolina Railway*, *supra*, the court held that, if a bill of lading contained a provision requiring the owners to insure for the carrier's benefit, such provision could not be sustained. When the carrier refuses to be itself liable for the destruction through its own negligence of part of the value of the goods it carries, it may fairly be held to have required a prudent owner to insure that part, and, if it be allowed it—

self to take the benefit of the insurance taken out on that part, the situation is the same as if it had required the insurance to be taken for its benefit. In our opinion, the clause in the bill of lading can only be sustained as to such insurance, or so much of the insurance, as represents the goods and the value for which in case of loss the carrier is to respond. If the assured is required to yield up to the carrier the insurance covering difference of value between port of shipment and port of discharge, the bill of lading by one clause "relieves the carrier from reimbursing the merchant for the full value of his goods, while an associated clause prevents the merchant from securing such reimbursement through the channels of insurance."

The judgment is affirmed.

ARMOUR PACKING CO. v. METROPOLITAN WATER CO.

(Circuit Court of Appeals, Third Circuit. June 27, 1904.)

No. 46.

1. MUNICIPAL CORPORATIONS—WATER FRANCHISE—ORDINANCES—CONTRACTS.

A city ordinance granting a corporation a franchise to operate water-works in the city on conditions specified, after having been accepted by the corporation, constitutes a contract between the corporation and the city.

2. SAME—CONSTRUCTION.

Where a municipal ordinance granting a corporation a water franchise provided that the water rates to consumers should not exceed the rates given to the citizens of an adjoining city, to which the corporation also furnished water under a similar franchise, such provision should be construed to relate only to prices charged by such corporation, and did not include prices charged by such adjoining city after it had exercised its statutory right to purchase the corporation's water plant therein and operate the same as a municipal department.

In Error to the Circuit Court of the United States for the District of New Jersey.

The following is the opinion of the court below (Kirkpatrick, District Judge):

The plaintiff in this case is the Metropolitan Water Company, a corporation organized under the laws of the state of West Virginia, and the defendant is the Armour Packing Company, a corporation organized under the laws of the state of New Jersey, but carrying on its principal business in the cities of Kansas City, Kansas, and Kansas City, Missouri, which cities are contiguous, and separated from each other by the state line. On February 19, 1897, these parties entered into a contract which was to continue for a period of five years from March 1, 1897, by which the plaintiff agreed to furnish to defendant a supply of water of not less than fifteen million gallons nor more than twenty-five million gallons per month at the prices therein specified. It was provided in the contract that at any time after March 1, 1898 "either party shall have the right to this contract to take or furnish water by giving the other party one year's notice in advance from the date of giving such notice that said company, whichever it may be, desires to discontinue the same." On October 7, 1898, the defendant served a notice on the water company that "it elects to discontinue the contract of February 19, 1897, and elects to decline to take or pay for water furnished under said proposition, and hereby give to you the one year's notice in advance of its desire to discontinue the same, and said contract will stand discontinued, and water will no longer be taken nor need

be furnished thereunder from and after the seventh day of October, 1899." Notwithstanding said notice, the defendant continued to receive and the plaintiff continued to furnish the defendant with water after said date. This controversy relates to the price to be paid by defendant for the water so furnished. The first contention of the plaintiff is that the rate should be that fixed by the contract of February 19, 1897, because, although a notice was given of an intention to abrogate it, yet by entering into negotiations for its continuance and the acceptance of water after the time fixed for its termination, the defendant waived its notice of cancellation. It is true such negotiations were had, but no agreement was reached. So far as appears from the correspondence between the parties, not only was there no waiver of the notice to refuse to take under the contract, but a continual insistence on the part of the defendant upon the efficacy of the notice which had been given and upon its right to receive water after the termination of the contract at the rates prescribed by law. The rates fixed in the contract were special, and the defendant relinquished its right to receive them by its termination. The contract being ended, the defendant, as one of the inhabitants of Kansas City, was entitled to receive water upon the payment of the legal rates as fixed by the ordinances of the city regulating the same. The plaintiff was obliged, by its franchise, to furnish water to all the inhabitants of Kansas City upon payment of the legal rates therefor, and the right of the defendant to take and receive water was in no way dependent upon the contract, which merely fixed the price to be paid by it. So, the contract being terminated by the notice, the taking of the water under this general right could not be construed into a continuance of the contract. It cannot be said that in relinquishing its special privileges under the contract the defendant was precluded from obtaining water upon the same terms offered to the general public. In my opinion, the contract of February 19, 1897, was canceled by the notice of October 7, 1898.

The remaining question is, at what rate is plaintiff entitled to charge and defendant obliged to pay for the water furnished since its expiration? This question of price is regulated by the ordinances of the city. Ordinance No. 2,131 relates to that part of Kansas City, Kansas, in which defendant's plant is located, and established the rates to be charged to consumers. It is insisted, however, that the rate fixed in this ordinance does not apply, because appended to the ordinance is note 3, which is as follows: "It is also agreed that if any less rate is given to Kansas City, Missouri, during the continuance of this franchise the same schedule of rates shall apply under this ordinance, and any other benefits given to Kansas City, Missouri, shall apply both to public and private consumers." In order to properly ascertain the intention of the parties when entering into this contract, it will be necessary to consider their relation to each other before and at the time the ordinance went into effect. The National Waterworks Company was organized about the year 1874 for the purpose of supplying Kansas City, Missouri, with water, and obtained from its authorities the franchise of laying its pipes in the public streets of that city. Afterwards, about 1881, it obtained a like grant for a like purpose from Kansas City, Kansas. Water was being furnished to the towns of Wyandotte and Armourdale, adjoining Kansas City, Kansas, by a separate company, which, upon the consolidation of Wyandotte and Armourdale with Kansas City, Kansas, into one municipality, was subsequently merged into the National Waterworks Company, so that in 1891, when Ordinance 2,131, as above, was approved, the National Waterworks Company was furnishing water to Kansas City, Missouri, and Kansas City, Kansas, which latter comprised old Kansas City, Kansas, and the towns of Wyandotte and Armourdale. Inasmuch as the two cities of Kansas City were contiguous, separated only by the state line, it was deemed advisable that the citizens of each should enjoy equal benefits in regard to the rates required to be paid for water furnished by this company which supplied it to both. So long as the National Waterworks Company controlled the plants in both cities, the rates were uniform, and so continued until January 15, 1898, when Ordinance No. 10,951 was passed by the authorities of Kansas City, Missouri, establishing a lower rate for that city. It appears that in the year 1895 the city of Kansas City, Missouri, purchased of the National Waterworks Company the waterworks of said company located in their city, and the National Company sold its works in Kansas City, Kan-

sas, to the plaintiff company. So far as Kansas City, Missouri, was concerned, the National Waterworks Company ceased to do business and no longer was in a position to furnish rates to Kansas City, Missouri, either to the public or to private consumers. The rates in that city were fixed by itself, and while the waterworks company might have agreed that it would charge to Kansas City, Kansas, the same rates which might be charged in Kansas City, Missouri, the contract will not bear that interpretation. In my opinion, the water company was stipulating for the acts which it would perform. It was the owner of both plants, and the true meaning of the note 3 was that, if a less rate than that named in the ordinance were given by it (that is to say, the water company) to Kansas City, Missouri, the same schedule of rates should apply (that is to say, be given by it) to Kansas City, Kansas. It will be observed that it is also provided in the contract that "any other benefits given to Kansas City, Missouri, shall apply also to public and private consumers" in Kansas City, Kansas. Certainly this must have been intended to apply to benefits given by the water company. The object of the ordinances was to produce uniformity. Equal rates were fixed in both cities, and, while the plaintiff company was left free to reduce its rates in either city, yet it could not reduce in one city without at the same time conferring equal benefits upon the other. There is nothing in the agreed case tending to show that a change of ownership or a separation of the plants was in contemplation at the time the contract was made. It was not intended that the National Water Company should surrender its franchise, or permit a stranger to change its rates at will and without its consent. The agreement (note 3) cannot be made to apply to the changed condition, and when the National Waterworks Company ceased to supply water to both cities the obligation to supply water at a uniform rate ceased. The conclusion is that the plaintiff is entitled to recover from the defendant the price fixed for water by the Ordinance 2,131 of Kansas City, Kansas, without reference to the rate fixed by the municipality of Kansas City, Missouri. In computing the amount due, allowance must be made for whatever sums have been paid to the plaintiff on account, as agreed upon in the state of the case.

Frank H. Platt, for plaintiff in error.

James E. Howell, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This was an action brought by the Metropolitan Water Company against the Armour Packing Company to recover the price of water furnished by the plaintiff to the defendant at Kansas City, in the state of Kansas, less such sums as admittedly had been paid thereon. The controversy between the parties concerns the price which the defendant is bound to pay for the water so furnished; and the question in dispute arises upon an ordinance (No. 2,131) of the city of Kansas City, Kan., passed in council on December 4, 1891. The parties differ as to the meaning and effect of that ordinance. For the proper understanding of the question in dispute certain facts must be stated.

Kansas City in the state of Kansas and Kansas City in the state of Missouri adjoin each other, the state line separating the two cities. In the year 1874 the National Waterworks Company received from Kansas City, Mo., a franchise to lay its pipes in the public streets of that city for the purpose of supplying the city and its inhabitants with water; and thereafter, and until the year 1895, that company owned, maintained, and operated under said franchise a waterworks system in Kansas City, Mo., supplying that city and its inhabitants with water. On November 29, 1891, by Ordinance No. 173, Kansas City,

Kan., granted to the National Waterworks Company a franchise to supply water to that city and its inhabitants and other consumers therein for a period of 10 years. The eighth section of this ordinance (No. 173) reads thus:

"Sec. 8. The water rates to consumers shall not exceed the rates paid by the citizens of Kansas City, Missouri, at any time, and shall be paid for such time as the grantee may deem best for both parties."

Adjoining Kansas City, Kan., in 1881, were two municipalities known as "Wyandotte" and "Armourdale." Waterworks were erected for the purpose of supplying these municipalities with water, and the franchises therefor were combined in 1885 in the Wyandotte-Armourdale Water Company. In that year the National Waterworks Company acquired all the stock and bonds of the Wyandotte-Armourdale Water Company, and changed its name to Kansas City Water Company. Afterwards, by virtue of its ownership of all the stock and bonds of that company, the National Waterworks Company furnished water to Wyandotte and Armourdale. By 1891, old Kansas City in the state of Kansas and Wyandotte and Armourdale were consolidated into one municipal corporation under the name of Kansas City, Kan. On December 4, 1891, the city of Kansas City, Kan., passed two ordinances in the same terms (No. 2,130 and No. 2,131). Ordinance No. 2,130 relates to the franchises originally given to water companies to supply water to that part of Kansas City, Kan., which was formerly Wyandotte and Armourdale, and that ordinance applies to that section of the city. Ordinance No. 2,131 relates to the franchise granted by Ordinance No. 173, above mentioned, to the National Waterworks Company, and applies to that part of Kansas City, Kan., in which the packing house of the defendant below is located, and where the water in question was furnished to the defendant. As already stated, it is out of Ordinance No. 2,131 that this controversy has arisen. This ordinance enacts:

"Section 1. That Ordinance No. 173 of the former city of Kansas, state of Kansas, being an ordinance entitled, 'An ordinance to provide a supply of water for the inhabitants of the city of Kansas, state of Kansas,' approved Nov. 29, 1881, be and the same is hereby ordained an ordinance of the city of Kansas City, and that all rights, privileges and franchises therein granted are hereby granted unto the said National Water Works Company of New York, and its successors and assigns, for the term of fifteen years from and after the passage, approval, acceptance and publication of this ordinance, under the conditions and restrictions named in said ordinance, No. 173, and under the further conditions that from and after the publication of this ordinance and during the continuance of said franchise, the compensation for each hydrant now located or that may be located hereafter by the said city of Kansas City, shall be at the rate of fifty (\$50) dollars per annum from and after January 1st, 1892, and the said city hereby agrees to pay such sum for such rental semi-annually in January and July of each year. The water rates to consumers during the continuance of this franchise shall be as per following schedule."

Here follows a schedule of water rates to consumers. Then, in note 3, this ordinance contains the following stipulation:

"It is also agreed that if any less rate is given to Kansas City, Missouri, during the continuance of this franchise, the same schedule of rates shall apply under this ordinance and any other benefits given Kansas City, Missouri, shall also apply both to public and private consumers."

In 1895 the city of Kansas City, Mo., in the exercise of a statutory right, purchased the waterworks and water system of the National Waterworks Company located in Missouri, and has since maintained and operated the same. On December 6, 1898, the city of Kansas City, Mo., passed an ordinance (No. 10,951) fixing the water rates to be charged by that city for water furnished by that city to consumers, which ordinance has since been in force. In 1895 the National Waterworks Company caused the Metropolitan Water Company, the plaintiff, to be organized, and caused all the waterworks properties and franchises in Kansas City, Kan., to be transferred to that company. The Armour Packing Company claims here, as it did in the court below, that Ordinance No. 10,951 of Kansas City, Mo., passed on December 6, 1898, fixes the rate at which it may take water from the plaintiff in Kansas City, Kan., and this by reason of the provisions of Ordinance No. 2,131 of the latter named city. The court below, however, declined to adopt this view. The court was of opinion that in and by note 3 of Ordinance 2,131 of Kansas City, Kan., the National Waterworks Company stipulated only for its own acts, and what the stipulation meant was that, if the water company gave to Kansas City, Mo., lower rates than those specified in Ordinance No. 2,131, then the water company should give the same reduced rates to Kansas City, Kan. The court therefore held that the rates which Kansas City, Mo., by its ordinance of December 6, 1898, fixed for the consumers of water in that city, did not bind the plaintiff in respect to water furnished by it to consumers in Kansas City, Kan., under its franchise granted by that city by Ordinance No. 2,131. Accordingly, upon the agreed statement of facts the court gave judgment in favor of the plaintiff in the sum of \$8,542.30.

The question we are called on to determine upon this writ of error is whether the court below rightly construed Ordinance No. 2,131. That ordinance, having been duly accepted by the National Waterworks Company, became a contract between the water company and the city of Kansas City, Kan. It therefore, like other contracts, is to be interpreted—if the meaning be in any respect doubtful—with reference to the circumstances surrounding the parties at the time it was made. *Canal Company v. Hill*, 15 Wall. 94, 21 L. Ed. 64; *Merriam v. United States*, 107 U. S. 437, 2 Sup. Ct. 536, 27 L. Ed. 530. Now, at the time of the passage and acceptance of Ordinance No. 2,131, the National Waterworks Company was the owner of the waterworks in Kansas City, Mo., and was supplying that city with water. It was natural and reasonable that the grant of the water franchise to that company by Kansas City, Kan., should provide that the water company should not exact from that city greater water rates than it should give to Kansas City, Mo. Note 3 of the ordinance employs apt language to effectuate such purpose. The parties to the contract which is embodied in Ordinance No. 2,131 were fixing water rates as between themselves. It may therefore well be supposed that they contracted with reference to the then existing state of affairs—with respect to the fact that the grantee of the franchise conferred by Ordinance No. 2,131 owned the waterworks and system in Kansas City, Mo., and was furnishing water to that city and its inhabitants under a franchise granted by that city.

It does not appear that any change in water service was then in contemplation. Kansas City, Mo., indeed, had a statutory right to purchase the waterworks in that city at the expiration of the then current term of the water franchise, if the grant thereof was not renewed. But such acquisition by the city was not impending at the time of the passage of Ordinance No. 2,131. If it had been the intention of the parties that water rates to consumers in Kansas City, Kan., should not exceed the rates which Kansas City, Mo., might establish for consumers in that city, different language would have been used from that contained in note 3. We think, with the court below, that the words, "if any less rate is given to Kansas City, Missouri, during the continuance of this franchise, the same schedule of rates shall apply under this ordinance, and any other benefits given Kansas City, Missouri, shall also apply both to public and private consumers," are fairly referable to the acts of the National Waterworks Company—to rates and benefits given by that company.

We are not able to accept the view suggested by counsel for the plaintiff in error that section 8 of the old ordinance No. 173 is to be treated as still in force, and be read into Ordinance No. 2,131 by virtue of the general language of section 1 of the latter ordinance. Ordinance No. 173 did not fix any schedule of water rates to consumers, and section 8 was intended as a limitation upon the rates which the water company might charge consumers. But Ordinance No. 2,131 fixes the water rates to consumers by a schedule of rates set out in the ordinance, subject to the single exception expressed in note 3. The provision of Ordinance No. 173 in respect to rates was not continued, but was superseded, by the express provisions of Ordinance No. 2,131.

We are of opinion that the conclusion which the court below reached is in accordance with the true meaning of Ordinance No. 2,131, and accordingly the judgment is affirmed.

THE COL. JOHN F. GAYNOR.

(Circuit Court of Appeals, Third Circuit. July 7, 1904.)

No. 34.

1. COLLISION—VESSEL AT QUARANTINE STATION—DUTY OF PASSING VESSELS.

A steamship, which has stopped her machinery, while lying at a quarantine station, where it is not customary to anchor, and is moving only slightly with the tide and without headway, has to a large extent the rights of a vessel at rest as regards other vessels that are passing.

2. SAME—STEAMER AT REST—PASSING TUG WITH TOW.

An incoming British steamship in charge of a licensed pilot stopped in the daytime off the quarantine station in the Delaware river, at the usual place, which was not more than two lengths from the pier on the western side, to undergo the customary medical inspection. She did not anchor, and it was not customary to do so. While so lying, with the quarantine flag up, and while the inspection was being made, a tug came down the river with two heavily laden scows, without rudders, in tow on a line which made the tow from 1,400 to 1,600 feet long. Each vessel saw the other when a mile distant, and the tug understood the position of the

steamship and the purpose for which she had stopped. The tug was properly on the westerly side of the channel, but there was ample room for her to pass to the eastward, so as to avoid any danger of collision. She had no lookout on the stern to keep watch of the tow, and passed so close to the steamship that both of the scows, sheering as she turned from the straight course, struck the steamship, and injured her. *Held*, that the steamship was entitled, under the circumstances, to the rights of a vessel at anchor, and that the tug was solely in fault in failing to keep at a safe distance in passing.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below see 115 Fed. 382.

See 124 Fed. 743.

La Roy S. Gove, for appellant.

J. Parker Kirlin, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the District Court for the Eastern District of Pennsylvania, in admiralty. The findings of fact, as contained in the opinion of the learned judge of the court below, are as follows:

"McPherson, J. This is an action brought to recover damages for a collision that took place about 3 o'clock in the afternoon of June 16, 1899, between the tug John F. Gaynor and the British steamship Vedra, in which the steamship was injured. The Vedra was on her way from London to Philadelphia in ballast, drawing about ten feet of water, and was proceeding up the Delaware river in charge of a duly licensed pilot. She is a tank vessel, built of steel, 2,622 tons net register, 435 feet long, 45 feet beam, and was properly manned and equipped.

"As she approached the Reedy Island quarantine station, which is upon a pier running parallel with and close to the western edge of the channel, the quarantine flag was hoisted upon her foremast, her engines were stopped and by the time she came nearly abreast of the station her way had practically ceased, so that she was merely being borne slowly up the river by the tide, which was then nearly flood. She did not anchor, but the testimony shows clearly that it is not customary for vessels to anchor while the medical examination is going on. A government boat put out from the station carrying a physician, and the examination was begun. While it was going on, the tug came down the river, towing two square-bowed scows tandem, each being heavily loaded with stone and drawing 12 or 13 feet of water. The total length of the tow was from 1,400 to 1,600 feet, each scow being 30 or 40 feet wide and about 150 or 160 feet long and having no rudder or independent means of propulsion.

"The day was clear, and the wind was blowing briskly from about northwest. Each vessel saw the other more than a mile away, and understood the other's character and situation. The tug did not expect the steamship to anchor, but knew that she was lying at rest upon the water, undergoing, or about to undergo, examination by the quarantine physician. The boiler of the tug was not in very good condition so that she was not able to exert her full power, but she was proceeding down the river against the tide at a speed of 3 or 4 knots an hour. At the time she saw the steamship, the tug was on the westward side of the channel, and, under ordinary circumstances, it was proper that she should be where she was. But, when she saw the steamship at rest upon the water with the quarantine flag flying, and knew that she was obliged to interrupt her voyage until the examination should be completed, it became the duty of the tug, as the moving vessel, to take every reasonable precaution to keep out of the way. There was ample room and depth of water for the tug to pass so far from the steamship that no collision could have possibly

taken place. The channel was wide at this point, and there were no vessels near enough to offer any obstruction. The tug, however, kept her course so closely that when she approached the steamship it was evident that she would be obliged to pass within a few feet. She herself managed to get by in safety, but the first scow sheered toward the steamship and broke one of the blades of the screw, and the second scow sheered more decidedly and with her forward starboard corner struck the ship a severe blow on the starboard bow, doing a good deal of damage.

"It is argued on behalf of the tug, that the steamship was at fault, because she did not anchor, because she was too far out in the channel, and because it is averred that she made certain movements with her engines that put the ship into a more dangerous position than she would have otherwise occupied. It is also argued that she did not keep a proper lookout, and therefore did not see the tug in time to move out of the way. In my opinion none of these charges is well founded.

"The pilot and second officer were on the bridge, other officers and men were on the deck, and the tug was seen more than a mile away. The steamship stopped in the customary place, and was not, I think, more than 500 or 600 feet from the station. She was not obliged to anchor in the absence of special circumstances indicating that to be her duty. I am also of opinion that her engines were not put into motion at all while she was undergoing examination. An order to go ahead was undoubtedly given, but it was countermanded immediately, and was not carried into effect. No signals were given by either vessel, and none was required. I see no reason, therefore, to charge the steamship with any fault. As it seems to me, the collision is properly chargeable to the tug, for approaching too close to the ship with so unwieldy a tow. It is well known that scows of this description are very apt to sheer, as they have no rudder, or other means of guidance than the tug itself, and as these were being towed on a very long hawser, the danger of sheering was increased. The tug was bound to take note of the position of the ship and the business upon which she was engaged, and to pass far enough to the eastward to avoid the danger of collision. Apparently, she either miscalculated the distance or put off the effort to take the tow to the eastward until it was too late."

From a careful examination of the testimony sent up to us in the record of this case, we are of opinion that the learned district judge was right in his findings of fact, and in the conclusions founded upon them.

Counsel for the appellant contends, with much force and ingenuity, that the tug was not in fault in her navigation, and that the steamship was solely in fault for the collision. The court below has found as a fact, that the Vedra was coming up the river in charge of a competent and licensed pilot, and that, at the lower end of Reedy Island, she hoisted a quarantine flag, and stopped, as under the circumstances she was bound to stop, to be boarded by a quarantine physician from the station at the upper end of the island. The island is something less than a mile in length, running nearly parallel with the center line of the channel, the course of which up the river would be north 14 degrees east. Necessarily, she ran to the westward side of the channel, to accommodate the boarding officer, and after her engine stopped and the physician was on board, her headway and the flood tide carried her up abreast of the quarantine station, and about 800 feet or two ship lengths away. The pilot and second officer were upon the bridge, and during all the time covered by the events detailed in the record, the captain was mustering the other officers and crew, for examination by the physician. The tug with her tow was coming down to the westward of the middle of the channel, as, under ordinary circumstances, she was entitled to do, and the steamship was in full

view of those on board the tug for more than a mile above the quarantine. The engines of the steamship, from the time they stopped at the lower end of the island, were not in motion, until just before the collision, when they were started ahead, in consequence of the impending peril of a collision with the barge, but were immediately stopped by the pilot, to avoid cutting the barge with the propeller. The steamship was practically in the situation of a motionless ship, moving only with the drift of the tide, without steerageway. The purposes for which she had stopped, were perfectly understood by the pilot and all others on board the tug.

The court was right in its statement, that under ordinary circumstances, the tug and tow should be where they were, that is, on the westward side of the channel. But the "ordinary circumstances," to which the learned judge alludes, would be where the steamer was under way, coming up the channel. In such a case, the steamer would presumably have passed on the port side, or to the eastward of the tow, and the tug would have probably borne a little more to the westward, to insure a safe passage. But these were not the circumstances of the case before us. The steamship was not under way, but had stopped for a proper purpose, well understood by those in charge of the tug, and though not exactly in the situation of a ship at anchor, had, to a large extent, the rights of a ship at rest, in regard to the movements of a passing vessel. The head of the steamer was always veered a little toward the westward of the channel, and it was perfectly apparent to the tug that it must pass to the eastward of the steamship. That this was in fact understood to be its duty by the tug, is evidenced by the fact that no attempt was made to do otherwise than pass to the eastward of the steamer, while practically at rest off the quarantine station. There was ample room in the channel eastward of the steamer, at least a half mile of water navigable for the tug and her tow.

The fault, it seems to us, as it seemed to the court below, was that, in passing to the eastward, those navigating the tug did not go far enough to allow for the sheering of the two barges, the towlines of which were, in the aggregate, 800 or 900 feet long, and the testimony shows that with towlines of such length, the sheering takes a very wide range. The barges were square at the ends, and were without rudders, so that, when the tug changed its course, to itself avoid the steamer, it was natural to expect that the barges would not be straightened out in the wake of the steamer for some appreciable time, and that the tendency to sheer would be augmented by the changed course of the tug. These conditions, those navigating the tug were bound to recognize and to exercise the degree of care and caution in passing the steamer made necessary thereby.

That a tug with such a tow is properly called an incumbered vessel, is most true, and, in a narrow channel, and when meeting steam vessels under way, is entitled to a consideration and indulgence often recognized by the courts. But, on the facts presented by this record, the tug is entitled to no such indulgence. The channel above and below the point of collision was wide, the course running straight past the quarantine and parallel with the island for a distance of between

four and five miles. The incumbrance of the tow, and the difficulty and danger ensuing therefrom, in passing any object at rest, must, as we have said, be recognized by those in charge of the tow, and in proportion to the danger and difficulty is the measure of duty imposed to avoid it. We repeat that, under the circumstances of this case, the Vedra was entitled to the privileges and rights of a vessel at rest. She was well over on the western side of the channel, was not under steerageway, and the pilot of the tug understood that it was his duty to pass to the eastward, and as ample room for that purpose existed in that direction, the responsibility of making a safe clearance of the vessel not under way, rested on the tug.

We do not find the contention of appellant, that the force of the wind and tide together had drifted the steamer so far to the eastward as to have contributed to the collision, to be supported by the evidence. The wind was northwest and light, and the pilot had kept the steamer's head well into the wind. But even if the steamer had, from the effect of the wind or the tide, or both, been carried, while not under way, toward the tow, such fact must have been apparent to the tug, and upon her rested the responsibility of taking that drift into the account. A steamer that is stopped, so far as her machinery is concerned, has, when her steerageway is gone, under such circumstances as these, the rights of a vessel at rest, as regards other vessels that are passing.

A matter in evidence, which should not be overlooked, is that there was no lookout on the stern of the tug to observe the situation of the barges in tow. Such a lookout, as the tug was approaching the steamer, might have given timely notice to the pilot of the danger threatened by the sheering of the tow, so that it could have been avoided by proper caution on his part.

We think the decree of the court below should be affirmed, and it is so ordered.

PORTLAND FLOURING MILLS CO. v. BRITISH & FOREIGN MARINE
INS. CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. May 31, 1904.)

No. 998.

1. EVIDENCE—CONTRADICTING WRITTEN CONTRACT—PROOF OF CUSTOM.

Proof of a custom of doing business between the parties is not admissible to contradict or vary the contract made by a bill of lading, which is plain and unambiguous in its terms.

2. SHIPPING—CONTRACT OF AFFREIGHTMENT—LIABILITY FOR FREIGHT.

A provision in a bill of lading that the freight shall be "considered as earned, steamer or goods lost or not lost at any stage of the entire transit," is valid and enforceable.

3. SALE—PASSING OF TITLE—DRAFT ATTACHED TO BILL OF LADING.

Where goods are shipped by a vendor to a vendee, the vendor taking a bill of lading in which he is named both as consignor and consignee, which bill is indorsed in blank and attached to a draft on the vendee

¶ 3. See Sales, vol. 43, Cent. Dig. § 547.

for the purchase price, the title to the goods does not pass to the vendee until payment of the draft.

4. SHIPPING—LIABILITY OF CONSIGNOR FOR FREIGHT.

The rule is that the consignor of goods is primarily liable for the payment of the freight, as the party making the contract, regardless of whether or not he is the owner of the goods, or whether the freight is secured by lien.

5. SAME.

Respondent shipped a cargo of flour, consigned to its own order under bills of lading providing that freight should be deemed earned, vessel or cargo lost or not lost. The flour was shipped under contracts of sale, and was insured by respondent in its own name for sufficient to cover the invoice price and freight. Respondent then indorsed the bills of lading and policies in blank, and attached them to drafts drawn on the purchasers for the selling price and cost of insurance, which were forwarded for collection. *Held*, the vessel having been lost, that respondent was liable for the freight, whether its interest in the cargo was that of owner, or whether it merely retained a lien, since in either case the purchasers were to have possession only on payment of the drafts.

6. SAME—DEFENSES.

Where a cargo was insured by the shipper for sufficient to cover its value and the freight, the fact that on the wrecking of the vessel the cargo was surrendered by the master to the insurer without notice to the shipper did not prejudice him, and constituted no defense to an action to collect the freight under the terms of the bills of lading.

Appeal from the District Court of the United States for the District of Oregon.

Appellant is engaged in the manufacture and sale of flour, having its principal office at Portland, Or., and a branch office at Hong Kong, China. It appears that the flour shipped to Hong Kong by appellant is handled by a Chinese syndicate; that the sales made are confined to the company's agent at Hong Kong, through whom the orders are made; that the members of the syndicate receive the flour in certain definite proportions, designated by shares—one firm having three shares, another two, and the third one; that on August 29, 1901, appellant received from its Hong Kong agent a cable confirmation of a contract for an amount of flour to be intended for the members of the syndicate, with a request that the order be confirmed, which was done, according to the shares of each. In December, 1901, appellant shipped with the Portland & Asiatic Steamship Company, for carriage on the Knight Companion, a British vessel operated by said company, a large quantity of flour. One lot, intended for Cornes & Co., was billed to Kobe, Japan, and the others, intended for different purchasers, were billed to Hong Kong, China. The goods in each case were shipped under a bill of lading issued by the carrier, wherein it was stipulated that the flour shipped was to be delivered "at the vessel's tackle unto the Portland Flouring Mills Company, or to his or their assigns. Freight on same as per margin to be collected in U. S. gold coin or its equivalent. The several freight and primages to be considered as earned, steamer or goods lost or not lost at any stage of the entire transit." On the margin of the bills of lading were the letters "Nfy" or "Notify," followed by the name of the firm on whose account the shipment is alleged to have been made. These bills of lading were in each case accepted by appellant, who was therein named both as consignor and consignee. Policies of insurance in the name of appellant were taken out at the invoice price and 40 per cent., which included freight, and drafts drawn at 60 days' sight on the members of the syndicate in the proportion of their shares for the selling price of the flour plus cost of insurance. These policies, one for each member of the syndicate, although in the name of appellant, and the several bills of lading, were indorsed in blank, so that they were available to the holder. The drafts, with the policies and bills of lading, so indorsed, were delivered to Ladd & Tilton, bankers of appellant, and the amount placed to the latter's credit.

The steamship Knight Companion left Portland, Or., on the 31st day of

December, 1901, and reached the coast of Japan, and was there stranded on the 2d day of February, 1902, and abandoned as a total loss by the steamship company and the several insurance companies interested. One of these insurance companies was the appellee, which had insured the steamship company for the freight to be earned by the voyage. Appellee settled with the steamship company, paying its claim in full, and the other insurance companies settled with the holders of their policies, and the insurance companies thereupon divided among themselves certain moneys secured from the salvage of the cargo; the insurers of appellant's shipment receiving 45,205 yen, approximately \$22,500. Appellant's insurers paid the face of their policies, which exceeded the selling price of appellant's goods. On the payment of the steamship company's claims in full for freight, appellee became subrogated to the steamship company's rights, and in addition thereto took from the steamship company an assignment of its claim for the freight, and brought this libel in personam for the recovery of the same. The court rendered a decree in favor of appellee (124 Fed. 855), and from that decree the appeal herein is taken.

C. E. S. Wood, S. B. Linthicum, J. C. Flanders, and Williams, Wood & Linthicum, for appellant.

Page, McCutchen & Knight and Snow & McCamant, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement, delivered the opinion of the court.

The contention of appellant is that the bills of lading and the practice between the parties in their previous business relations of a similar character show that the steamship company had always collected from the purchasers of the flour, that the bills of lading constitute a consignment to order, that the person or firm who is to receive the freight at its destination is indicated by the person who is named to be notified, and that the understanding and intention of the parties were, at the time the bill was given, that the freight should be collected from the person receiving the goods. Appellant's counsel in their brief say:

"Our contention is that it was well known by the Portland & Asiatic Steamship Company in this particular case, and by some years of customary traffic between the parties, that the flour was sold to the consignees f. o. b. at Portland, and in making delivery to the steamer and receiving the bill of lading the shipper, so far as all carriage of the goods was concerned, was acting only as the agent and representative of the purchasers' consignees."

The contention of the appellee is that the bills of lading upon their face clearly show that appellant was the owner and consignee, as well as the consignor, of the flour, and that these facts necessarily make it responsible for the freight. We are of opinion that, whatever the customs, usages, and understanding between the parties may have been in their previous transactions, where the goods were delivered and the payment of the freight thereon made by the parties who received the goods, it cannot have any controlling effect in the present case, where the goods were not delivered. The testimony as to the usages and customs in the shipping of the flour was all received subject to the objections urged by appellee as to its sufficiency and relevancy, in this: that each bill of lading constituted a contract between the parties, and could not be impeached or contradicted by parol evidence. The general rule upon this subject is well stated by Story, J., in *The Reeside*,

2 Sumn. 567, Fed. Cas. No. 11,657 (where numerous authorities upon the point are cited), as follows:

"The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, a fortiori, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties."

In *The Delaware*, 14 Wall. 579, 603, 20 L. Ed. 779, the court said:

"Such evidence may be introduced to explain what is ambiguous, but it is never admissible to vary or contradict what is plain."

In the present case the intention of the parties was clearly expressed in the bill of lading. There was nothing of an equivocal or ambiguous character contained therein, and there were no words used which required any oral testimony as to their true meaning. In all such cases it is manifest that "the rights of the parties are fixed by the bill of lading, and the evidence of conversations prior to the date of it cannot have any effect to vary its provisions." *O'Rourke v. 221 Tons of Coal* (D. C.) 1 Fed. 619, 624. "The carrying contract, reduced to writing in a bill of lading, can no more be altered or varied by parol evidence than any other written contract." *The Golden Rule* (C. C.) 9 Fed. 334. "Such a contract is to be construed, like all other written contracts, according to the legal import of its terms. It becomes the sole evidence of the undertaking, and all outstanding agreements are extinguished by the writing." *Louisville, E. & St. L. F. Co. v. Wilson* (Ind. Sup.) 21 N. E. 343, 4 L. R. A. 244. See, also, *Galveston, etc., R. Co. v. Silegman* (Tex. Civ. App.) 23 S. W. 299.

The contract as made between the parties is a valid one, that can be enforced. It is true, as claimed by appellant, that, where there is no specific agreement to the contrary, freight is not deemed earned until the voyage is completed, and the goods are delivered or ready to be delivered at the point of destination. But this principle has no application whatever to a case like the present, where it is expressly provided:

"The several freight and primages to be considered as earned, steamer or goods lost or not lost at any stage of the entire transit."

The true rule in regard to contracts of this character was thus expressed by Lord Ellenborough, C. J., in 1815, in *De Silvale v. Kendall*, 4 M. & S. 37, 42:

"By the policy of the law of England freight and wages, strictly so called, do not become due until the voyage has been performed. But it is competent

to the parties to a charter party to covenant by express stipulations in such manner as to control the general operation of law. The question in this case is whether the parties have not so covenanted by the stipulations of this charter party. If the charter party be silent, the law will demand a performance of the voyage; for no freight can be due until the voyage be completed. But if the parties have chosen to stipulate by express words, or by words not express, but sufficiently intelligible to that end, that a part of the freight (using the word 'freight') should be paid by anticipation, which should not depend upon the performance of the voyage, may they not so stipulate? * * * And there can be no doubt that the payment of freight may by the agreement of the parties be so exempted."

In 7 Am. & Eng. Enc. of Law, 246, it is said:

"It is competent for the parties to a contract of affreightment to stipulate expressly that the freight, or a part thereof, shall be payable absolutely at the time of the shipment of the cargo, or at a certain time thereafter, without regard to performance of the contract."

It is argued by appellant that there is no explanation of the words of the bill of lading, "Freight to be collected in U. S. gold coin or its equivalent, payable at Hong Kong, China," and "Notify Wing Chong Lee," that is consistent with the language of the bill of lading, except that the carrier had agreed to collect its freight from Wing Chong Lee at Hong Kong. But the record shows that appellant transacted business at Hong Kong, as well as at Portland, and this may have been the reason for inserting the provision as to the place of payment of freight. We do not, however, consider it important to ascertain the reasons why such stipulations were embodied in the contract. It is enough to say that the contract as made is valid and of binding force. The fact that appellant's vendee was named in the respective bills of lading, in connection with the letters "N'fy" or "Notify," does not change the meaning and intent of the contract made by the parties that appellant should pay to the steamship company the amount of freight agreed upon.

We are of opinion that appellant, at the time the bill of lading was executed, must be considered as the owner as well as the shipper of the flour, upon the familiar and well-settled principle of law that, where goods are shipped by a vendor to a vendee, the vendor taking a bill of lading in which the vendor is named both as consignor and consignee, which bill of lading is indorsed in blank and attached to a draft for the purchase price drawn on the vendee, the title to the goods remains in the vendor, and the vendee does not become the owner of the same until the payment of the draft. *Dows v. National Exchange Bank*, 91 U. S. 618, 630, 23 L. Ed. 214; *Seeligson v. Philbrick (C. C.)* 30 Fed. 600; *Ramish v. Kirschbraun*, 107 Cal. 659, 661, 40 Pac. 1045; *Stollenwerck v. Thacher*, 115 Mass. 224, 226; *Erwin v. Harris*, 87 Ga. 336, 13 S. E. 513.

The question of ownership may be considered immaterial, under the facts of this case. The rule is that the consignor is the party primarily liable for the payment of the freight, and this rule is enforced, independent of the question whether the consignor is the owner, and regardless of the question whether the payment of freight is secured by a lien on the cargo, because the consignor is the party for whom the

service is performed. This rule is applied to clauses, often found in bills of lading, "he or they paying freight," or "he, the consignee, paying freight." In *Wooster v. Tarr*, 8 Allen, 270, 85 Am. Dec. 707, Bigelow, C. J., in delivering the opinion of the court, said:

"The question raised in this case is very fully discussed in *Blanchard v. Page*, 8 Gray, 281, 286, 290-295. It is there stated to be the settled doctrine that a bill of lading is a written simple contract between a shipper of goods and the shipowner; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed. Of the correctness of this statement there can be no doubt. The shipper or consignor, whether the owner of the goods shipped or not, is the party with whom the owner or master enters into the contract of affreightment. It is he that makes the bailment of the goods to be carried, and, as the bailor, he is liable for the compensation to be paid therefor. The dictum of Bayley, J., in *Moorson v. Kymer*, 2 M. & S. 318, subsequently repeated by Lord Tenterden in *Drew v. Bird*, Mood. & Malk. 156, that, in the absence of an express contract by the shipper to pay freight, when the goods are by the bill of lading to be delivered on payment of freight by the consignee, no recourse can be had for the price of the carriage to the shipper, has been distinctly repudiated, and cannot be regarded as a correct statement of the law. *Sanders v. Van Zeller*, 4 Q. B. 260, 284; *MacLachlan on Shipping*, 426. * * * A master is not bound at his peril to enforce payment of freight from the consignees. The usual clause in bills of lading, that the cargo is to be delivered to the person named or his assignees, 'he or they paying freight,' is only inserted as a recognition or assertion of the right of the master to retain the goods carried until his lien is satisfied by payment of the freight; but it imposes no obligation on him to insist on payment before delivery of the cargo. If he sees fit to waive his right of lien, and to deliver the goods without payment of the freight, his right to resort to the shipper for compensation still remains. *Shepard v. De Bernales*, 13 East, 565; *Domett v. Beckford*, 5 B. & Ad. 521, 525; *Christy v. Row*, 1 Taunt. 300. Although the receipt of the cargo under a bill of lading in the usual form is evidence from which a contract to pay the freight money to the master or owner may be inferred, this is only a cumulative or additional remedy, which does not take away or impair the right to resort to the shipper on the original contract of bailment for the compensation due for the carriage of the goods."

See, also, 7 Am. & Eng. Enc. of Law, 276, and authorities there cited

In the light of all the facts in the present case, we are of opinion that there was no obligation on the part of the carrier to notify the shipper of the goods of the loss of the ship, and no penalty to be incurred by the carrier for failure so to notify. The carrier cannot be deprived of its right to collect freight unless the vessel was lost by the carrier's negligence, and there is no evidence in the record that the steamer was lost by any negligence on the part of the carrier. Negligence on the part of a carrier cannot be presumed. It must be proved by the party alleging it.

The gist of the whole case was briefly, but clearly and pointedly, expressed by the court below, to the effect that the president of appellant testified that the flour stood as security for the drafts. Whether its interest was that of ownership or lien, the parties for whom the flour was intended were to have it when paid for, and not before. "In whatever light the transaction is viewed, this is what it comes to." The consignment in the bills of lading to appellant's order, and the insurance in its name, were to this end; and the conclusion is unavoidable that appellant was the shipper, and to it the carrier's service, whether

for receiving the freight and agreeing to carry it, or for in fact carrying it, was rendered, and, as the case stands, the appellant is responsible for the freight agreed to be paid.

The decree of the District Court is affirmed, with costs.

ROTHSCHILD v. ADLER-WEINBERGER S. S. CO.

(Circuit Court of Appeals, Third Circuit. June 13, 1904.)

No. 28.

1. INSURANCE—STATE LAWS—EXTRATERRITORIAL OPERATION—LIABILITY OF AGENTS.

Pa. Act May 1, 1876 (P. L. 66), § 48, declaring that the agent of any insurance company of any other state or government which does not comply with the laws of Pennsylvania shall be personally liable on all contracts of insurance made by or through him, directly or indirectly, for or on behalf of the company, applies only to contracts of insurance on property in Pennsylvania.

2. SAME—POLICY LIMITATIONS.

A provision of a marine policy that all claims thereunder should be void unless prosecuted within 12 months from the date of the disaster was applicable to a suit against insurance brokers issuing certain policies on behalf of foreign companies which had not complied with the laws of Pennsylvania, under Pa. Act May 1, 1876 (P. L. 66), § 48, declaring that any agent of a foreign insurance company which has not complied with Pennsylvania laws shall be personally liable "on all contracts of insurance" made by or through him on behalf of any such company.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 123 Fed. 145.

James C. Sellers, for plaintiff in error.

Horace L. Cheyney, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. On the trial of this case in the Circuit Court, the jury was directed to find a verdict in favor of the plaintiff below for \$5,385.29, the learned trial judge reserving the question whether there was any evidence to go to the jury in support of the plaintiff's claim. A verdict was rendered accordingly, and, after argument upon the motion of the defendant for judgment in his favor non obstante veredicto, a judgment for plaintiff was entered upon the verdict. Thereupon the defendant sued out this writ of error.

The action was based upon section 48 of the Pennsylvania statute of May 1, 1876 (P. L. 66), to wit:

"The agent of any insurance company of any other state or government, which does not comply with the laws of this commonwealth, shall be personally liable on all contracts of insurance made by or through him, directly or indirectly, for or in behalf of any such company."

¶ 2. Conditions in insurance policy as to time for bringing suit, see notes to *Steel v. Phoenix Ins. Co.*, 2 C. C. A. 473; *Rogers v. Home Ins. Co.*, 35 C. C. A. 404.

The facts are sufficiently stated in the opinion of the court below, as follows:

"The plaintiff, a citizen of Louisiana, in March, 1900, obtained the three marine policies in question through a firm of ship brokers in New Orleans. The vessel traded between New Orleans, Mobile, and Honduras, and was at the first-named port when the policies were written. The New Orleans broker applied for the insurance to another firm of brokers in Tampa, Fla., who in turn applied by mail to the defendant Rothschild & Co. The application was received at the defendants' office, 411 Walnut street, Philadelphia, and two of the policies were afterwards mailed by them from Philadelphia to the Tampa brokers, by whom they were forwarded to New Orleans. In August following, the New Orleans brokers wrote to the defendants at Philadelphia for a third policy, and this was mailed directly to New Orleans. The premiums were sent by mail to the defendants at Philadelphia, and were there received. Later several slips, or permits, were obtained from them, also by mail, to be attached to the policies. On these slips the defendants described themselves as agents for the respective companies. The policies were all issued by companies foreign to Pennsylvania, and none of them had complied with the laws of that state. There was evidence that the written portion of two of the policies was in the handwriting of the defendants' bookkeeper, and had been filled in at their office in Philadelphia. It did not appear where or by whom the other policy had been filled in, but the defendants did not deny that they had prepared and mailed it in Philadelphia, nor did they deny at the trial that they were agents of the respective companies by whom the policies were issued. The loss occurred in September, 1900, and this suit was brought by the insured on February 1, 1902, under the foregoing section, to recover from the defendants the amount of the loss."

Is section 48 of the Pennsylvania statute of May 1, 1876 (P. L. 66), properly applicable to a policy of insurance issued to a person not a citizen nor a resident of Pennsylvania, upon property not situated within that state? No doubt, the language of the section is inclusive of "all contracts of insurance," but as the liability it imposes is an extraordinary and penal one, it should not be held to embrace anything beyond what clearly appears to have been contemplated by the Legislature, and for ascertainment of the legislative intent attention is not to be confined to the words employed, but the familiar rule must be applied, "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Holy Trinity Church v. United States*, 143 U. S. 459, 12 Sup. Ct. 511, 36 L. Ed. 226. As was said in the case just cited, "We cannot think the Legislature intended to denounce with penalties a transaction like that in the present case," and that it did not in fact intend to do so becomes apparent when other of the Pennsylvania statutes upon the subject of insurance are considered, as they should be, in connection with the particular section in question. *Bacon's Abr. "Statute"* (1, 3). These statutes, in so far as material—including, for completeness, the section heretofore quoted—are as follows:

The act of April 4, 1873 (P. L. 20), provides:

"Sec. 9. It shall be unlawful for any person, company or corporation, to negotiate or solicit within this state any contract of insurance, or to effect an insurance or insurances, or pretend to effect the same, or to receive and transmit any offer or offers of insurance, or receive or deliver a policy or policies of insurance, or in any manner to aid in the transaction of the business of insurance without complying fully with the provisions of this act.

"Sec. 10. No person shall act as agent or solicitor in this state of any insurance company of another state, or foreign government, in any manner

whatever relating to risks, until the provisions of this act have been complied with on the part of the company or association, and there has been granted to said company or association, by the Commissioner, a certificate of authority, showing that the company or association is authorized to transact business in this state; and it shall be the duty of every such company or association, authorized to transact business in this state, to make report to the Commissioner in the month of January of each year, under oath of the president or secretary thereof, showing the entire amount of the premiums of every character and description received by said company or association in this state, during the year or fraction of a year ending with the thirty-first day of December preceding, whether said premiums were received in money or in the form of notes, credits or any other substitute for money, and pay into the state treasury a tax of three per centum upon said premiums; and the Commissioner shall not have power to grant a renewal of the certificate of said company or association until the tax aforesaid is paid into the state treasury.

"Sec. 11. Companies to which certificate of authority are issued, as provided in the preceding section, shall, from time to time, certify to the Commissioner the names of the agents appointed by them to solicit risks in this state; and no such agent shall transact business until he has procured from the Commissioner a certificate, showing that the company has complied with the requirements of the act, and that the person named in said certificate has been duly appointed its agent."

"Sec. 14. That any person or persons, or corporation, receiving premiums or forwarding applications, or in any other way transacting business for any insurance company or association not of this state, without having received authority agreeably to the provisions of this act, shall forfeit and pay to the commonwealth the sum of five hundred dollars for each month or fraction thereof during which such illegal business was transacted, and any company not of this state doing business without authority, shall forfeit a like sum for every month or fraction thereof, and be prohibited from doing business in this state until such fines are fully paid."

The act of May 1, 1876 (P. L. 53), which is a supplement to the act of April 4, 1873, provides:

"Sec. 47. Any person transacting business within this commonwealth as the agent of an insurance company of any other state or government, without a certificate of authority, as required by the act to do which this is a supplement, shall be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine of five hundred dollars, but this section shall not be held to prevent the Insurance Commissioner from pursuing the remedy or remedies provided in the act aforesaid. The person or persons on whose complaint such conviction is had, shall receive one half of the fines so paid, provided the insurance commissioner or his deputy is not the complainant.

"Sec. 48. The agent of any insurance company of any other state or government, which does not comply with the laws of this commonwealth, shall be personally liable on all contracts of insurance made by or through him, directly or indirectly, for or in behalf of any such company."

The act of April 26, 1887 (P. L. 61), amended section 14 of the act of April 4, 1873, so as to read:

"That any insurance company or association not of this state, doing business without authority agreeably to the provisions of this act, shall forfeit and pay to the commonwealth the sum of five hundred dollars for each month, or fraction thereof, during each month, on and after the passage of this act, which such illegal business was transacted, and be prohibited from doing business in this state until such fines are fully paid. And that any person or persons, or any agent, officer, or member of any corporation paying, or receiving or forwarding any premiums, applications for insurance, or in any manner securing, helping, or aiding in the placing of any insurance, or effecting any contracts of insurance upon property within this commonwealth, directly or indirectly, with any insurance company or association not of this

state, and which has not been authorized to do business in this state under the terms of this act, shall be guilty of a misdemeanor, and, on conviction thereof, shall be sentenced to a fine of not less than one hundred dollars nor more than one thousand dollars, and upon conviction of a second offence shall be sentenced to pay a like fine and undergo an imprisonment not exceeding one year, or either, in the discretion of the court."

The first-mentioned of these acts is the earliest one regulating insurance by foreign companies which is now in force in Pennsylvania. It established "a distinct department * * * charged with the execution of the laws of this state in relation to insurance," and it is evident that by it and the later acts it was purposed to create and perfect a general system of regulations and requirements respecting the transaction of business by foreign companies within the limits of the state, with the manifest object of affording protection to those taking insurance from such companies, either directly or through agents. But whom was it intended to protect? Presumably, of course, the citizens and the residents of Pennsylvania, or, at the utmost, such persons, also, as, being neither citizens nor residents of that state, might have insurable interests in property there situated. Waiving the question which has been argued as to the competency of any state to affect by such legislation persons and things not within its territorial boundaries, we are satisfied that in this instance no attempt to do so was made. The words "within this state," and "in this state," as they occur in sections 9, 10, and 11, p. 26, of the act of 1873, and the words "within this commonwealth," as they occur in section 47, p. 66, of the act of 1876, and especially the provision of section 10 of the act of 1873 for reports for taxation, persuasively indicate, if they do not positively show, that this system of legislation was not intended to apply to such a case as this; and, finally, we have in the act of 1887 the phrase "any contracts of insurance upon property within this commonwealth," which, in our opinion, is tantamount to an express legislative definition of the intended scope of the whole series of statutes. And, as the section immediately involved is included in the series, it follows that the contracts upon which the agent is thereby made liable are such contracts of insurance as are upon property in the commonwealth of Pennsylvania, and no others.

Furthermore, this action, even if otherwise maintainable, was, we think, barred by the clause, which each of the policies contains, "that all claims under this policy shall be void unless prosecuted within twelve months from the date of the disaster." The disaster here involved occurred in September, 1900, and the suit was begun on February 1, 1902. The terms of this provision were therefore met, and that it would be enforceable in favor of the companies themselves seems not to be denied, and we think is unquestionable. It is contended, however, that the defendant below was not entitled to benefit by it, because, as is argued, it is a "subsequent condition imposed upon the assured by the contract," like the ordinary provision for proofs of loss, which it was said in *McBride v. Rinard*, 172 Pa. 543, 33 Atl. 750, need not, to consummate the agent's liability, be complied with by furnishing proofs of loss to the company. But we are not dealing with a condition affecting the agent's liability, but with a contractual limitation of the time within which his liability, assuming its unconditional existence, may

be enforced, and the real and only question is whether this limitation is properly applicable to an action founded upon the forty-eighth section of the act of 1876. That section, as we have said, is a penal one, and the particular penalty it prescribes is not open to conjecture. It is distinctly specified. It is that the offending agent "shall be personally liable on all contracts of insurance made by or through him." The contracts are not to be extinguished. They must continue in force, for otherwise there would be nothing of which liability on the contract could be predicated. If it was not intended that the agent would be liable precisely as if he had been a principal party to the contract, it would, we think, be difficult to perceive that any penalty whatever was designated. We need not question the correctness of the statement of the Supreme Court of Pennsylvania (*McBride v. Rinard*, *supra*) that it would be a mistake to assume "the liability of the agent to be no higher than that of sureties or guarantors for the foreign company which had violated the law." As was said by that court, "the moment the agent makes a contract for a foreign insurance company which has neglected to obtain the proper authority from the Insurance Commissioner to do business in this state, that is the inception of the agent's liability on the contract, which is consummated by the loss by fire." But the liability is "on the contract," and therefore, though compliance with "every subsequent condition imposed upon the assured" may not be requisite to establish its existence, it ceases to be enforceable upon the expiration of the period contractually limited for its enforcement. The agreement for the limitation in this case, and the reasons upon which such agreements are founded, are quite as appropriate to an action against an agent as to a suit against a company, and it is not supposable that the Legislature designed that in this regard the assured should have, as against the former, a policy more favorable to himself than that which he had been content to accept from the latter.

The views we have expressed necessitate the conclusion that the judgment entered for the plaintiff below was erroneous. Therefore that judgment is reversed, and the cause will be remanded to the Circuit Court with direction to enter a judgment for the defendant notwithstanding the verdict.

LONG v. LEHIGH VALLEY R. CO.

(Circuit Court of Appeals, Second Circuit. April 14, 1904.)

No. 146.

1. CARRIERS—INJURY OF EXPRESS MESSENGERS—CONTRACT LIMITING LIABILITY.

An express messenger while riding in a railway car in the performance of the duties of his employment is not a passenger, nor does the railroad company occupy the relation of common carrier toward him, but of a private carrier only, and there is no public policy which forbids the parties from contracting for its exemption from liability for negligence in the carrying of such messenger; and a contract with the express company by which the messenger, as a condition of his employment, assumes all

¶ 1. Limitation of liability for injury to passengers, see note to *Clark v. Geer*, 32 C. C. A. 301.

risk of injury while so riding, and one between the express and railroad companies by which the former agrees to hold the latter indemnified against claims for injuries to its employes, whether arising from negligence or otherwise, are valid and effective to prevent a messenger injured in collision due to the negligence of railroad employes from recovering therefor against the railroad company.

2. SAME—CONSTRUCTION OF CONTRACT OF EMPLOYMENT.

A contract by which an express messenger, as a condition of his employment, assumes all risk of personal injury while riding on any transportation line, and agrees to release and indemnify the company or any transportation company with which it may contract from any claim which might be made on account of any such injury, must be construed to apply to an injury resulting from negligence of a railroad company in whose car he is riding in the course of his employment, since, not being a passenger while so riding, no claim could be made against the company except on the ground of negligence.

3. SAME.

An express messenger riding in a railway car in the discharge of the duties of his employment is chargeable with notice of the contract under which he is being transported by the railroad company.

In Error to the Circuit Court of the United States for the Western District of New York.

E. C. Aiken, for plaintiff in error.

James McC. Mitchell, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the plaintiff in the court below to review a judgment for the defendant. Upon the trial the court directed the jury to render a verdict for the defendant. The assignments of error challenge the correctness of that ruling.

The action was brought to recover damages for personal injuries sustained by the plaintiff. At the time of the accident in which he was injured he was in the employment of the United States Express Company as a messenger, and was engaged in the duties of such employment in an express car on one of the defendant's trains. The accident was caused by a collision between that train and a switching engine of the defendant, owing to the negligence of the employes of the defendant in charge of the switching engine. The contract of employment between the plaintiff and the United States Express Company contained the following provision:

"I understand that I may be required to render services for the company on or about the railroad, stage and steamboat lines used by the company for forwarding property, and that such employment is hazardous; I assume the risk of accident and injury to myself arising out of such employment, and release and indemnify the United States Express Company, and the corporations or persons owning or operating said transportation lines, from any or all claims that I or my executors or administrators might make, arising out of any such accidents or injuries that may happen to me while so employed."

By a contract between the United States Express Company and the defendant, in force at the time the plaintiff entered upon his employment and at the time of the accident, it was provided that the defendant should not be or become liable or responsible to any person for any damage or injury happening to or sustained by any employe, servant, or

agent of the express company while acting for the express company in or about its business, whether such injury should have been occasioned by or through the negligence, omission, or default of the railroad company, or otherwise, "it being distinctly understood and agreed that the express company hereby assumes and undertakes to pay and indemnify the railroad company for and against all and every claim and demand for loss and injury of any nature to life, person or property arising from the performance of this contract."

The trial judge ruled that, in view of the contracts between the plaintiff and the express company, and the express company and the defendant, the defendant was not liable. It is quite unnecessary to refer to the numerous decisions in the state courts on similar or analogous cases. The case of *Baltimore & Ohio Railway Company v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, is decisive, and is controlling as authority in this court. In that case Voigt had made a contract with the express company by which, as a condition of his employment as an express messenger, he agreed to assume the risk of all accidents and injuries that he might sustain in the course of his employment by negligence or otherwise, and to indemnify and hold the express company harmless for all claims that might be made against it arising from any claim or recovery on his part for the damages sustained by him by reason of any injury whatever resulting from negligence or otherwise, and to release to the company operating the transportation line upon which he might be injured all claims, demands, and causes of action arising out of any such injury, and to ratify all agreements made by the express company with any transportation line, in which the express company had agreed or might agree that its employes should have no cause of action for injuries sustained in the course of their employment upon the line of the transportation company. The express company had made a contract with the *Baltimore & Ohio Railway Company* substantially like that between the express company and the defendant in the present case. While in an express car upon one of the trains of the railroad company, engaged in performing his duties as express messenger, Voigt was injured by a collision between the train to which his car was attached and another train of the railroad, caused by the negligence of the employes of the railroad company. The court held that Voigt, occupying the express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger; that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him; and that such a contract did not contravene public policy. The case was presented to the court upon a certificate of a division of opinion between the judges in the court below, and although, in answering the questions certified, it was not necessary for the court to decide whether the railroad company was liable to Voigt under the circumstances, the answer necessarily enforced that conclusion. The opinion proceeds upon the reasoning that Voigt's only right to be on the train of the railroad company was that created by the terms of his contract with the express company; that the railroad company did not assume towards him the obligations of a common carrier to a passenger, but only assumed those of a private carrier; and

that a private carrier is free to contract as to the conditions of the carriage, and no reason of public policy forbidding a common carrier from stipulating against its own negligence applies to such a contract. It is said that the contract in that case in terms included among the risks assumed by the express messenger accidents and injuries occasioned by negligence, while the contract here does not; and it is urged that, in the absence of such a stipulation, the contract should be construed not to extend to that class of accidents or injuries. This contention would doubtless be sound if the parties contracting had not been treating on terms of equality, as is the case between a common carrier and a shipper of goods or a passenger. But when this is not the case, and no rule of public policy forbids a contract by which one of the parties is exonerated from any risk arising from negligence, there is no reason why the ordinary rules of construction should not obtain, and the contract be given effect according to the intention of the parties. The observations of this court in *McCormick v. Shippy*, 124 Fed. 48, 59 C. C. A. 568, are appropriate:

"There is no question of public policy involved in this contract, as in the case of a common carrier. It is well settled that the parties in such a case have the right to provide by apt language against liability for negligence. * * * The clause must be interpreted to include loss through negligence, because for loss not arising from negligence he would not be liable."

So, in this case, the defendant, being merely a private carrier in respect to the plaintiff, owed him merely the duty of ordinary care, and could only have been liable to him for injuries arising from negligence, and the release made in advance must have contemplated accidents and injuries of that character. In *Bates v. Railroad Company*, 147 Mass. 255, 17 N. E. 633, the agreement between the express messenger and the express company was that the former "will assume all risk, and accidents and injuries resulting therefrom, and will hold said company free and discharged from all claims and demands in any way growing out of any injuries received by him while so riding." In *Hosmer v. Railroad Company*, 156 Mass. 506, 31 N. E. 652, the plaintiff was an expressman, and had agreed that, in consideration of the company's allowing him to ride in baggage cars on its trains, he would "assume all risk of accidents and injuries resulting therefrom." In both cases the language of the contract, although not expressly including injuries or accidents by negligence, was construed to relieve the railroad company from liability for injuries by negligence. In *Chicago, etc., R. Co. v. Wallace*, 66 Fed. 506, 14 C. C. A. 257, 24 U. S. App. 589, 30 L. R. A. 161, the language of the contract was as general as it is in the present case, and the railroad company was exonerated from liability.

It is also urged for the plaintiff that the contract did not release the defendant in the absence of evidence tending to show that the plaintiff had any knowledge or information of the provisions of the contract between it and the express company. Upon this point the language of Judge Earl in *Blair v. Erie Railway Company*, 66 N. Y. 313, 23 Am. Rep. 55, commends itself to our approval:

"He was not a passenger upon the train. He was upon the train in an express car, engaged in the separate business of the express company. He was

in that car lawfully, only as he was there under the agreement. He knew that he had not paid any fare, and that he had made no contract for his carriage. He must have known that he was there under some arrangement between the express company and the defendant, and that whatever right he had to be transported was as the servant of the express company. He was there, not in his own right, but in the right of the express company, and hence he was bound by the arrangement that company made for him."

Moreover, the general language of the release extended to every contract, existing or future, between the express company and any corporation operating a transportation line upon or by which the plaintiff might encounter the risk of accident or injury.

The ruling of the court below in directing a verdict was correct, and the judgment is affirmed.

BATTIN v. NORTHWESTERN MUT. LIFE INS. CO.

(Circuit Court of Appeals, Third Circuit. June 13, 1904.)

No. 41.

1. INSURANCE—ACTION ON POLICY—PLEADING.

In an action on a life policy, an allegation that defendant has, in its dealings with assured, now deceased, treated the policy as in force, without stating the facts showing the nature of such dealings and treatment, was not sufficiently specific.

2. SAME—CONDITIONS—PREMIUM—NONPAYMENT—WAIVER.

Where a declaration on a policy of life insurance alleged that on August 20, 1901, when a certain premium of \$146.80 became due and payable, insured paid on account thereof the sum of \$38.75, which was accepted by defendant as a payment on account of said premium, and that a credit was given to assured for the unpaid balance, it sufficiently alleged a waiver of a provision of the policy that, if the premium shall not be paid at or before the time mentioned for payment thereof, the policy shall cease, etc.

3. SAME.

Where in an action on a policy the declaration alleged that, on the maturity of a premium, insured paid and defendant accepted a certain amount as a credit thereon, and extended credit to insured for the unpaid balance, but did not allege that any premium whatever was actually paid on that day, a provision of the policy that no premiums after the first should be considered paid unless a receipt should be given therefor signed by the president or secretary of the company, and that the payment and receipt of any premium less than a full annual premium should not have the effect to continue the policy longer than three months in case of a quarterly payment, or six months in case of a semiannual payment, was not involved.

In Error to the Circuit Court of the United States for the Middle District of Pennsylvania.

Joseph A. Culbert, for plaintiff in error.

E. N. Willard, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. Plaintiff's "statement of claim" in the court below was as follows:

"The plaintiff in the above case, Mary F. Battin, claims of the defendant, the Northwestern Mutual Life Insurance Company, the sum of five thousand

dollars (\$5,000), with interest from the 8th day of April, which sum is now justly due and payable to the plaintiff by the defendant, upon the cause of action whereof the following is a statement:

"On or about the 20th day of August, 1894, William J. Battin, plaintiff's husband, applied for and received a policy of insurance on his life in favor of the plaintiff, in the defendant company, in the sum of five thousand dollars (\$5,000), a copy of the said policy being hereunto annexed and made a part hereof, and marked 'Exhibit A.' The consideration for the issuance of the said policy of insurance by the defendant company was the payment to them of the sum of one hundred and forty-six dollars and eighty cents (\$146.80) on the same day and annually thereafter, and the said policy was conditioned that on the death of the said William J. Battin the said defendant company would pay to the said plaintiff the sum of five thousand dollars (\$5,000).

"And the plaintiff further avers that the said annual payments of one hundred and forty-six dollars and eighty cents (\$146.80) aforesaid, being the premium on the said policy, were paid to the defendant company as the same fell due. On August 20, 1901, when the said premium of one hundred and forty-six dollars and eighty cents (\$146.80) became due and payable, the said William J. Battin paid on account thereof the sum of thirty-eight dollars and seventy-five cents (\$38.75), which was accepted by the defendant company as a payment on account of the said premium, and a credit was given to the said William J. Battin for the unpaid balance. The said premium of thirty-eight dollars and seventy-five cents (\$38.75) has been and is still retained by the defendant, and since the payment thereof, and as late as December 20, 1901, the said defendant has in its dealings with the said William J. Battin, now deceased, treated the said policy as in force.

"On or about the 28th day of January, 1902, the said William J. Battin departed this life. On or about the 4th day of February, 1902, due proof of the death of the said William J. Battin, in accordance with the terms of the said policy, was made to the said defendant company, and demand was then and there made upon it to pay the said five thousand dollars (\$5,000) due under said policy to the beneficiary named therein, Mary F. Battin, the plaintiff in this case, less, however, the sum of one hundred and ninety-five dollars (\$195), with interest thereon from June 18, 1901, the said amount being a loan from the defendant to the said William J. Battin upon the security of said policy. And the said defendant then and there refused to pay the said sum demanded unto the plaintiff, and has continued down to the present day to refuse and to neglect to pay the said sum, or any part thereof, unto the plaintiff. The plaintiff having repaid to the defendant the said sum of one hundred and ninety-five dollars (\$195), with interest from June 18, 1901, and having received from the defendant the said policy of insurance, now brings this her suit for the full amount of the said policy, with interest as aforesaid, having first demanded of defendant the payment of said \$5,000, which the defendant refused and continues to refuse to make."

The policy sued upon contained, inter alia, the following condition:

"1st. If the said premium shall not be paid at or before the time within mentioned for the payment thereof, then, and in every such case this policy shall cease and determine; and no premium after the first, hereby acknowledged, shall be considered paid unless a receipt shall be given therefor, signed by the President or Secretary, and the payment and receipt of any premium less than a full annual shall not have the effect to continue this policy in force longer than three months in case of a quarterly payment, or six months in case of a semi-annual payment."

The defendant demurred to the statement of claim. Of the causes of demurrer assigned, two only are substantial, viz.:

"(1) Having admitted the nonpayment of \$146.80, which was due on the 20th day of August, 1901, the declaration sets forth no waiver of the condition above quoted, and therefore the declaration shows that the policy was null and void at the time of the death of the said William J. Battin, which, it is alleged in the declaration, occurred on the 28th day of January, 1902.

"(2) The declaration fails to state what credit, if any, was given; for how long a time; or the character of the dealings between the plaintiff and the defendant creating the alleged extension of the credit or waiver. And it also fails to state how or in what manner the said defendant treated the said policy as in force as late as December 20, 1901, and, if it was treated as in force on that date, there is no allegation that it was in force at the time of the death of William J. Battin, to wit, on the 28th day of January, 1902."

The Circuit Court entered judgment for the defendant upon the demurrer, and thereupon the plaintiff sued out this writ of error.

We think the learned judge of the court below was right in holding that the allegation that "the said defendant has, in its dealings with the said William J. Battin, now deceased, treated the said policy as in force," was too vague and general. Whether the policy was or was not in force was a question of law, and the facts necessary to be known for its proper determination should have been explicitly stated. Whether the defendant's dealings with Battin, and its treatment of the policy, were such as to maintain the policy in force, could not be decided without information of what those dealings and treatment had been, and that information this averment did not supply. Therefore it was not, when separately considered, sufficient.

But we cannot agree that, "having admitted the nonpayment of \$146.80, which was due on the 20th day of August, 1901, the declaration sets forth no waiver of the condition above quoted." What the declaration does set forth is:

"On August 20, 1901, when the said premium of \$146.80 became due and payable, the said William J. Battin paid on account thereof the sum of \$38.75, which was accepted by the defendant company as a payment on account of the said premium, and a credit was given to the said William J. Battin for the unpaid balance."

This statement is distinct and definite, and therefore, as to it, the only question is whether the acceptance by the defendant of a payment on account of the annual premium due August 20, 1901, amounted to a waiver of the condition that a failure to pay any premium at or before the time mentioned in the policy for the payment thereof would incur a forfeiture of the policy. We are of opinion that it did. It clearly indicated an election by the company to waive the forfeiture, and Battin was entitled to rely upon that election. *Insurance Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841. This waiver was not repugnant to the written agreement; it was but the exercise of an option which the written agreement left to the company; "and whether it did exercise such option or not was a fact provable by parol evidence, as well as by writing, for the obvious reason that it could be done without writing." "Forfeitures are not favored in the law. They are often the cause of great oppression and injustice. And where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture upon such compensation being made. It is true we held in *Statham's Case*, 93 U. S. 24 [23 L. Ed. 789], that in life insurance time of payment is material, and cannot be extended by the courts against the assent of the company. But where such assent is given, the court should be liberal in construing the transaction in favor of avoiding a forfeiture." *Insurance Co. v. Norton*, 96 U. S. 240-242, 24 L. Ed. 689. "Any agreement, declaration, or course of action on the

part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract." Insurance Co. v. Eggleston, 96 U. S. 577, 24 L. Ed. 841.

The condition in question also contained declarations that no premiums after the first should be considered paid unless a receipt should be given therefor signed by the president or secretary, and that the payment and receipt of any premium less than a full annual should not have the effect to continue the policy longer than three months in case of a quarterly payment, or six months in case of a semiannual payment. But in this case these declarations are not involved, for it has not been alleged that any premium whatever was actually paid on August 20, 1901, but only that a payment on account of the annual premium then due was made.

The statement of claim did not set forth the evidence to be adduced in its support, and it should not have done so. It did disclose the condition we have discussed, and clearly and succinctly stated facts which, notwithstanding that condition, would, if proved, entitle the plaintiff to recover, and this is all that was requisite. Therefore the judgment of the circuit court is reversed, with costs, and the cause will be remanded to that court with direction to overrule the demurrer, but with leave to the defendant to plead over within such time as that court shall prescribe.

LADEN et al. v. MECK et al.

(Circuit Court of Appeals, Sixth Circuit. July 1, 1904.)

No. 1,275.

1. REMOVAL OF CAUSES—PETITION—ALLEGATION OF CITIZENSHIP.

An allegation in a petition for removal, merely, that certain of the petitioners are "residents" of a state other than that of which plaintiff is a citizen, and that none of the petitioners are "residents and citizens" of the state whereof the plaintiff is a citizen, is insufficient to give the federal court jurisdiction.

2. SAME—SEPARABLE CONTROVERSY.

To authorize a removal by one or more of the defendants on the ground that there is a separable controversy which is "wholly between citizens of different states," it must appear from the petition that each party to the controversy is a citizen of some state.

3. SAME.

The question whether there is a separable controversy in a suit, which will authorize its removal, must be determined by the state of the pleadings and the record at the time of filing the petition for removal.

¶ 1. Averments of citizenship to show jurisdiction of federal courts, see note to Shipp v. Williams, 10 C. C. A. 261.

See Removal of Causes, vol. 42, Cent. Dig. §§ 170, 173.

¶ 2. Separable controversy as ground for removal of cause to federal courts, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

This is a suit originally brought in the court of common pleas for Wyandotte county, Ohio, by Meek against the other appellees and the appellants, for the specific performance of a contract in writing for the sale to him by the said John A. Mathews and Rumina E., Anna, and David Ayres of a parcel of land in Upper Sandusky, in said county. The petition alleged the contract of sale, the performance of the contract by the petitioner, the refusal of the vendors to make the deed stipulated for in the contract, and the tender of the purchase money, which he brought into court. The petition represented that Ida Hurst Mathews was the wife of John A. Mathews, and claimed some interest in the premises, and that the other defendants asserted claims by way of assignments of parts of the purchase money, or, as in the case of the defendants Laden, by liens acquired by attachment, or, as in the case of other defendants, by liens upon the purchase money. The case was removed into the Circuit Court of the United States upon the petition of the defendants John A. and Ida Hurst Mathews and Rumina E., Anna, and David Ayres. A motion was made by the defendant Fraser to remand the case to the state court upon the grounds that the petition for removal did not show sufficient facts to give jurisdiction to the Circuit Court of the United States, and because there was no separable controversy. The motion was denied. Pleadings were filed by the defendants, and proofs were taken before the master, whose report was confirmed by the decree of the court. The decree, which was for the enforcement of the contract, declared the rights of the various parties, and, among other things, denied the claim of the defendants Laden. These last-named parties thereupon appealed to this court.

Foran, McTighe & Gage, for appellants.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge, having made the preceding statement, delivered the opinion of the court.

When this appeal came on for hearing, it was observed that a question concerning the jurisdiction of the court below was presented by the record, but we consented to pass it and hear the arguments of counsel upon the merits. Upon consideration we are convinced that the removal into the Circuit Court was unauthorized, and that we cannot consider its decree upon the merits.

In view of the facts that the only concern of the removing defendants was with the question whether their contract with the complainant should be specifically enforced, while the other defendants were concerned with questions relating to the disposition of the purchase money, it may be that the removing defendants had a separable controversy with the complainant. We do not, however, decide that question. The petition did not in terms claim that there was a separable controversy. In respect to the citizenship of the parties the petition alleged "that, at the time said suit was brought, the plaintiff was, and still is, a resident and citizen of the state of Ohio, and that the defendants John A. Mathews and Ida Hurst Mathews were, and still are, residents and citizens of the state of Michigan; that the defendants Rumina Ayres, David Ayres, and Anna Ayres were, and still are, residents of the state of Illinois, and that none of your petitioners herein are residents and citizens of the state of Ohio." The difficulty is that the citizenship of the defendants Ayres is not alleged. It appears only that they are residents of Illinois, and are not citizens of Ohio. It is not shown that

they are citizens of any other state, and, for aught that appears, they may have been citizens of the District of Columbia or of some territory, in which case the suit would not have been removable. *Hepburn v. Ellzey*, 2 Cranch, 445, 2 L. Ed. 332; *New Orleans v. Winter*, 1 Wheat. 91, 4 L. Ed. 44; *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825; *Hoove v. Jamieson*, 166 U. S. 395, 17 Sup. Ct. 596, 41 L. Ed. 1049. Or, indeed, they may have been aliens. While the statute provides for the removal of some cases by aliens, in the instance of separable controversies the controversy must be "wholly between citizens of different states." It is supposed, in *Dillon on Removals by Black*, § 84, that "the failure to extend the right of removal in such a case is a *casus omissus*." But Chief Justice Waite, in *King v. Cornell*, 106 U. S. 395, 1 Sup. Ct. 312, 27 L. Ed. 60, demonstrates that the omission was intentional. At all events, it is clear that the parties to the separable controversy must all be citizens of states, in order to found the right of removal from the state court. And the members of each of the respective parties to that controversy must all be citizens of different states from those of the members of the opposite party. *Removal Cases*, 100 U. S. 457, 25 L. Ed. 593; *Fraser v. Jennison*, 106 U. S. 191, 1 Sup. Ct. 171, 27 L. Ed. 131. And the question whether there is a separable controversy must be determined by the state of the pleadings and the record at the time of filing the petition for removal, and not by any subsequent proceedings which may be had in the case. *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514; *Wilson v. Oswego Township*, 151 U. S. 56, 66, 14 Sup. Ct. 259, 38 L. Ed. 70.

It follows that the removal of this case from the state court was unauthorized. The decree of the court below must be reversed, and the cause remanded, with instructions to remand it to the state court from which it was removed; the costs of both the circuit and this court to be paid by the removing defendants.

In re SPITZER et al.

(Circuit Court of Appeals, Second Circuit. May 17, 1904.)

No. 197.

1. BANKRUPTCY—ACTION OF TROVER AGAINST RECEIVER—JURISDICTION OF STATE COURT.

A state court has jurisdiction of an action of trover brought against a trustee or receiver in bankruptcy to recover the value of property alleged to have been converted by him as a part of the assets of the estate.

Petition to Review the Order of the District Court of the United States for the Southern District of New York.

This cause comes here upon petition for review of an order of the District Court, Southern District of New York, restraining the petitioner from prosecuting certain actions in the state court against Louis E. Binsse, who was duly appointed receiver of the assets of the bankrupt.

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 414.

M. D. Steuer, for petitioner.

S. J. Rawak, for respondent.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The date of adjudication in bankruptcy does not appear, but Binsse was appointed receiver on November 25, 1903. Prior to his bankruptcy Spitzer assigned certain of his accounts receivable, amounting to about \$20,000, to Rosenberg, for a valuable consideration. Rosenberg paid 80 per cent. of the face value of said accounts, less certain discounts in cash, and agreed that any amount in excess of that sum which he might collect—after retaining 2 per cent. a month—should eventually be paid over to Spitzer. Whether or not Rosenberg has collected from Spitzer's debtors 80 per cent. of the total indebtedness besides the discounts and the 2 per cent. does not appear. All that the receiver avers in his petition is that 20 per cent. of the total amount of said accounts (less the deductions) is an "indemnity fund, * * * part and parcel of the assets of the estate," and that Rosenberg is indebted to the estate of the bankrupt in a sum exceeding \$2,500 on account of said assignment. It is not disputed that the assignment of the several choses in action to Rosenberg was a perfectly proper one, made in entire good faith; nor is it claimed that it is obnoxious to any provision of the bankrupt act. Whatever sum might be due or might eventually become due from Rosenberg to the bankrupt on account of the purchase price which he had agreed to pay, and of which he had paid 80 per cent. only, there can be no doubt that the property and title to each and every one of the choses in action specified in the assignment passed to Rosenberg. Rosenberg was examined as a witness in this proceeding, told of the assignment to him, and subsequently gave the receiver a transcript from his ledger showing precisely what accounts he had purchased from Spitzer. The record before us indicates that there were outstanding accounts of the bankrupt's debtors which were not transferred to Rosenberg. The receiver has collected various sums of money from several debtors of the bankrupts. Rosenberg claims that among them are items which were included in the assignment to himself, and he has brought actions against the receiver in the state court to recover damages for their conversion. The order sought to be reviewed restrained Rosenberg from further prosecution of these actions.

The sole question presented upon this appeal, viz., whether the state court has jurisdiction of these actions of trover, has already been disposed of in this court. In *Re Russell & Birkett*, 101 Fed. 248, 41 C. C. A. 323, a trustee in bankruptcy had taken into his custody certain property in the possession of the bankrupts, which it was claimed belonged to the Machinists' Supply Company. That company brought an action of replevin against the trustee in the state court to recover possession of such property, and the United States District Court enjoined the further prosecution of that action. We held that the action for replevin was properly enjoined, because it was one for the seizure of property in the custody of the bankruptcy court, which, upon the principle decided in *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749, is protected

from any interference by state process; but also held that: "We should entertain no doubt that the Machinists' Supply Company was entitled to bring an action of trespass or trover for the recovery of the value of the property against the trustee in the state court." And in *Re Kanter & Cohen*, 121 Fed. 984, 58 C. C. A. 260, which was an action of trover, we reaffirmed our decision in the *Russell & Birkett Case*.

The order of the District Court is therefore reversed, with costs.

In re FREDERICK L. GRANT SHOE CO.

(Circuit Court of Appeals, Second Circuit. April 21, 1904.)

No. 139.

1. BANKRUPTCY—PROVABLE CLAIMS—BREACH OF CONTRACT.

A claim for damages for breach of contract is one founded "upon a contract," within the meaning of Bankr. Act July 1, 1898, c. 541, § 63a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447], and is provable in bankruptcy.

2. SAME—INVOLUNTARY PETITIONERS—CREDITOR HAVING UNLIQUIDATED CLAIM.

A creditor having a provable claim, although the amount is unliquidated, may file a petition in bankruptcy against his debtor.

In Error to the District Court of the United States for the Western District of New York.

For opinion below, see 125 Fed. 576.

P. M. French, for petitioner.

Hiram Wood, for respondent.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The issues herein are raised by the petition of the alleged bankrupt to review the order of the United States District Court for the Western District of New York denying its motion to dismiss proceedings in involuntary bankruptcy. The questions of law presented appear from the following allegations of the petitioning creditor and of the alleged bankrupt: The alleged bankrupt is a corporation engaged in the manufacture of shoes. It owes debts to the amount of \$1,000 and over, and is insolvent, and has less than 12 creditors. It sold to the petitioning creditor shoes under an express warranty, which warranty was broken, to the damage of petitioner in the sum of \$3,732.80. Within four months prior to the filing of this petition it committed an act of bankruptcy, by assigning all its property to a single creditor, under an agreement that said creditor should, out of said property, reimburse itself and all other creditors except this petitioning creditor. The alleged bankrupt denied its insolvency and the alleged breach of warranty, and demanded a jury trial. It also moved to dismiss the petition on the ground that the damages for the alleged breach of warranty were un-

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 479.
130 F.—56

liquidated, and therefore were not a provable claim against it. The District Court denied the motion to dismiss, and directed that the claim of the petitioning creditor be liquidated at the jury trial demanded by the alleged bankrupt.

Section 59b of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445]) provides for the filing of petitions in involuntary bankruptcy by "creditors who have provable claims." Section 63 of said act (30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]) includes among the "debts of the bankrupt which may be proved and allowed against his estate" those "founded upon an open account or upon a contract express or implied." In the case at bar the petitioning creditor alleges that his claim is founded upon an express contract. The court below has found that the claim, although unliquidated, is a provable one, and, under the provisions of section 63b of said act (30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), has provided for its liquidation. The effect of the denial of the motion to dismiss is only to preserve and safeguard the rights of the parties until the petitioning creditor can have his day in court at the jury trial demanded by the alleged bankrupt, in order that the validity and amount of his claim may be determined. To hold, as is contended by the alleged bankrupt, that a claim is not provable because the amount of the claim itself is not determinable, or its validity is disputed, would defeat the purpose of the involuntary provisions of the bankrupt act. Thus, in the case at bar, if the petition were dismissed, it would only be necessary for the alleged bankrupt to delay such proceedings as might be brought for the liquidation of said claim until after the expiration of the time for bringing involuntary proceedings, and then secure a dismissal of the petition on the ground that said petition was not seasonably brought. In *In re Stern*, 116 Fed. 604, 54 C. C. A. 60, we held, in a case where certain claims for breaches of contract were undisputed, that the mere fact that the damages therefrom were to accrue in the future did not prevent them from being provable. In disposing of the case at bar, it is unnecessary to add anything to what was there determined. It appears from the petition that this claim is for a debt founded upon a contract, and is therefore a provable claim.

The order of the District Court is affirmed, with costs.

BERGER et al. v. WILD.

(Circuit Court of Appeals, Third Circuit. June 27, 1904.)

No. 58.

1. MALICIOUS PROSECUTION—EVIDENCE—MALICE—PROBABLE CAUSE.

Defendant's superintendent, on being led to apprehend that plaintiff had tampered with certain accounts in her charge, sought the assistance of another of defendant's superintendents; and they, on examining the books, found what they supposed to be a considerable deficit. Defendant company was then notified, and sent a supervising inspector, who, after making an examination, confirmed the result previously arrived at, when, by defendant's direction, the superintendents submitted the books and papers

to its counsel, and he, after examining them, advised plaintiff's prosecution. *Held*, that plaintiff's acquittal and proof of such facts were insufficient to establish a cause of action for malicious prosecution; such evidence being insufficient to establish either malice or want of probable cause.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

W. K. Jennings, for plaintiffs in error.

S. S. Robertson, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and KIRKPATRICK, District Judge.

DALLAS, Circuit Judge. This writ of error has brought up the record in an action for malicious prosecution. The plaintiffs in error, who were defendants below, requested the learned trial judge to give binding instructions in their favor, and the refusal of that request is here assigned for error.

A jury should never be allowed to render a verdict unsupported by evidence, and the question which we deem to be controlling in this case is whether there was any evidence from which lack of probable cause for the prosecution complained of, and the existence of malice in its institution, could be rationally deduced. The record discloses no such evidence, and, indeed, the pertinent facts are not disputed. Mr. Berger was a local superintendent of the Metropolitan Insurance Company. The plaintiff below was also employed by that company, in a clerical capacity. Mr. Berger's attention was called to a transaction which led him to apprehend that she had tampered with accounts in her charge. He sought the assistance of another superintendent of the company, Mr. Thornton, and they, upon examining the books, found, as they supposed, a considerable deficit. Mr. Berger notified the company, and it sent a supervising inspector, Mr. Gaslein, who also made an examination, and confirmed the result which had been arrived at by Mr. Berger and Mr. Thornton. Thereupon, by direction of the insurance company, Mr. Berger and Mr. Gaslein submitted the books and papers to its counsel, and he, after examining them, advised the prosecution. Surely such conduct could not warrant an inference either of malice or of want of probable cause; and, on the other hand, the fact that the defendant sought, obtained, and acted upon the advice of counsel, who for a long time had been employed by the company, raised a strong presumption—practically a conclusive one—that there was probable cause, and that the prosecution was initiated in good faith and without malice.

The defendant in error was mistakenly charged with a serious offense, and, no doubt, she greatly suffered in consequence; but she utterly failed to make out a case of malicious prosecution, and therefore the jury should have been told that its verdict must be for the defendants.

The judgment of the Circuit Court is reversed, with costs.

NOTE BY THE COURT. This judgment had been determined upon prior to the death of the late Judge KIRKPATRICK, and was concurred in by him.

CHICAGO TERMINAL TRANSFER R. CO. v. BOMBERGER.**(Circuit Court of Appeals, Seventh Circuit. May 10, 1904.)****No. 1,058.****1. ERROR—ASSIGNMENTS OF ERROR.**

An assignment of error that the verdict is contrary to law is too general to be considered.

2. SAME—SETTING OUT WRIT FOR DELAY—DAMAGES ON AFFIRMANCE.

Where it is apparent, from the fact that the record presents no question for decision by the appellate court, that a writ of error was sued out for delay, the Circuit Court of Appeals will award damages on affirmance, as authorized by rule 28 (90 Fed. cxix, 31 C. C. A. cxix).

In Error to the Circuit Court of the United States for the District of Indiana.

Jesse B. Barton and John B. Peterson, for plaintiff in error.

Robert W. McBride, for defendant in error.

Before JENKINS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

PER CURIAM. This is a writ of error to review a judgment in an action for personal injuries. The errors assigned are nine in number. The 1st, 2d, 3d, 5th, 6th, 7th, 8th, and 9th assignments challenge the action of the court below upon several grounds, and are dependent upon the evidence submitted at the trial, but that evidence is not preserved by any bill of exception, and therefore they cannot be considered. The fourth assignment, that the verdict of the jury is contrary to law, is altogether too general, and nothing preserved in the record enables us to consider it.

The writ of error, as we cannot but think, was sued out for purposes of delay. It is not otherwise conceivable that the writ of error should be sued out, when the plaintiff in error must have known that no question could, upon the record, be presented to the court for its decision. We are not disposed to encourage frivolous appeals. It is a case calling for the application of the second paragraph of rule 28 (90 Fed. cxix, 31 C. C. A. cxix), and the judgment is affirmed, with 10 per cent. damages upon the amount of the judgment, in addition to interest. Affirmed.

¶ 2. See Costs, vol. 13, Cent. Dig. §§ 983, 986, 987.

UNITED STATES v. AH CHUNG.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1904.)

No. 1,022.

1. ALIENS—CHINESE—EXCLUSION—RESIDENCE—PRESUMPTIONS.

In proceedings for the deportation of a Chinaman, the fact that he was permitted to live in the United States for 19 years without molestation was insufficient to raise a presumption that his arrival antedated the date on which the exclusion act (Act May 6, 1882, c. 126, 22 Stat. 58, as amended by Act July 5, 1884, c. 220, 23 Stat. 115 [U. S. Comp. St. 1901, p. 1305]), went into effect, he never having registered as a laborer or merchant as required by law.

Appeal from the District Court of the United States for the Northern Division of the District of Washington.

Jesse A. Frye, U. S. Atty., for appellant.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. Accepting the appellee's testimony as true, he came to the United States from China prior to Chinese Exclusion Act May 6, 1882, c. 126, 22 Stat. 58, and, of course, prior to the similar act of 1884 (Act July 5, 1884, c. 220, 23 Stat. 115 [U. S. Comp. St. 1901, p. 1305]), and subsequent acts of Congress upon the same subject, although he did not give the exact date of his arrival at San Francisco. He was then 12 years old, and at once engaged in manual labor. He claims to have since become a merchant. He has remained in this country continuously, but never registered either as a laborer or as a merchant under the laws of Congress in respect to that matter. The court below held (reversing the action of the commissioner) that, the appellee "having been permitted to live in this country for nineteen years without molestation, there is a reasonable presumption that his arrival antedated the exclusion act, or at least the date on which it went into effect, rather than that his entrance was clandestine." In cases of this character there is no such presumption. *United States v. Wong Dep Ken* (D. C.) 57 Fed. 206; *United States v. Lung Hong* (D. C.) 105 Fed. 188; *United States v. Chun Hoy*, 111 Fed. 899, 50 C. C. A. 57; *United States v. Chu Chee*, 93 Fed. 797, 35 C. C. A. 613; *United States v. Yong Yew* (D. C.) 83 Fed. 832; *Li Sing v. United States*, 180 U. S. 486, 21 Sup. Ct. 449, 45 L. Ed. 634.

The judgment must be reversed, and the cause remanded to the court below, with directions to affirm the judgment of the commissioner directing the deportation of the appellee to China.

¶ 1. Citizenship of the Chinese, see notes to *Gee Fook Sing v. U. S.*, 1 C. C. A. 212, and *Lee Sing Far v. Same*, 35 C. C. A. 332.

LOWRIE v. H. A. MELDRUM CO.

(Circuit Court of Appeals, Second Circuit. April 25, 1904.)

No. 154.

1. PATENTS—INFRINGEMENT—GARMENT FASTENER.

The Steel patent, No. 652,407, for a garment fastener, designed to hold down the skirt band and belt so as to give the waist a downward curve in front, and which, as described, consists of a combination of hooks to hold the band and belt, with a shank fitted to be attached to the fastening devices of a corset, was not anticipated, and discloses invention, but is not infringed by a device otherwise similar, but which is fastened to the fabric of the corset by means of a safety pin; such device being substantially shown in the prior art.

Appeal from the Circuit Court of the United States for the Western District of New York.

This cause comes here on appeal from a decree adjudicating the validity and infringement by defendant of patent No. 652,407, granted June 26, 1900, to Anna M. Steel for a garment fastener. For opinion below, see 124 Fed. 761.

Harry C. Kennedy and Horace Pettitt, for appellant.

F. F. Church, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The record shows that for some years prior to the date of the patent in suit a host of would-be inventors had been directing their efforts toward the production of a practicable device for firmly fastening garments together at the waist. The earlier devices were generally designed chiefly to support the lower garment. Later such devices were also adapted to depress alike the upper and lower garments so as to give the required shape. The patentee herein appears to have constructed a device superior to those which had preceded it, and one which has achieved great commercial success. It is "adapted for the purpose of holding down the front of the skirt and the belt of women's garments; it having for its objects to prevent the skirt from 'hiking,' and also to produce a downward curve or slope of the skirt band and belt toward the front." It consists "essentially of a garment fastener composed of a shank provided with means for its attachment to the fastening devices of the corset, and provided at its upper end with hooks located in position to engage with the upper edge of the skirt band, and with hooks located above the plane of the first hooks, and adapted to engage with the upper edge of the belt."

The claims in suit are the following:

"(1) A garment fastener provided with means for its attachment to the fastening devices of a corset, and with two outwardly and downwardly extending hooks, each in a different plane, the one being adapted to engage with the upper edge of the skirt band, and the other with the upper edge of the belt, substantially as described."

"(3) A garment fastener comprising a shank having means for its attachment to a corset, and provided with a row of outwardly and downwardly extending hooks, projecting from lateral extensions on said shank, and with a second

row of outwardly and downwardly extending hooks in a different plane from that of the first row, substantially as and for the purpose specified."

The elements of this combination were old. Shanks provided with means, etc., said means being specifically described as "a series of longitudinal slots or other suitable sockets for the purpose of adapting the shank to be attached to one of the usual fastening studs in corsets," were shown in prior patents to Towson and Carr & Wolf, and on reference to the latter patent a claim by this patentee for such means was rejected in the Patent Office. Hooks in different planes for engaging respectively the belt and shirt waist were shown and described in the Dunbar patent of 1899. And Sanders, in his patent of 1899, had shown and described a device to keep men's belts in place, which comprised a combination of elongated shank, and means capable of attachment to a woman's corset or corset clasp, with hooks in different places at the upper end of the shank, adapted to keep a skirt band and belt in position. But when, at the close of the nineteenth century, the decrees of fashion transformed the circular waist of nature, characteristic of that period, into the conventional downwardly curved slope in front, in the similitude of a girdle, or the pointed waist of the Elizabethan period, a new problem was presented to the designers of garment clasps. They must no longer fasten and support the garments at the waist line of nature, and in a natural position. They must now force the meeting edges of skirt band and belt, and incidentally of the shirt waist, down below the true waist, and "draw and hold the front of the skirt downward" by an attachment so firmly fastened as to be adapted to the anatomy of a woman having a prominent abdomen, and to prevent the skirt and belt from rising above it. The patentee herein met the exigencies of the situation by providing in compact form a combination of the old devices, but now adapted to grip with the corset stud, and to engage the meeting garments and hold them down in suitable relative positions. It appears that in so doing she exercised in a humble way, and to a limited extent, the faculty of invention. She certainly succeeded in producing a practical fastener, superior to all the devices of the prior art. We conclude that the claims in suit of her patent are valid, so far as they cover the precise device "substantially as described."

The defendant has attempted to meet the demands of the new fashion by providing a fastener which should be so within the disclosures of the prior art, and without the limitations of the patented fastener, as not to infringe. It has constructed a shank provided with the outwardly and downwardly extending hooks, in different planes, of the patent in suit. But it has not provided any means for attachment to the fastening devices or stud of the corset. Instead, it has equipped the lower end of the shank with an ordinary safety pin, for the purpose of fastening the device to the fabric of the corset, and adapted to engage only with such fabric. That this safety pin is not "a means for attachment to the fastening devices of a corset" is proved by the admission of complainant's witness Mrs. Holch, a dealer in such articles, that she has seen a great many of defendant's devices in use; that all of them which she has seen have been pinned to the fabric of the corset and skirts; that, while it would be possible to engage the

corset stud with the safety pin, pinning through the fabric is the quickest way, by the self-evident fact that such fastening would not be firm, stable, or sufficiently strong, if accomplished by engagement of safety pin and stud, and finally by the fact that such engagement would not be practicable, because the long distance between the corset studs would preclude the possibility of practical adjustment. The sole question, then, is as to infringement of the third claim by broadening the same so as to include a safety pin, as the equivalent of the "means for attachment to a corset * * * substantially as described." But the effect of thus broadening said claim is to raise the question of patentable novelty, in view of design patent No. 25,795, granted in 1896 to E. B. Bunnell for a "garment supporting buckle or pin such as may be used to retain in place a lady's shirt waist, skirt, and belt." The specifications describe and the drawings show a body portion or plate provided with an upper hook and two arms extending downwardly from its ends; said arms consisting of spring clasps, the lower portions of which are adapted to grasp and hold down a shirt waist in place. If the spring be omitted, the sole function of the clasps would be that of downwardly extending hooks to keep the skirt from rising up, and to produce a downward curve of said band. The center of the plate is provided with a safety pin for attachment to the fabric of the corset or other garment. The single material difference between this fastener and that of defendant is that in the latter the band is lengthened, and the safety pin is at the lower end instead of in the center of the band. But this change is a mere mechanical adaptation to the later requirement of fashion, that the skirt band should be kept down, instead of held up, as formerly. In view of this complete disclosure of the means employed by defendant, the scope of the third claim cannot be enlarged to cover defendant's device without destroying its validity. The admissions of complainant's expert as to the Bunnell patent confirm this view. The argument of complainant's counsel that Bunnell does not anticipate, because the statement of functions in the specifications is not a proper subject for consideration, is immaterial, because such statement, in connection with the drawings, constitutes a complete disclosure of defendant's construction in a printed publication prior to the patent in suit.

The decree of the court below is reversed, with costs of this court, and the cause is remanded to the Circuit Court, with instructions to enter a decree in accordance with the foregoing opinion.

SPENCER ELEVATOR SAFETY GUARD CO. v. BEIFELD et al.

(Circuit Court of Appeals, Seventh Circuit. April 26, 1904.)

No. 1,068.

1. PATENTS—INVENTION—ELEVATOR GUARDS.

The Spencer patent, No. 648,309, for an elevator guard, consisting of a board or riser extending downward from the doorsill of an elevator from 12 to 18 inches, to prevent the feet of persons entering from being caught between the bottom of the elevator and the floor, is void for lack of patentable invention.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

In Equity. Suit for infringement of letters patent No. 648,309, for an elevator guard, granted to William W. C. Spencer April 24, 1900.

The following is the opinion of the Circuit Court (Kohlsaat, District Judge):

This bill was filed to enjoin defendants from infringing letters patent No. 648,309, for improvements in elevator guards, granted April 24, 1900. It charges defendants with unlawfully using complainant's device. In this patent there are two claims, both of which are sued on, and which are as follows:

"(1) An elevator in combination with a guard having a flat exposed surface extending vertically downward from the doorsill, and at right angles to the floor of the elevator, as and for the purposes set forth.

"(2) In combination an elevator, tread, and guard, said tread being adapted to be attached to the floor of the elevator upon substantially the level thereof, and said guard being adapted to extend downward vertically therefrom in a plane at substantially right angles thereto, and, when the elevator has descended nearly to a level with the floor of the building, to afford a flat, vertical protecting surface to any object projecting from the floor surrounding the elevator well, as set forth."

Spencer describes his invention as follows:

"When a passenger elevator reaches a landing, the door is often opened to admit passengers while the attendant is still attempting to bring the elevator to the exact level of the floor. In such case, if the elevator is raised slightly above the floor—say two or three inches—a person anxious to get into the elevator can step forward in such a manner that a part of his foot will overhang the edge of the floor and come under the elevator. If the attendant, not seeing this, attempts to lower the elevator, the person's foot may be seriously injured by being jammed between the elevator and the floor. * * *

"My invention is intended to guard against such an accident. For this purpose I provide a guard or riser extending downward from the sill below the floor of the elevator a sufficient distance—say from twelve to eighteen inches—and flush with the front of the sill.

"In operation, if the attendant stops the elevator at any point within, say, eighteen inches above the floor of the building, and opens the door, it is impossible for the would-be passenger to get his foot under the elevator for the reason that his toes will strike the guard, and, as the elevator settles to the level of the floor of the building, the guard will simply grind against the toe of his shoe."

The defenses relied upon by the defendants are (1) that the patent is void for want of patentable novelty; (2) that the subject-matter thereof had been invented or used by others prior to the date of the invention or discovery thereof by the patentee; and (3) that there is no infringement. The sketch made of defendants' elevator guard, in the joint record, clearly indicates that, if complainant's patent is valid, defendants infringe. This disposes of the last-named of the three defenses relied on by the defendants, and, as to the other two, I will consider the second one first.

The only prior patent introduced in behalf of defendants was that of C. M. Dalsen, No. 167,993, for improvement in hatchways, which does not, in my judgment, anticipate the patent.

The evidence, which is very meager, makes no attempt to show prior use. It only remains to consider the question of want of patentable novelty and utility. So far as the record discloses, defendants are the only users, notwithstanding the patent is three years old. Generally speaking, defendants would not be permitted to urge this fact as a defense, but, in determining this question of utility, the court should consider it. Neither does it appear from the record that the danger sought to be provided against by the device of the patent is a real danger, nor that any person was ever injured for want of such a device.

The court cannot assume that people will thrust their feet under the elevator, nor that the elevator conductor will be so negligent as to open the elevator shaft door before the car is in position. Nor is it in evidence whether or not the floor of an elevator car is 1 inch or 20 inches in thickness. They may vary even more than that. It does not appear from the evidence that a guard 12 or 18 inches in depth would accomplish what is claimed for it in the patent and the argument. Notwithstanding all that is said, it may be true that there is just as much demand for a guard 3 feet in depth as one-half of that depth. In fact, the record is utterly devoid of evidence of utility, except as shown by defendants' attempt to apply it to their elevator. Considering that the device is claimed to supply a crying need, the evidence is startlingly devoid of lachrymose symptoms.

In arriving at the patentable novelty of a device like that of complainant, general and ready acceptance and application to use in the art would be of weight, while want thereof would tend strongly against its novelty, since it is of such doubtful validity as to, at best, be close to the line which divides mechanical skill from patentable novelty. Complainant's device would be infringed by nailing a board from a packing box onto the face of an elevator car floor. If it may be called invention at all, it must be located at the lowest round of the invention ladder. Just at what point below the floor it enters the domain of invention, I am unable to discover from the record.

In fact, whether owing to the meagerness of the record, or to the total want of merit and novelty in the patent itself, I am unable to discover any ground upon which to sustain complainant's contention herein.

The bill is dismissed for want of equity.

Thomas F. Sheridan, for appellant.

Milton J. Foreman, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

PER CURIAM. Appellant's bill to enjoin appellees from alleged infringement of letters patent No. 648,309, April 24, 1900, to Spencer, was dismissed for want of equity.

The purposes and character of the device are thus described in the specification:

"When a passenger elevator reaches a landing, the door is often opened to admit passengers while the attendant is still attempting to bring the elevator to the exact level of the floor. In such case, if the elevator is raised slightly above the floor—say two or three inches—a person anxious to get into the elevator can step forward in such a manner that a part of his foot will overhang the edge of the floor and come under the elevator. If the attendant, not seeing this, attempts to lower the elevator, the person's foot may be seriously injured by being jammed between the elevator and the floor. * * * My invention is intended to guard against such an accident. For this purpose, I provide a guard or riser extending downward from the sill below the floor of the elevator a sufficient distance—say from twelve to eighteen inches—and flush with the front of the sill."

The claims are as follows:

"(1) An elevator in combination with a guard having a flat exposed surface extending vertically downward from the doorsill flush with the outer edge of said sill, and at right angles to the floor of the elevator, as and for the purposes set forth.

"(2) In combination, an elevator, tread, and guard, said tread being adapted to be attached to the floor of the elevator upon substantially the level thereof, and said guard being adapted to extend downward vertically therefrom in a plane at substantial right angles thereto, and, when the elevator has descended nearly to a level with the floor of the building, to afford a flat, vertical, protecting surface to any object projecting from the floor surrounding the elevator well, as set forth."

The use of "guards or risers" in stairways to prevent persons from thrusting their feet into the openings being common and old, and the employment of a board, or any similar "guard," being the obvious means to cover a hole, we think the patent is void for want of invention.

The decree is affirmed.

YOUNG v. WOLFE.

(Circuit Court of Appeals, Second Circuit. April 21, 1904.)

No. 98.

1. PATENTS—VALIDITY AND INFRINGEMENT—ABDOMINAL PAD AND STOCKING SUPPORTER.

The Young patent, No. 638,540, for a combined abdominal pad and stocking supporter, was not anticipated, discloses patentable invention, and is not invalid for prior use; also *held* infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 120 Fed. 956.

This cause comes here on appeal from a decree of the United States Circuit Court for the Southern District of New York adjudicating the validity and infringement by defendant of patent No. 638,540, granted to complainant December 5, 1899, for a hose supporter, and ordering an injunction and accounting.

J. P. Bartlett, for appellant.

C. C. Linthicum and J. J. Kennedy, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The defenses of insufficiency of the specification, anticipation, lack of patentability, and prior use were raised in the court below, and disposed of in an opinion which critically discusses the status of the patent and the material evidence relevant to said defenses. We fully concur with the court in its conclusions.

But it was strenuously argued on this appeal that certain prior patents, which were not referred to by the court below in its opinion, especially Minthorn patent No. 13,011, of 1855, Porter patent No. 99,347, of 1870, and the George patent No. 208,387, of 1878, which latter patent it is claimed was not argued and was overlooked by the court, are so "conspicuous in the anticipatory art" as to divest the patented article of all claim of patentable novelty.

The George patent describes and shows a hose supporter consisting of a waistband provided with "hip pieces composed of inelastic border strips, and elastic triangular shaped insertion pieces filling the space between the strips, said material being made elastic in order that when resting on the hips they" shall retain their places and adjust themselves comfortably to the varying exterior form of the

hips in all positions of the person. The patentee says that "hip pieces made of rigid and inelastic material will not, if fitted to the hips in one position, cover and fit the hips accurately and comfortably in any other position," but that:

"The central parts of the said hip pieces, by virtue of their elasticity, form pockets for the reception of the projecting part of the hip joints, and thus prevent the displacement of the stocking supporter, which, as hitherto constructed, has been very liable to become displaced and incommode the wearer."

The drawings show the openwork elastic hip pieces as described. The object of the patentee was thus to provide an elastic pocket adapted to receive "the projection of the hip joint," and to permit it to be thus prominently projected in order to hold the supporter in place.

The object of the patentee herein was to repress the prominence of the abdomen, and thus "maintain the abdominal viscera in proper position," by providing an inelastic pad "capable of effecting the repression of a particular part of the body." It was also designed to supersede the older type of abdominal belts, such as those in which the belt passes under the abdomen, and must therefore be always tight, and in which, when the wearer sits down, the tightness is increased, by providing a lever device which, when the wearer stands up, holds the stomach in and gives a straight-front effect, but which releases the pressure when the wearer sits down. In the absence of any contradicting expert testimony, the utility of this device in producing the results sought must be taken as proved. The essence of the invention was the provision of new means to accomplish a new result in a new way by a radical departure from the prior art. In these circumstances, the fact that the old George pocket of 1878 might be forced around to a position in which it might receive and hold the prominence of the abdomen instead of that of the hip bone is immaterial.

All that the Minthorn patent of 1855 showed was a stocking supporter suspended from a belt at a point so far below the abdomen as to leave the "viscera perfectly free in their action." The Porter patent of 1870 merely showed an arrangement of flaps to support a napkin. The suggestion that the clasps on the front of a corset, shown in patent No. 421,086 to Schmidt, could be attached to the Porter flaps, is so patently impracticable as not to require discussion.

An examination of other patents introduced by defendant confirms the conclusion of the court below that the Rogers patent is the nearest approach to the patent in suit, and that it does not anticipate, for the reasons stated by said court in its opinion.

The decree is affirmed, with costs.

DIAMOND DRILL & MACH. CO. v. KELLEY BROS. & SPIELMAN.

(Circuit Court, E. D. Pennsylvania. July 8, 1904.)

No. 49.

1. PATENTS—VIOLATION OF INJUNCTION AGAINST INFRINGEMENT.

Complainant owned a patent for a coil clasp for fastening belts, and also one for a machine for making and inserting the coils. Defendants made and sold coil clasps which were adjudged to infringe complainant's patent, and they were enjoined from further infringement. They also made and sold a machine for inserting the coils, which was adjudged not to infringe complainant's patent. After service of the injunction, defendants having obtained the opinion of counsel that it would not be a violation thereof to direct their customers to others who would supply the coils, their foreman induced a third person to go into the business; and he was given a coil-making machine, and a quantity of wire from defendants' shop, and also furnished with a list of customers to whom defendants had sold machines, and to whom he sent circulars stating that he had taken over the supply business of defendants, and he thereafter filled orders from all customers for the infringing coils. It was also admitted by one of the defendants in his testimony that they had given coils to such party for the purpose of enabling him to sell them to owners of their machines, and that in some instances they had directed them to him. *Held*, that defendants were directly responsible for his infringement, and were guilty of contempt for a violation of the injunction.

2. SAME—DEFENSES.

Where defendants were enjoined as individuals from infringement of a patent, they cannot avoid individual liability for a violation of the injunction by organizing a corporation which commits the acts of infringement.

On rule to show cause why defendants should not be adjudged in contempt for violation of injunction against infringement of a patent.

For previous opinion sustaining the patent and awarding an injunction, see 120 Fed. 282; affirmed on appeal, 123 Fed. 882, 129 Fed. 756.

W. C. Strawbridge, for the rule.
Horace Pettit, opposed.

ARCHBALD, District Judge. The defendants are charged with having violated the injunction which was issued to restrain the infringement of the patent in suit, and which was served upon them January 2, 1903. The affidavits on which the rule to show cause was granted have been materially supplemented by the evidence recently taken in the proceedings before the master for an account, and a state of affairs is disclosed thereby which is decidedly damaging to the defendants, being nothing less than an attempt to overcome the adverse decision of the court by which the patent was sustained, and to evade the injunction issued to enforce it.

The device in controversy is a coil clasp for fastening together the ends of belts, and consists, in general terms, of spiral coils of wire screwed into holes in the ends of the material to be united; the coils being brought together and locked by a pin run through their intermeshing spaces. For convenience of use, a machine which will make and insert the coils is necessary, and each of the parties to this liti-

gation has invented and patented such an accessory device. It was contended by the complainants that in this respect, also, the defendants infringed upon them, the complainants' machine being the first patented; but in a suit brought to test this it was decided by this court, contemporaneously with the determination of the case in hand, that such was not the case, and the defendants were therefore left free to make and use their own. (C. C.) 120 Fed. 289. The result produced by this, however, was somewhat peculiar. The defendants, while entitled to manufacture and sell machines for making and inserting coils, could do nothing with the coils themselves, which were covered and protected by the complainants' patent, and the one was useless without the other. This presented a necessity and a temptation. They could not furnish coils to parties to whom they had sold their machines; neither could they to new customers whose patronage was solicited. As a means of escape from this dilemma, they seem to have thought that it would be no violation of the injunction which had been served upon them if those who applied to them for coils were directed to others, not connected with their business, who could supply them. That they had this distinctly in mind is established by the fact that they consulted counsel upon the subject, and were advised that it was permissible. This has an important bearing on what follows, and must be taken in connection with it. In one instance—in February, 1903—they are shown to have sold coils or lacings and needles to an owner of one of their so-called Peerless machines without any intermediary, which of itself was a disregard of the injunction. But if the matter had stopped there, in all probability these proceedings would not have been instituted. Unfortunately, however, it did not. Even before that, in the latter part of January, a few weeks after the injunction was served, Albert Rahrer, foreman of the defendants' workshop, approached one Hans Hamilton, who had done a little teaming now and then for the concern, with the proposition that he should go into the business of furnishing coils to parties who might order them; explaining to him that the defendants could not, because of the injunction. Turning over to him an old coiling machine and two or three hundred pounds of wire, all of which was taken from the defendants' shop, he gave him, also, a list of former customers who would be likely to need coils; telling him he could go on and supply them, and make what he could out of it. This was the inception of the so-called Hamilton Supply Company, afterwards changed to the Hamilton Spring Company, the better to cover up the nature of what was being done. Following Rahrer's instructions, Hamilton wrote to the parties whose names had been given him, informing them that his company could furnish them with coils; and a printed slip was adopted and sent out, stating that that company had taken over the supply business of the Peerless Belt Lacing Company, under which name the defendants were then incorporated, and that future orders should be mailed to the Hamilton Company, at 120 South American street, Philadelphia. Beginning in this way, the business of furnishing coils has been carried on at the place named ever since. Hamilton claims to be the sole owner of the concern, but is regularly employed by the Bell Telephone Company

to tend switchboard, and only comes to the shop once or twice a day, which is in charge of a man named Charles Simmons, who formerly worked for the defendants. No one is allowed to come in, and parties who want supplies are required to send written orders, stating what they need and furnishing samples. According to Simmons, springs are all that are sold there; his instructions from Hamilton, as he says, being not to sell coils for belt lacings under any circumstances, and the goods being billed to customers as "coil springs." "What the man does with the wire," says Hamilton, "is none of our business. We never inquire." But the fact is that coils for use as clasps are furnished knowingly, and he finally admits it; shielding himself behind the opinion which he advances with confidence, that, if a joint is made with the coil alone, it is all right, and only wrong when a pin is used to fasten it. But even so he is convicted, for he furnishes rawhide pins for that very purpose, when they are ordered; Rahrer, with his other information, having been careful to advise him where the material could be procured.

The law would be a laughing stock if any such flimsy arrangement to get around it could succeed. The infringement of Hamilton is deliberate and obvious; the pretext which he gives, and his attempts to cover it up, only serving the more to fasten it upon him. The only question is how far the defendants are involved. It will have to be admitted that it starts very close to their doors, and I am convinced that it stays there. Not only is Hamilton induced to go into the scheme by Rahrer, their foreman, but out of their shop come the coiling machine and the wire which set him up in business, and from the papers in their office the list of names which is furnished him is obtained. It is difficult to see how any of this could have been accomplished without their knowledge and consent, and it is hardly credible that Rahrer, of his own motion, would make this effort to get around the injunction for their benefit without prompting or suggestion on their part. This is more than a suspicion. It is a conclusion which is forced from the facts found. Nor does it by any means stand alone. It is the undisputed evidence, as we have already seen, that the defendants consulted their counsel to see whether they could not refer to a convenient third party the orders for coils which were sent them by customers; and Spielman, in his answer to the rule, declares that they were under the impression there was no objection to their turning over to another concern, with which they had no connection, "the wires and stuff for fasteners," for which they had no further use, all of which is in exact correspondence with what was subsequently done. It is said, however, that, according to Rahrer, Spielman knew nothing till he inquired what had become of the old coiling machine, and that, when he found out, he told Rahrer that he ought not to have done what he did. Just what this mild protest referred to is not clear. It may have been simply to his giving away the machine and material. At all events, it was not followed up by any effort to stop the infringing use which the gift of these articles incited and furthered. But Kelley, in his testimony, does not pretend to any such want of knowledge. He admits that since the injunction his company has given coils to Hamilton for the very pur-

pose of enabling him to sell them to owners of their machines, and that in some instances they had directed such parties to him. The only qualification that he makes is that nothing of this kind has been done since the proceedings for contempt were instituted. But the mischief was already done when they set Hamilton up in business, and they did not have to do anything more. The significant thing is that he would not have gone into it, except as they supplied the impulse and the means, and they are therefore responsible for his acts. They cannot escape simply because they were not pecuniarily interested, or did not personally participate in them. Neither are they relieved by the advice of counsel, as argued, for they went far beyond it; and at best it could only extenuate.

This observation applies only to Frank Kelley and E. W. Spielman, and not to H. L. Kelley, who seems to have taken no part in what was done, and is only on the record in a representative capacity, as an executor of Edward Kelley, one of the original defendants, who is now deceased. It is suggested in relief of the parties named that since the suit was brought the defendants have become incorporated as the Peerless Belt Lacing Machine Company, which has taken over the entire business, and that they are not, therefore, liable individually. But they were sued as individuals, and the decree and the injunction both went against them as such, and they cannot shield themselves from their individual acts by a subsequent change in their relation to each other. *Janney v. Pancoast, etc., Co.*, 124 Fed. 972.

Let a decree be drawn adjudging the respondents, Frank Kelley and E. W. Spielman, in contempt for having violated the writ of injunction which was served upon them, and imposing a fine of \$250, with costs.

DIAMOND STONE SAWING MACH. CO. v. BROWN et al. SAME v.
MORRISON et al. SAME v. BRADLEY et al.

(Circuit Court, E. D. New York. April 7, 1904.)

1. PATENTS—PATENTABLE NOVELTY—STONE SAWING MACHINE.

An improvement in mechanism for sawing stone by which the saw is moved against the stone, which remains at rest during the operation, instead of being fed to the saw as in machines of the prior art, discloses patentable novelty and utility.

2. SAME—CONSTRUCTION—INFRINGEMENT.

The Williams patent, No. 429,874, for a stone sawing machine, was not anticipated, and discloses patentable invention. Claims 2 and 3, construed in the light of the specification and drawings and the requirement of means "for feeding the saw blade up to its work," held to require as an element a proportionate feed, with respect to the speed of the saw during the stroke. Claims 1, 2, and 3 also held infringed.

In Equity. Suit for infringement of letters patent No. 429,874 for a stone sawing machine, granted to George N. Williams, Jr., June 10, 1890. On final hearing.

Man & Protheroe (Charles C. Protheroe, of counsel), for complainant B. F. Lee.

Seabury C. Mastick (Seabury C. Mastick and Arthur v. Briesen, of counsel), for defendants.

THOMAS, District Judge. It cannot be justly urged that the saw used by the defendants before the bill was filed did not infringe the claims of the patent, inasmuch as Dietrich testifies that such was the fact, and no evidence is offered in contradiction. The evidence of Dietrich is sufficient, in the absence of any counter evidence tending to diminish whatever force it has. The reference to patents (other than those considered in the Dean Case [C. C.] 111 Fed. 380) antedating that in suit show several where the material is fed to the saw. Marston, Palmer, and Le Marchand are of this nature. While these enumerated patents differ in some other respects from the complainant's patent as described in some of the claims, they all provide for feeding the material to the saw, and are thereby differentiated. There does seem to be a substantial difference between means for pressing a saw reciprocating in a straight line to the stationary material and a mechanism whereby material of great bulk and weight is laboriously lifted into relation with the saw. If it had never been known that any object could be mechanically sawed save by reciprocating the material across the sharp edge of some harder substance relatively much lighter in weight, and some person discovered that the same result could be attained by a method that would send a light, keen blade forward and backward through the substance, a very decided advance in the art of sawing would be admitted, and the doctrine of equivalents would not be invoked successfully. In the references the material is not reciprocated, but is ponderously lifted or pushed against the blade. Means contrived to leave the great weight at rest, and to press the relatively light and rapidly cutting saw to it, according to due necessity, on the face appears a better and improved means of doing the work. Surely the swift and light tool is better pressed to the unwieldy stone, the saw to the log, than the awkward and bulky block or tree carried to meet the cutting tool. Any person who should discover a means of reversing the object moved, so as to move the lighter and leave at rest the heavier subject of the operation, would invent something very useful, and very novel also, if the whole art were shown in the three patents named.

Without further discussion, the new references upon which special reliance is placed are met by this conclusion, except the French patent to Gary. This patent is discussed so scantily by the experts and counsel that there is some difficulty in finding its bearing upon the patent in suit. The specification states:

"L is a star wheel having teeth for turning the screws to the extent to which the saw can descend. M is a stop or ratchet tooth against which the star wheel strikes when the saw is to descend."

The defendants urge that the specification and diagrams show proportional feeding of the saw blade to the stone on each stroke. It is not understood that the specification shows any mechanism to produce proportional feed. Proportional to what? And how is the proportion ascertained and maintained? The complainant's counsel con-

tend that the saws are fed at the end of the reciprocation by impact of a star wheel upon a stop, and it may be as well applied that way as any other. The letters provide a star wheel for turning the screws, to the extent to which the saw can descend. To what extent it can descend, and when it shall be made to descend, seems to be left to the judgment of the operator. No mechanism is suggested to produce automatically proportionate feed. It is considered that the reference has a very remote, if any, bearing upon the question in issue.

Attention is again called to the Luce & Green patent, No. 85,317. Of this reference it is sufficient to say that the evidence tends to confirm the conclusion reached in the Dean Case.

There remains for consideration the Huffman patent, No. 180,344. Concededly, this does not show proportionate feed, and would not anticipate the first claim. It does show mechanism operating means for feeding the blade, as demanded by the second claim. It has continuous positive feed on both strokes, while the saw blades reciprocate in a straight line. The specification states:

"As thus arranged, the rotation of the pulley V' will, through the pinion V, gear wheel S', pinion S, and gear wheel R, be communicated to the mechanism for moving the saw-frame vertically, and cause said frame to descend, the velocity of such descent being governed by the speed imparted to said pulley, and being easily and quickly varied by changing the driving-belt from one pulley to a larger or smaller pulley."

Mr. Benjamin thinks that it would be effective in connection with diamond saws; Mr. Hooker states that it was intended for stone saws. There is no evidence that it would or would not act effectively with a diamond-toothed saw blade. It provides means for imparting to the saw a reciprocating movement in a straight line throughout its entire stroke; a screw mechanism for positively feeding the saw blade up to its work; means for actuating the feeding screws during the forward and backward strokes of the saw, whereby the saw is fed up to its work, but not intermittently, during both its reciprocating movements. If it is applicable to diamond-toothed saw blades, and nothing is shown to the contrary, it covers the second claim, except that the saw blade is not fed "intermittently," unless this claim provides for proportionate feed only. It continues to feed until it is stopped, whether the saw be at rest or in motion. But the complainant's machine operates "intermittently during both its reciprocating movements," and this intermittence of action arises from such arrangement of the parts that the feeding mechanism will have motion only when the saw has motion, thereby showing minimum feed at the ends and maximum feed at the middle of the strokes. There are in the second claim no precise words requiring that the feeding movement shall correspond in extent to the speed at which the saw blade reciprocates, as provided in the first claim; but, if the intention of the claim is that the feeding movement shall intermit at the end of each stroke, then there must be some relation between the duration and consequent extent of the feeding movement and the movement of the saw. It seems probable that the patentee intended to have the correspondence between the mechanism feeding and actuating the saw as described in the first claim. In any case, his mechanism as

described and illustrated shows nothing else. If claim 2 means that the feeding mechanism shall intermit when the saw intermits, then the speed of the saw, rising from zero to maximum, and declining to zero, would have a fixed relation to the feed. It is true that the claim might have another meaning, and that the mechanism could be otherwise adjusted; but no other meaning seems admissible in view of the machine displayed and described in the letters. Can it be that the patentee intended in claim 2 to provide for a feeding that was not proportionate? In the letters he says:

"I prefer to so arrange the feed that the saw blade will be fed to the stone in a degree proportionate to the speed at which the saw is moving during both strokes."

Again:

"I prefer to so arrange the feed that it will be at its maximum at the middle of the stroke and at its minimum at the ends thereof. Thus in my machine the feed is at the maximum when the saw blade is moving most rapidly, and when the most advantage is being derived from the momentum of the heavy sash."

What he means by the words in the second claim, "whereby the saw blade is fed up to its work," and by the words "for feeding the saw blade up to its work, * * * substantially as set forth," in the third claim, is illustrated by his statement in the specification. He says:

"Thus rotation of the crank-shaft, while it imparts a reciprocating motion to the saw blade, C, at the same time feeds the saw up to its work through the medium of the pawl and ratchet mechanism last described. * * * The cranks, M and t, on the shaft, K, are so set, relatively, that when the saw blade is moving with the maximum speed (at about mid-stroke) the pawls will move the ratchet wheel o, at its maximum speed. One pawl feeds the saw up to its work on the back stroke, and the other pawl feeds it on the forward stroke."

While the patentee states that he prefers the proportionate feed, there is scanty suggestion of any means for employing disproportionate feed, although, as Mr. Benjamin shows, the old ratchet mechanism used by the complainant could be readily adjusted so as to produce a feeding movement greatest when the sawing movement is least. If claims 2 and 3 cover disproportionate feed, the Huffman patent would be a serious obstacle to their validity. It is true that Huffman does not provide for feeding "intermittently" on both strokes; but a mere provision for a feeding mechanism that intermits is of doubtful novelty. The feed intermits because its actuating mechanism stops. It stops because it is dependent on the mechanism that drives the saw. When one stops, the other stops. That is what happened in the old saw before the lift was eliminated. The vital thought in the mind of the patentee, and for which he made provision in his claims, was that there should be a concurrence of action and speed between the apparatus that fed the saw and the parts that gave the saw motion. If this happened, the feed must be intermittent. While it is not necessary to determine at this time whether the Huffman patent would be an anticipation in case claims 2 and 3 cover disproportionate feed, it is considered that the patentee understood that the saw should be fed up to its work by this correspondence between the movement of the

feed and the saw. As already shown, he uses the expression in the specification in that connection, and must be held to have repeated the words in the claims with the intention of giving them the same significance. The utility of the complainant's invention, so far as it demands proportionate feed, is attacked. The interesting experiments of Mr. Benjamin would be more persuasive had not the defendants persisted in the use of a mechanism that produces proportionate feed, when, by very slight labor, they could adjust their machines for disproportionate feed, as they claim to have done since the bill was filed. Why did the defendants incur the peril of infringing letters patent, why did they disregard the final judgment of this court in earlier cases, unless they preferred the proportionate feed because of its utility?

It is considered that the further objections to the patent should be overruled, and that the complainant should have a decree enjoining the use of the infringing machines, and for an accounting, with costs.

HAYES-YOUNG TIE PLATE CO. v. ST. LOUIS TRANSIT CO.

(Circuit Court, E. D. Missouri, E. D. April 15, 1904.)

No. 4,910.

1. PATENTS—PROCEEDINGS TO OBTAIN—EFFECT OF ABANDONMENT OF FIRST APPLICATION.

Where the Commissioner of Patents denied a petition for the revival of an application on the ground that there had been such unexcused delay in its prosecution as to work an abandonment under Rev. St. § 4894 [U. S. Comp. St. 1901, p. 3384], a new application filed thereafter cannot be regarded as a continuation of the same proceedings, but stands on the same footing as though no previous application had been made; and to authorize the granting of a patent thereon it must appear that the invention had not been in public use or on sale in this country for more than two years prior to such application.

2. SAME—SUIT FOR INFRINGEMENT—REQUISITES OF BILL.

A bill for infringement must allege that the invention of the patent had not been in public use or on sale in this country for more than two years prior to the application for the patent.

In Equity. Suit for infringement of patent. On demurrer to bill.

Higdon, Longan & Hopkins, for complainant.

Boyle, Priest & Lehmann, for defendant.

ADAMS, District Judge. This is a demurrer to a bill for the infringement of a patent. It alleges that on July 23, 1894, James M. Hayes, under whom the complainant claims title, made an application for a patent upon his invention; that this application was rejected by the Commissioner on October 8, 1894; that afterwards Hayes presented an application for the revival of the abandoned petition, which was denied by the Commissioner; and that on April 15, 1901,

¶ 2. Pleading in patent infringement suits, see note to *Caldwell v. Powell*, 19 C. C. A. 595.

See Patents, vol. 38, Cent. Dig. § 508.

Hayes filed an entirely new application for his patent. The chief ground of the demurrer is that the bill fails to allege that the invention had not been in public use or on sale for more than two years prior to the time the second application was filed.

I think the bill, when fairly construed, fails to make any such averment. The second paragraph of the bill avers that James M. Hayes, heretofore and before the 23d day of July, 1894, was the true, original, and first inventor of a certain new and useful improvement in tie plates, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country before his invention thereof, and not in public use or on sale for more than two years prior to his application for a patent therefor. In the third paragraph the bill avers that on the 23d day of July, 1894, Hayes duly made application to the Commissioner of Patents for letters patent; and, after reciting the history of that application and its final rejection, it alleges that Hayes was advised to file an entirely new application, and that on April 15, 1901, an entirely new application was filed, and that the applicant then made oath that the invention had not been in use or on sale for more than two years prior to the time that his original application was placed on file in 1894. The bill alleges that this new application was filed as a substitute for or continuation of the original application. All these averments, taken together, show that the complainant did not intend by paragraph 2 to allege that the invention of the patent had not been in public use or on sale for more than two years prior to his last application, made in 1901, but that he thereby did intend to state that his invention had not been in public use and on sale for more than two years prior to the time that his application for a patent was made, namely, that of 1894, so that the demurrer presents the question fairly as to whether the application made in 1901 was a continuance of the application made in 1894, and whether it gains any advantage from the fact that an application was made in 1894.

Act July 8, 1870, c. 230, § 32, 16 Stat. 202 (section 4894 Rev. St. [U. S. Comp. St. 1901, p. 3384]), provides that:

"All applications for patents shall be completed and prepared for examination within two years after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

The bill in this case avers that Hayes presented to the Commissioner of Patents a petition for the revival of his abandoned application, and accompanied the same by what he thought were good and sufficient reasons for the formal abandonment; but the bill affirmatively avers that the Commissioner held that the reasons assigned were not sufficient to account for the delay in the prosecution of the application. It therefore clearly enough appears that Hayes did not bring himself within the protecting provision of the section just referred to. His application made in 1894 was therefore abandoned.

The other remaining question is whether it was necessary to aver in the bill of complaint that the invention of the patent had not been

in public use or on sale for more than two years prior to the application, which was made in 1901. As already seen, this averment does not appear. In my opinion it is a necessary jurisdictional averment. It is an averment of a fact, which is of the essence of the right of action, and must therefore be stated in the complaint. The rights of the complainant in this case must date from the date of the second application in 1901, and, if he has secured a valid patent as of that date, his rights will be enforced, notwithstanding the abandonment of the application of 1894; but, as I understand counsel, the fact is that the complainant did have the invention of the patent in public use for more than two years prior to the filing of the application in 1901. Accordingly, if that is the fact, this ruling goes to the merits of the action. If the court has misconstrued the language employed, and if it be true that the invention was not in public use or on sale for more than two years prior to the application in 1901, the complainant can take leave to amend his bill and state the truth in that particular.

The demurrer must be sustained.

THOMSON-HOUSTON ELECTRIC CO. v. WAGNER ELECTRIC MFG. CO.

(Circuit Court, E. D. Missouri, E. D. February 16, 1904.)

1. PATENTS—INFRINGEMENT—INJUNCTION.

Where the issue as to the infringement of a patent on an electric motor was dependent on the correct application of the law of physics governing the action and application of the electric current to defendant's motor, and experts familiar with the subject differed fundamentally on the principle of action involved in defendant's device, a preliminary injunction will not be granted.

2. SAME.

Where defendant had been manufacturing, selling, and advertising the motor claimed to be an infringement of complainant's motor, with the constant claim of right to do so, for six years, and had built up an established business, having expended large sums of money therein, and was amply able to respond in damages for any injury to complainant, whose patent was about to expire, a preliminary injunction was not justified.

On Motion for Preliminary Injunction to Restrain Infringement of Thompson Patent No. 363,186, of May 17, 1887.

Charles Neave, J. Edgar Bull, and George C. Hitchcock, for complainant.

A. C. Fowler and James H. Bryson, for defendant.

ADAMS, District Judge. There are two reasons why the motion for a preliminary injunction in this case should be denied.

1. There is a sharp conflict between the parties as to whether the defendant's motor is an infringement of complainant's patent. This issue is dependent for its determination upon the correct application of the law of physics, and particularly those governing the action and application of the electric current. Experts whose affidavits appear in this record, and counsel whose familiarity with the subject and whose candor and fairness in presenting it commend them to the favorable consideration of the court, differ fundamentally on the principle of ac-

tion involved in the defendant's device, which is claimed to constitute an infringement of complainant's patent. Under these circumstances the proper and safe course to be pursued, in my opinion, is to await a hearing on the merits, when evidence more reliable than *ex parte* affidavits can be procured, and when the court can act more intelligently on the difficult issue of infringement involved in this case. It is true the complainant presents an adjudication of a court of concurrent jurisdiction, decreeing that its patent sued on is valid. This is ordinarily sufficient basis for a preliminary injunction in a subsequent suit on the same patent, provided infringement is made to clearly appear; but the rule is well settled that when infringement is doubtful no preliminary injunction should be awarded.

2. The life of complainant's patent expires on May 16, 1904. The defendant has for about six years been manufacturing, selling, and advertising the motor now claimed to be an infringement of complainant's patent, with a constant claim of right to do so, has expended large sums of money in establishing its plant and building up its business, now employs about 100 men in manufacturing the motor in question, and has sold between 5,000 and 6,000 of such motors. In other words, the defendant has an established business, and no claim is made that it cannot respond in damages for any injury which complainant may sustain. I think it would be a very harsh and inequitable remedy to now, before final hearing, enjoin the defendant as prayed for, and interfere with the prosecution of its established business for the short period of three months only. The benefit or advantage to complainant of such an injunctive order is out of proportion to the injury and disadvantage which the defendant would necessarily suffer if such an order should be made. The granting of such an order at the present time and under the conditions already referred to would, in my opinion, be an abuse of discretion.

TIMOLAT et al. v. PHILADELPHIA PNEUMATIC TOOL CO.

(Circuit Court, S. D. New York. May 31, 1904.)

1. SUPERSEDEAS—DISCRETION.

The power to grant a supersedeas is discretionary, to be exercised only where it is manifest that extraordinary reasons justify it.

2. PATENTS—INFRINGEMENT—APPEAL—SUPERSEDEAS.

Where, in a suit for infringement of a patent, complainants, having succeeded on all the proofs in establishing the merits of their bill, were entitled to an interlocutory judgment, and it also appeared that before a hearing could be had on an appeal the patent would have expired, a supersedeas would not be granted.

In Equity.

Hillary C. Messimer (John R. Bennett, of counsel), for complainant.

D. Frank Lloyd (E. Hayward Fairbanks and Hector T. Fenton, of counsel), for defendant.

HAZEL, District Judge. The supersedeas heretofore allowed upon the *ex parte* application of the defendant must be vacated. The

complainants having succeeded, upon all the proofs, in establishing the merits of their bill, an interlocutory judgment to preserve to them the rights of their patented invention during the short remainder of its existence is bound to issue as of course. Section 7 of the Circuit Court of Appeals act of 1891 (Act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 550]) is declarative of the right to an appeal from an interlocutory decree granting or continuing an injunction, and vesting power in the Circuit Court to stay the proceedings during the pendency of such appeal. The power to grant a supersedeas is discretionary. In *re Haberman Manufacturing Co.*, 147 U. S. 525, 13 Sup. Ct. 527, 37 L. Ed. 266; Eq. Rule 93. Such discretion, however, should be cautiously exercised, and only where it is manifest that there are extraordinary reasons to justify it. If we assume it to be true that grave doubt exists as to the validity of complainants' patent, which the appellate tribunal should pass upon, it nevertheless does not appear that there are sound reasons for withholding the relief to which the complainants are entitled by the decree made at final hearing upon the question of injunctive relief. Cause is shown for denying the request to hold the injunction in abeyance. It appears that no hearing of the appeal can be had until after the expiration of the patent. It is therefore exceedingly doubtful whether the Circuit Court of Appeals will then listen to the appeal, the right of injunction having expired by operation of law. *National Folding Box & Paper Co. v. Robertson et al.*, 104 Fed. 552, 44 C. C. A. 29; *Thomson-Houston Electric Co. v. Nassau Electric Co.*, 119 Fed. 354, 56 C. C. A. 96; *Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co.*, 61 Fed. 208, 9 C. C. A. 450; *Lockwood v. Wickes*, 75 Fed. 118, 21 C. C. A. 257.

The point is made that, because the appeal assigns errors which go to the entire relief, the Circuit Court of Appeals will examine into the merits of the case for the purpose of determining whether an account shall be taken. It was expressly held to the contrary in *National Folding Box & Paper Co. v. Robertson*, *supra*. It was there stated that, in view of the expiration of the patent, the interlocutory injunction appealed from terminated, and hence there was "nothing remaining for a judgment of this court to act upon." The point was further expressly negated in *Thomson-Houston Electric Co. v. Nassau Electric Co.*, *supra*. There it was stated that an appeal from an interlocutory decree lies only to that part of the decree which grants an injunction.

These observations constrain me to vacate the previous order of this court granting a supersedeas and refusing the defendant's request. So ordered.

WRIGHT v. STEWART et al.¹

(Circuit Court, D. Missouri, S. W. D. June 14, 1904.)

1. CONSPIRACY TO DEFRAUD—EVIDENCE.

Where a conspiracy is charged to swindle, by obtaining under false pretenses money of a third party by means of a "fake" foot race, evidence of the separate acts and declarations of the alleged members thereof may, in the sound discretion of the judge, be admitted in advance of proof, *prima facie*, of the existence of the conspiracy, where, tracing step by step the footprints of each, they converge to a common center of such purpose.

2. SAME—ANTERIOR AND SUBSEQUENT ACTS AND DECLARATIONS.

In a civil action, founded on a conspiracy to defraud the plaintiff and steal his money, the conduct, acts, and declarations of the conspirators, in *pari materia*, from the inception of their operations, may be inquired into for the purpose of demonstrating the character of the particular act complained of, limited to those of a like character in furtherance of a common enterprise. Likewise, where the question involved is as to the fraudulent character of the given transaction, and the guilty knowledge of the alleged conspirators, evidence of subsequent like acts and transactions, closely allied in point of time, before the end of the conspiracy, may be admitted.

3. SAME—PARTIES TO CONSPIRACY—BANK.

A banking corporation may become a party to a fraudulent conspiracy, the same as a natural person, with like responsibility. It and its managing officers may legitimately receive on deposit the moneys of a gambler, with reason to believe it was won in gaming or by other questionable means; but they cross the line of permissibility when, with a knowledge that such depositor is obtaining the money by fraud or theft, they do acts in aid of the wrongful means by which the money is obtained.

4. NOTICE—COMMON NOTORIETY.

Proof of the notoriety of a fact in the neighborhood of the party to be affected thereby is competent to carry home to him knowledge.

5. ACTION—RIGHT TO BRING—DISTINCTION BETWEEN "IN DELICTO" AND "IN *PARI DELICTO*."

In an action to recover money from defendants, obtained from the plaintiff by means of inducing him to believe that a foot race was "fixed," so that one party was sure to win, and persuading the plaintiff to participate to the extent of betting the money of one side to the simulated race as if it were his own, on the assurance that he should receive 20 per cent. of the sum won, he being ignorant at the time that the money all belonged to the parties on both sides of the pretended wager, *held* that, although he was in *delicto*, by consenting to act in such deceitful attitude, he was not in *pari delicto* with the conspirators, and is therefore entitled to recover back the sum of \$5,000 which the conspirators persuaded him to intrust to the possession of one of them as a stakeholder, not to be bet on the race, but to be used to make a showing by the stakeholder in the event of a count of the stake money being called for by one of the feigned bettors.

6. SAME—MONEY HAD AND RECEIVED—DEMAND OF RETURN OF MONEY BEFORE RACE.

Where, in the instance above stated, the plaintiff demanded back his money before the pretended race was run, action will lie for its recovery, and the plea of moral turpitude constitutes no defense.

(Syllabus by the Court.)

¹ 4. See Evidence, vol. 20, Cent. Dig. § 228.

Action by H. S. Wright against Joseph C. Stewart and others.
Judgment for plaintiff.

McReynolds & Halliburton and H. W. Currey, for plaintiff.
W. R. Robertson and Howard Gray, for defendants.

PHILIPS, District Judge. A trial by jury having been waived by written stipulation of the parties filed herein, this cause has been submitted to the court on the pleadings and the evidence. The plaintiff is a citizen of the state of Texas, and the defendant bank, an incorporated bank under the laws of the state of Missouri, is located at Webb City, Jasper county, Mo., and the defendant Joseph C. Stewart was president and the defendant James P. Stewart was cashier of said bank at the times hereinafter stated, and were citizens of the county aforesaid, and the principal stockholders and practical managers of said bank.

The petition, in substance, charges that at the dates thereafter mentioned, and prior and subsequent thereto, the defendants, together with Robert Boatright, Ed. Ellis, C. F. Landers, William Segrider, L. E. Hindman, ——— Maloney, R. H. Williams, George Thompson, Burt Brumley, Harry Wasser, Bud. Jillet, and others, were combined and confederated together in managing and operating fake gambling devices at said Webb City, to wit, fake foot races and other games, for the purpose of obtaining possession of the money and property of strangers who had no knowledge of their games, with the intent to feloniously steal, take, and carry away such money and convert the same to their own use; that they were engaged in person and by agents in enticing strangers to come to Webb City and engage in such games, for the purpose of getting possession of the money and property of such strangers, and converting the same to their own use; that such foot races were so arranged that it was impossible for any person outside of defendants and their agents to win in said races, said races being known as "fixed" races; that prior to the 6th day of September, 1901, the defendants and their confederates conspired and confederated together to induce and entice the plaintiff to come from his home in Cooper, Tex., to Webb City, for the purpose of betting the money of Robert Boatright and others belonging to said combination on a foot race, to be arranged and to be run by the defendants Landers and Segrider as opposing runners, for the purpose of defrauding and swindling the plaintiff out of his money and property, under pretense of winning the same; that by various devices and false pretenses and representations they induced the plaintiff, on the 6th and 7th days of September, 1901, to place in the hands of said Boatright as stakeholder on such foot race \$5,100, said foot race to be arranged by the defendants and confederates, said defendants and their confederates representing that it was necessary for the plaintiff to put the amount of money in Boatright's hands until the stake on said race could be counted, agreeing with plaintiff that if he would do so, as soon as the money was counted, it would be returned to him; that in reliance upon said statements and inducements the plaintiff placed said sum of money in Boatright's hands

for the purpose aforesaid; that he made demand of Boatright for his money before the pretended race was run, but the defendants and their confederates failed and refused to return said money, or any part thereof, to the plaintiff, but stole, took, and carried the same away, and converted the same to their own use, pretending that plaintiff had bet said money and lost it on said foot race; that the plaintiff did not bet his said money, or any part thereof, on said foot race, but placed the same in Boatright's hands solely so that Boatright could show that said purse was full and complete. The petition charges that the defendants, the Stewarts and the bank, were at said times engaged in assisting their said confederates and co-conspirators in enticing and inducing plaintiff to put his money in said Boatright's hands, with knowledge that the plaintiff was bound to lose any and all moneys so placed in the hands of Boatright. The petition then proceeds to state the manner in which the plaintiff drew his money on sight drafts in favor of the defendant bank, and how it was then placed with the said Boatright. It then charges that said foot race was arranged for the sole purpose of obtaining from the plaintiff fraudulently the possession of his money, and stealing and converting the same to the use of the conspirators, and falsely claiming that the plaintiff had lost his money on said foot race.

That the conspiracy charged in the petition existed between Boatright and the parties named as co-conspirators with him, other than the defendants, to defraud strangers to their fraudulent combination by means of the device and scheme of conducting fake foot races, conducted ostensibly under the auspices of a so-called athletic club at Webb City, controlled and managed by Boatright as president, is fully established by the evidence. This organization had its inception as far back as 1899, and continued its operations until perhaps 1902. All of the parties named may not have been connected with this fraudulent enterprise from its inception, but they came into it from time to time as it became useful to admit any one of them. Boatright was the chief organizer, director, and controlling mind of the dishonest and cunningly devised scheme. He acquired the sobriquet of "Buckfoot," and he and his co-conspirators and subalterns went by the name of the "Buckfoot Gang." The devices employed for inveigling subjects to be preyed upon by their scheme were various, suited to the best method of influencing their victim to come to Webb City and be entrapped into parting from his money. These devices and deceitful representations all had one objective point—to decoy the prey to Webb City to be manipulated and controlled by the genius of Boatright, the master mind. No one outside of the gang of conspirators was ever allowed to win any money on said pretended foot races, or to get his money back, no matter under what assurances or circumstances he was induced to intrust it to the hands of any one of the confederates. Boatright had his emissaries and "strikers" scattered over the country, into adjacent and nonadjacent states. These men were shrewd, plausible, and resourceful scoundrels. They seemed to have made themselves familiar with the character and gullibility of the men they sought to entrap and despoil, so that the method pursued to bring within their toils one man in a

given locality would be a wholly different expedient resorted to in respect of another subject.

One man, for instance, residing in the state of Iowa, a farmer and cattle dealer, possessed of some wealth, with extensive credit at his local bank, would be approached by an emissary of the "Buckfoot gang," who would obtain audience by informing him of a "bunch" of cattle in the vicinity of Webb City suitable to his wants, which, it was represented, could be purchased at a low figure. Discovering a yielding disposition of the farmer to "bite," this persuader would cunningly suggest to him the advisability of taking along with him a letter of credit or draft, as the case might be, from his local bank, to be used in case of effecting a purchase of the cattle. This agent would then accompany the party to Webb City, and bring him face to face with Boatright, when, according to prearranged plan, the matter of foot races would be suggested, and a plausible story unfolded by which money could be made by a fake foot race, and that Boatright for certain reasons did not want it known to parties who would bet on the opposing foot racer that he was betting moneys of the athletic club on the other racer, and therefore they desired this stranger to bet the money of the club for Boatright, who would place the money for such purpose in the stranger's hands to bet as if it were his own. Perhaps the stranger would be informed that the race was so fixed that Boatright's man was certain to win. Then the conspirators, with a perfect understanding between themselves, would conduct the stranger into what is known in the evidence as the "16 to 1" saloon, their place of rendezvous, whereupon some one would bring up the subject of foot racing and propose to bet on a racer, who himself was a member of the gang, whereat some one or other of the gang would accept his offer and bet on another racer, also a member of the gang. Thereupon the betting would begin swift and furious. This stranger, provided with say \$3,000 by Boatright, would put it up against \$3,000 ostensibly bet by some one of the gang on the other racer. Boatright was the stakeholder and tally keeper of the bets. Thereat intense excitement would be feigned by the conspirators, and the betting would run higher and higher. To meet the large additional sums offered as a bet by the opposition side, Boatright, who kept the stakes in a convenient satchel, would take money therefrom and slip it to the stranger, and after this was bet the same money would be slipped back into the satchel by Boatright. When this mock performance, which the stranger believed was genuine, had reached a certain point, some one of the gang would claim that he had bet \$500 not shown by Boatright's tally, and demand a count of the stake money. Others would join in the clamor, until the demand would become an uproar. Whereat Boatright, feigning great alarm, would pluck the stranger to one side and whisper to him that those fellows were desperate men, and, as a count would disclose a shortage in the stake, his life would be imperiled if something were not at once done to relieve the situation. Sometimes he would make the pathetic appeal that he was the support of dependent parents, and it would bring ruin and sorrow, should the enraged crowd call him to account. Boatright was so much of an actor as to show by his cun-

ningness and manner great distress and perturbation of mind. Finally, as a dernier resort, he would demand of his victim that he go at once to the bank of the defendants, and on his letter of credit, or whatever means he had, draw through the bank the required sum to meet the deficit, and bring it forthwith to Boatright to be placed in the satchel. Some one of the gang would follow the stranger closely to the bank to watch and urge him on. As soon as the stranger's money got safely into the capacious maw of the proverbial satchel, the clamor for a count would cease, and the stranger would demand of Boatright the return of his money, as he was not betting it on the proposed foot race. Boatright would put him off by saying the other fellows were watching him, so that it was not safe to undertake to take the money from the satchel and hand it to the stranger, and, perhaps, would suggest that the race be brought off at once before further trouble. Before the dazed victim could collect his wits, he would almost be forced into a closed carriage and driven to the race course, where the pretended race would be gone through with, with the prearranged result among the conspirators that the man Boatright's money was supposed to be placed on would fall down and lose the race. One of the witnesses testified that there was a convenient ridge raised across the race course where Boatright's man always conveniently stumbled and fell violently to the ground, losing the race, of course. In some instances the gang would insist that the stranger had in fact bet his money on the race and lost, or Boatright would put him off when he demanded his money back, with the statement that he would return it to him as soon as it was safe, out of sight of the excited crowd, to do so. This return was never made and the stranger lost his money.

Another subject would be found in some other locality, and inveigled to Webb City by some other plausible device, and be brought into the meshes of the conspirators at this 16 to 1 saloon, and induced to act as stakeholder of the feigned bets on such fake foot race. After the form had been gone through of placing these ostensible bets with this stakeholder, some one of the gang would suggest that, as he was a stranger to them, he ought to furnish some security to answer for the stakes; and thereupon he would be piloted, by some one of Boatright's lieutenants, to the defendant bank, where on his letter of credit, draft, or check he would draw say \$5,000, and bring it over and put it in the noted satchel, which satchel would be taken charge of by Boatright. The same process would be gone through with respecting the race, with the same result as above indicated; and when this stranger immediately went back to the bank to countermand the collection of his check or draft the "gang" would follow him there, and in the presence of the bank officers vociferously assert that he had lost his money on the race, and threaten him with drawn pistols, so that the man would deem himself fortunate to get away with his life. Another subject, for instance, would be brought under the influence of Boatright by the representations of one of his lieutenants to the effect that a certain deserving fleet-footed athlete, who had won races for the club, had not been allowed by the members thereof to get any of the money he had won; that Boatright wished

that justice might be done him by allowing him to win money from "the other fellows"; that all that was desired of him was to bet the money furnished by Boatright to enable this deserving racer to get even. Supposing that there were two sides, in fact, to the race, he would suffer himself to be overreached; and they would get the stranger by some means to obtain the money from the bank and intrust it to Boatright's satchel, with the usual result.

In the case of this plaintiff the evidence, in substance, shows that he was a farmer, 53 years of age, residing in Delta county, near Cooper, Tex., in September, 1901; that he was at that time deputy sheriff of that county. Boatright sent a member of this "gang" by the name of Hineman, to Dallas, Tex., to enlist the services of a man named Hodges. As this victim was out of the way, Hineman met with a man named Duncan, whom he knew; and, after he had informed Duncan of his scheme, that he wanted a man who could go to Webb City, backed by a letter of credit from some bank, he obtained an introduction to the plaintiff through Duncan. Hineman stated to the plaintiff, in substance, that in conducting one of their boxing contests under said club they had a man against whom they had been betting, and when they wired to his home respecting his credit they ascertained he had no credit, and they quit betting; that he was hunting for a man who could carry a letter of credit or draft, so that, "if they wired home to the home bank, he would stand up under the wires." He asked the plaintiff if he could obtain the requisite letter of credit from bank, and being informed that he could, to the extent of \$5,000, he was told by Hineman there were some miners at Webb City with plenty of money; that he had a foot racer at Webb City who stood very high as a racer, and they could match him and win some money; that what they wanted with the plaintiff was to bet the money which Boatright would furnish, but didn't want his (Boatright's) name known in it; and that they would give the plaintiff 20 per cent. of the winnings. When the plaintiff consented to go, Hineman asked him if he did not have a large white hat he could wear, indicating that he was a Texas cowman, or something of that kind. The plaintiff answered that he wore a white hat sometimes, and Hineman told him to get it and wear it. Accompanied by Duncan they came by train to Webb City, Hineman preceding them from Monett to Webb City. When the plaintiff and Duncan reached Webb City, Hineman met them at the platform, and the plaintiff was told to go with some man to a park between Webb City and Joplin, which he did. The next morning Hineman brought Boatright to this park, where he met the plaintiff. Boatright told the plaintiff that he had the Ellis party outmatched with his man, and that they could win some money, and he gave the plaintiff \$3,300 to bet, as he did not want his name known in it. He was directed by Boatright to deposit this \$3,300 in the defendant bank, as that was the bank where they did all of their business, and it was a good place for the plaintiff to get money on his letter of credit if he wanted it. The evidence also tends to show that the two pretended racers were at this meeting in the park, and that the plaintiff was given to understand that Boatright's man was the faster of the two, and that it was so arranged

that he was to win the race. Boatright directed the plaintiff how to find the bank, and Hineman accompanied him and told him that he would make a stop right in front of the bank, and there turn and walk across the street. "I would know that was the bank." Which direction the plaintiff obeyed, and deposited in the bank in his name the money given him by Boatright. Boatright told him, after he had deposited the money, to go over to the 16 to 1 saloon. When he deposited the money with the bank, he told the banker that he "might want to sport some. I got a letter of credit here, too, and I might want some money on it, too. He [meaning the banker] looked at it, and said I could get it, and I told him my name, and he gave me a deposit check of some kind for it, and I went over to the 16 to 1 saloon." The witness Duncan, who accompanied the plaintiff over to the bank at the time he made the deposit of the \$3,300 and presented his letter of credit, testified that the plaintiff then asked the cashier of the bank if he was acquainted with Boatright, and, on his answering that he was, the plaintiff said: "I am having some dealings with him. I am having some business with him—with Boatright," or something. "Is he perfectly responsible for what he does and says?" Mr. Stewart said: "Well, he is a patron of our bank, and we think he is." When the plaintiff reached the saloon he was introduced to Boatright by Landers as if he had never seen him. He had been introduced to Landers at the park by the name of Segrider. Landers turned out to be the other foot racer.

Plaintiff further testified that he did not know who mentioned matching a foot race, but believed it was Landers, whereat the man, Ed Ellis, said he was there for that business, that he had a man there who could outrun anything from Texas. After he was introduced to several parties standing around in the saloon, he was conducted upstairs into what was called the "club room." When they reached the club room Ellis wanted to match a race for \$6,000 for 50 yards. He finally agreed with Ellis on a 50-yard race for a \$5,000 stake, and put up \$2,500 as a forfeit. Some kind of form of written agreement was presented and signed there respecting this race. Thereupon Ellis said he must go to the bank and get some money; and Boatright told plaintiff to go to the bank and make a bank showing as if it were his money. He went to the bank and told the cashier that he was sporting a little now, and that Boatright was to hold the stakes, and he said to the banker, "I guess he is all right?" The banker answered, "Yes, Boatright is all right." He thereupon drew \$3,000 on a check and went back to the 16 to 1 saloon, into the club room, where the \$2,500 forfeits were put up. Others of the gang were there. One of them pretended to be drinking and wanted to bet some. Boatright nodded to him to take the bet, \$300 with him, and \$200 with some others. Thereupon the crowd said they would get more money, and wanted to know if the plaintiff had any more. When they went out Boatright gave him \$3,000 or \$4,000, and said that he must go to the bank and make a showing, as the crowd might be watching him and catch him furnishing him the money. Thereupon he went to the bank and checked out \$1,000 of his own money on his letter of credit. This he took over to the club and bet with

Ellis. Thereupon Ellis took a large bundle of money out of his bosom and offered to bet, and Boatright told him he must go to the bank and check some more. The man Landers had gone to the bank with him when he drew the \$1,000. Boatright handed the plaintiff \$6,000, and told him to go to the bank and check some more as the crowd would be watching him. When he reached the bank the bank was closed, and upon information of this fact Ellis returned with him and rang at the door, and was told by a man in charge that he would not open the bank any more that evening. When he informed Boatright of what had been done, Boatright had him leave the money with him until the next morning. The plaintiff was sent over to Joplin to stay all night, accompanied by Duncan and Landers. After a while Hineman came over and told him that "Boatright was ribbing those fellows up there to bet a good deal to-morrow; that if we could win to-morrow we could get a right smart more to-morrow." Returning to the 16 to 1 saloon the next morning, Boatright nudged him and took him up into the club room, when he handed the plaintiff \$4,000 and again told him to go and make a bank showing, that he had better check some. Boatright told him: "They will be watching you. If they find you are not betting your own money, it will be all off. They won't bet any more." He then went to the bank, accompanied by Landers, who told him he better check the other \$4,000 out. "They are watching you; you better check it." Finally he told Landers he would check it, but he was not going to bet it. Thereupon Ellis came in and asked if the plaintiff had checked any yet. Landers said: "Now, you will just have to check. They are watching you." Thereupon he checked out the remaining \$4,000. Ellis, who was standing at the desk, said: "I am going to check more money than you do. I am going to outbet you." This remark was made close to and in the hearing of the cashier of the bank. When Ellis presented his check, the cashier said that he was about out of paper money, and gave Ellis \$5,000 in gold in a little sack without counting it. When they returned to the club room the plaintiff told Landers that he could not bet his \$4,000; that he was not going to do it; that he had to protect his credit. Landers said: "You must do it. We can win right smart now. If you don't get up enough, it will be the cause of us not winning so much. See here; Boatright gave me \$6,000. I will just hold this to protect yours and make you good. You go on. They ain't after betting with me. They want to bet with you. I will hold this to make you good." Thereupon the plaintiff put up all the money he had, and after he had done so this man Landers pulled out his money and said: "Here I call all, God damn you, you got." The plaintiff said he would not bet all that. Landers answered: "Yes, we got a cinch. I am going to call every dollar they got"—and took out a roll from each pocket, which Boatright counted, and "was put up with the money, that took all the \$5,000 in gold." Thereupon Boatright got the gripsack and packed all the money into it. When the crowd had gone down stairs, the plaintiff asked Boatright to give him some more money. Boatright told him that there was no use to give him any more; that they were all in with the money they had. To this plaintiff said: "Here, this

fellow put in or caused me to put in my money, and I want my money out of this thing. I see it is a trap now. I want my money out of it." Boatright said: "They are watching me. I didn't know your money was in it. They are watching me, and I can't well get it out now. I will get it directly and hand it to you." The plaintiff told him that he had put up \$5,100, which Boatright said he would get out directly when they were not watching him. Boatright went down stairs and put the grip back in a little safe behind the counter and locked it. The plaintiff again applied to him for his money, and sent Hineman and Duncan to him. Again he promised to return it, but failed. At this juncture the plaintiff was hustled into a carriage and driven to the race track, where Boatright was selected as referee and the plaintiff was made one of the judges of the race, and held the string, and Hineman did the starting. When the plaintiff saw the supposed racers at the starting point, he said to Boatright: "This is a job. That fellow is throwing off right now. You can see it. You ought to give me my money now, without this mock way." Boatright said: "No; no." When they had started the plaintiff dropped the string and turned to Boatright and said: "This is a damned job you fellows put up. I seen it before now." And he again told Boatright that he ought to give him his money. Boatright said he did not know what to do about it; that he did not know whether to run off and leave the grip, or what to do; that "they had him in a hole; that the stakes were short." After their return to the 16 to 1 saloon Boatright again told him he would give him his money as soon as he could get it without their seeing; that they were watching him. Boatright advised him to go to Joplin and put up at a given hotel, and when he got a chance, when they were not watching him, he would get his money and send it to him by Hineman.

The evidence further shows that during the progress of the betting the plaintiff gave Duncan \$100, which Duncan put up on the race, and the plaintiff also put up with Boatright his watch, which watch Boatright afterwards returned to Duncan. The plaintiff returned to his home a poorer, but wiser, man. Duncan remained behind and had another interview with Boatright, to see if he could get the plaintiff's money. Boatright laughed over his smartness, by which he had obtained this money.

The only remaining question of fact to be determined is whether or not the defendants were in privity with the "Buckfoot gang." It is hardly to be expected that, if Boatright was sharing the spoils of his ill-gotten gains with the defendants, proof of this fact would be accessible to the plaintiff. It is quite clear, however, that the bank was the beneficiary of the conspirators' gains. The large amount of money obtained by their operations the bank enjoyed as the depository. It reaped the benefit of its use and the exchange. In this civil action, however, it is not essential to show that the defendants received directly a share of the spoils. It is sufficient to show that the defendants aided knowingly in the promotion of the fraudulent enterprise. *Felsenthal v. Thieben*, 23 Ill. App. 569; *Breedlove v. Bundy*, 96 Ind. 319; *Martin v. Leslie*, 93 Ill. App. 44.

It may be conceded that a banking institution may legitimately receive on deposit the moneys of a gambler, with reason to believe it was won in gaming, or by other questionable means, without accountability to any one save the depositor. But a bank and its managing officers cross the dividing line between what is permissible and what is forbidden when, with the conscious knowledge that the depositor is obtaining the money by fraud or theft, they do acts in aid of the means by which the money is thus obtained from others. When it co-operates with organized conspirators, it becomes equally liable with them, and each of them, to the party wronged for the money it receives on deposit, stolen by the more active conspirators from their victims, and for the money which it consciously obtains from the victim on his letter of credit, draft, or check by reason of the bank's assistance or inducement. A party who encourages or promotes, knowingly, the commission of a trespass or a fraud, is equally liable with the active participants. All are liable in *solido*. *Wallace v. Miller*, 15 La. Ann. 449; *Irwin v. Scribner*, 15 La. Ann. 583; *De Donato v. Morrison*, 160 Mo. 591, 592, 61 S. W. 641; *Waterman on Trespass*, vol. 1, p. 23. See note to *State v. Hildreth*, 51 Am. Dec. 373. A corporation, like this bank, may become a party to a conspiracy to defraud and be held liable as a joint tort-feasor "to the same extent and under the same circumstances as natural persons for the consequences of its wrongful acts, and will be held to respond in a civil action at the suit of an injured party for every grade and description of forcible, malicious, or negligent tort or wrong which it commits, however foreign to its nature, or beyond its granted powers, the wrongful transaction or act may be." *Alexander v. Relfe*, 74 Mo. 517; *Zinc Carbonate Company v. First National Bank (Wis.)* 79 N. W. 229, 74 Am. St. Rep. 845.

It is equally well settled that, where there is a conspiracy to commit fraud or larceny, each person in the confederation, though not actually present at the taking and appropriation, is guilty. *Commonwealth v. Hollister*, 157 Pa. 13, 27 Atl. 386, 25 L. R. A. 349. The bank cannot receive and enjoy the benefits of the ill-gotten gains or the wrongs perpetrated by its members in their official capacity to the detriment of another without being equally liable with its managing officers. That the defendants Joseph C. and James P. Stewart, president and cashier, respectively, of the defendant bank, practically owning all of its stock and managing its affairs, had knowledge at the time of the swindle practiced on the plaintiff that the "Buckfoot gang," with Boatright as the inspiration and directing mind, long anterior to and at the time in question, were engaged in conducting fake foot races and fleecing outsiders, quite satisfactorily appears in this evidence. I am furthermore persuaded that the part played in said scheme by the Stewarts, acting for the bank, was of such character that without its co-operation, or some other similarly situated bank, the scheme of the conspirators would not have been so successfully conducted. It was altogether important, if not indispensable, to the successful operation of the swindlers that, when they had brought their intended victims to the point where their money should be gotten into Boatright's "grip," they should have the assistance of

the superserviceable bank, where the victim's letter of credit, draft, or check would be immediately converted into money without any questioning or delay. This bank was most conveniently located, immediately across the street from the 16 to 1 saloon. The Stewarts must have been aware of the gathering there of this noisy, disreputable gang of gamblers. Their unsavory character and reputation in conducting swindling foot races was a matter of common notoriety in the little village. The malodor of the "Buckfoot gang" permeated the social and business atmosphere of the community. Proof of the general notoriety of the business conducted by this gang is admissible to carry home knowledge to the defendants. This rule is aptly stated in *Benoist v. Darby*, 12 Mo. 206:

"Where particular knowledge of a fact is sought to be brought home to a party, evidence of the general reputation and belief of the existence of that fact among his neighbors is admissible to the jury as tending to show that he also had knowledge as well as they. It is next to impossibility in very many cases to fix a positive knowledge of a fact upon an individual, notwithstanding the interest he may have in being correctly informed, and doubtless is informed thereof, and we cannot see the injustice of permitting a party to raise a presumption of knowledge in such a case by showing that the community are informed on the subject, and hence the party interested may also have similar knowledge."

But the evidence in this case goes much further to show actual knowledge on the part of the defendants of the fact that the "Buckfoot gang" was stealing other people's money. Boatright, a hitherto impecunious man, engaged in no known avocation of profit, soon after the operations of the "gang" began became a depositor in the defendant bank of large sums of money. The accounts of himself and Ellis, who seemed to be his principal coadjutor, were placed with the bank in other names. The name of Boatright's mother, a moneyless woman, was used, as also that of Boatright's hired girl, whose signature the bank did not even take upon its depositors' book. This money was drawn out at will by Boatright and Ellis, by checks signed by them without obtaining the signatures of the nominal depositors, and without any authority thereto indicated to the bank from said women. This bank account swelled enormously. The famous grip-sack, after a fake race occurred, would be carried to the bank and placed by Boatright behind the counter or desk as if it were his private place of deposit. When the victims of the conspirators went to the bank to make the deposits of Boatright's money or to draw out the money on their checks, usually some one of the gang was along or hanging close around in the bank, keeping watch; and Ellis and Landers at the same time were taking out large bundles of money which the bank officers must have known were to be used in promoting these fraudulent foot races. The testimony shows an instance where a young lady went to the bank to draw out \$7,000 of money belonging to her father, which was tendered by the cashier in a large amount of gold, with the statement that he was without sufficient money in currency. She protested that the money in gold was too inconvenient. Thereat Boatright appeared at the window and passed in the noted grip to the cashier, and, without more, the cashier

took out of this grip sufficient money in currency to supply the amount necessary to fill out the order of her check.

Prior to the transaction in suit the defendant bank had brought suit in an Arkansas court to recover on some check or draft given by one of the victims for money which went to the "Buckfoot gang." To that suit the defendant made answer, explicitly alleging and charging the fraudulent character and methods of this "Buckfoot gang," by which the money was obtained through the bank. Thereupon the defendant bank took a nonsuit. On another occasion, prior to the time in question, one of the Stewarts was visited by an attorney of one of the victims of this "Buckfoot gang," who was seeking to recover back the money they had stolen from his client, and he was distinctly advised by said attorney of the character of the business conducted by "Buckfoot," and was warned of trouble to the bank by its assistance therein. On another anterior occasion, in conversation with another attorney, who visited the bank in an effort to compel it to surrender a draft, or remittance made to it on a draft, of one of the victims of the gang, the defendant James P. Stewart, in effect, stated that the bank had an arrangement with Boatright by which it would not lose anything; and in the course of the cross-examination of James P. Stewart he in substance admitted that he had knowledge of the business of the "Buckfoot gang"—that he understood that under the method of conducting the races no one on the outside ever won any money. Unless the judicial mind is to close all avenues to common sense, it cannot escape the conclusion that, when the plaintiff and others of his fellows in misfortune were drawing out their money through the defendant bank, the Stewarts knew the purposes thereof; and they must have known that it found its way into the Boatright grip, and then came back to the bank through Boatright. Time and again, when the victims of the conspirators were piloted into this bank to draw their money out to be intrusted to Boatright, they made inquiry of the bank officer touching Boatright and Ellis, and were asked respecting their reliability, and would be told that they were "all right," or could be depended upon, and that thereupon these abused and confiding men went ahead and took their money and delivered it over to Boatright. From this the inference may be drawn that the defendants were aiding and abetting. *Gardner v. Preston*, 2 Day (Conn.) 205, 2 Am. Dec. 91.

At the time the plaintiff was drawing out his money from the bank there was something almost pathetic in the question he put to the bank officer. It can be readily inferred that this man was almost dazed by the perplexing situation in which Boatright had brought him. He evidently had some misgivings as to intrusting such a large amount of his money with Boatright; and, while being watched and urged by one of the gang to draw his money from the bank, he anxiously inquired at the cashier's window if Boatright was all right, and, receiving an assuring answer, checked out his money. The Stewarts must have known that the reliance these strangers would place in such statement of the officers of a banking institution, in thus indorsing the character of a man who was a stranger to them, would be a persuasive inducement to them to intrust their money to the in-

tegrity of Boatright. The Stewarts knew that Boatright was not all right, for they had reason to know and believe that he was all wrong. They knew that Boatright and his associates bore the suggestive epithet of the "Buckfoot gang"; that his business was that of a gambler; that he was conducting fake foot races; and that he was, therefore, not all right, but a disreputable man. They knew that he was covering up his money in the bank under the name of a hired girl. They knew, for the evidence in this case discloses, that on a former occasion, when Boatright had been called into court to make answer under oath as to where his money was located, with a view of subjecting it to process of execution, that he had withdrawn his money from the bank, and that to enable him to carry it on his person the bank had gotten for him \$31,000 in \$1,000 bills; and Stewart in his cross-examination in this case undertakes to excuse himself for his assistance in this transaction by saying that he did not inquire into his purpose. With all this knowledge of the character and methods of that man, it assured the plaintiff that his \$5,000, being drawn from the bank, could be intrusted to this "Buckfoot." All of which leaves the impression indelibly fixed upon my mind that the defendants were in the full confidence of the "Buckfoot gang," and were consciously aiding and abetting them in their nefarious schemes. There is evidence in this record tending to show that the method pursued by the defendant bank in sending on the checks drawn by the victims of this "gang" for collection on other banks was out of the ordinary course of collection by banks, evidencing that, in the mind of the officers of the bank, payment thereon by the drawer might be stopped as soon as he discovered the fraud practiced upon him. I attach, however, little importance to this evidence, as there is abundance of other facts and circumstances in this record which satisfies the mind of the court of the culpability of the defendants.

Objections to Testimony.

As this case was submitted to the court on the record of evidence taken on the trial in the state circuit court of one Hobbs against the defendants, growing out of a similar transaction, it is somewhat difficult to determine exactly what objections made by the defendants to the admissibility of testimony it is intended by counsel this court should rule upon. The objections, in their essentiality, may be grouped under the following heads: First, evidence as to the acts, conduct, and statements of the members of the alleged combination, separately made in advance of what the defendants' counsel contends was not sufficient proof of the conspiracy; second, evidence showing the other acts and transactions of the "Buckfoot gang," in which other parties are alleged to have been cheated out of their money by said fake races prior and subsequent to the transaction on trial. As a general proposition of law it may be conceded that, in an action founded on conspiracy, the existence of the conspiracy should be first established, *prima facie*, before the acts and statements of the alleged members of the conspiracy, not made in the presence of all, are admitted in evidence. But, as it is not to be expected that the conspirators came to their conventions in the open, and may have

reached an understanding among themselves without any formality of expressed agreement, it would be quite impossible to establish the existence of the conspiracy in many cases otherwise than by progressive steps in detail, by tracing the separate footsteps of each alleged party to see if they do not all converge to a common center of purpose. It is by collecting together the apparently scattered parts that the composite structure is formed. The order in which the evidence shall be admitted must necessarily, at times, rest in the sound discretion of the trial judge. When the collected evidence in this case is considered as a whole, it shows beyond any reasonable doubt that the persons named in the petition as members of the so-called "Buckfoot gang" were acting in concert with and under the mastery of Boatright as its head center. Although some of them may have come into the conspiracy from time to time after its inception, yet, as they were found co-operating with and aiding the object of the conspirators, they became responsible, at least, for every act and wrong subsequently done in furtherance of the purposes of the association.

It is equally well settled that in a civil action for redress against wrongs of alleged conspirators, for the purpose of establishing the existence of the conspiracy and demonstrating the character of the particular wrong complained of, the conduct, acts, and declarations of the conspirators, *in pari materia*, from the inception of their operations, may be inquired into and unfolded. Of course, such evidence must pertain and be limited to acts of a like character in furtherance of the common purpose, continuing up to the time of the particular matter on trial. *State v. Myers*, 82 Mo. 558, 52 Am. Rep. 389; *State v. Beaucleigh*, 92 Mo. 490, 4 S. W. 666; *Davis v. Vories*, 141 Mo., loc. cit. 241, 242, 42 S. W. 707; *O'Hara v. U. S.* (C. C. A.) 129 Fed. 552. "The mental conditions of knowledge, intent, and plan (or design) may often be evidenced by conduct of the person, exhibited at other times, but leading by one process of thought or another to an inference that he has knowledge, intent, or plan with reference to the act in question." 1 *Greenleaf on Evidence* (16th Ed.) par. 14q. See *Wood v. United States*, 16 Pet. 342-360, 10 L. Ed. 987. The rule is aptly expressed in *United States v. Wilson* (D. C.) 60 Fed. 898. After alluding to the fact that a criminal agreement between certain parties was established, the court said:

"The assent of the other defendants may be established as an inference by the jury from the other facts proved. Any joint action upon a material point, or a collection of independent but co-operating acts, by persons closely associated with each other, is sufficient to enable the jury to infer concurrence of sentiment. *Archer v. State*, 106 Ind. 426, 7 N. E. 225. Without the proof of the original agreement, it was competent to prove the acts of the different defendants, and thus prove the conspiracy between them. *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320. The evidence of joint action between the defendants covers a great many transactions, and extends over several months of time. It is not only sufficient to authorize an inference of guilt, but it is of a character, if believed, to make any other inference impossible."

There is also good reason and authority for the proposition that where the question involved is as to the fraudulent character of the

transaction and the existence of a conspiracy, as also the guilty knowledge of the alleged participants, evidence of subsequent like acts and transactions, of a similar character, closely allied in point of time, before the end of the conspiracy, may be admitted. *Cary v. Hotaling*, 1 Hill, 311, 316, 37 Am. Dec. 323.

In *Erfort v. Consalus*, 47 Mo. 212, 213, where the admissibility of evidence of acts and conduct of the alleged fraudulent conspirators was in question, the court said:

"It was also proper to show what preceded and followed the transaction, the relations of the parties prior and subsequent, and all the facts and circumstances surrounding the principal event."

In *Lane v. Kingsberry*, 11 Mo. 410, Judge Scott said:

"The transactions of an individual so frequently running into each other, in order to ascertain his conduct, his transactions about the time of his making a conveyance, sought to be avoided, must be inquired into; nor should they be rejected in evidence, although they may have occurred after a fraudulent conveyance, if they serve to throw light upon, or to explain, his previous conduct. In the investigation of questions of this kind, the courts should lend an unwilling ear to the objection of irrelevancy merely. If the evidence is merely irrelevant, it cannot affect the rights of the objector. The delay in hearing such evidence is never as great as that caused by arguing the question of its admissibility. It is always best for the courts to err on the safe side."

The transactions between the witness John R. Black, of Griswold, Iowa, and the "Buckfoot gang" and the defendants, which occurred near the middle of November, 1901, for instance, is so nearly allied in point of time and so similar in its character in many respects to the case on trial that its competency should be unquestioned. It was but a continuation of the business of the "Buckfoot gang" and the bank, which illustrated their method of operation, and throws a calcium light on the knowledge and assisting co-operation of the defendants in furthering the fraudulent scheme of the "gang" at the time of the transaction at bar. Beyond this transaction the court excludes the evidence as to other like transactions. Nor does the court, by admitting the evidence touching the Black transaction, wish to be understood as deeming it essential to the conclusion reached by the court as to the culpability of the defendants, as there is ample evidence to satisfy the court on this issue exclusive of the Black incident.

Can the plaintiff recover on the foregoing facts? If, as urged, the money sued for was in fact put up by plaintiff as a wager on a foot race, real or feigned, the evidence shows that not only when the plaintiff intrusted his money with Boatright as stakeholder he distinctly stated to him that he was not wagering it on any race, but before the simulated race occurred, time and again, he demanded of Boatright its return, which was refused. The law ever accords to the party about to commit a wrongful act—delictum—his locus poenitentiae. The refusal to return the money on demand gave the plaintiff a right of action to recover it. *Bernard v. Taylor* (Or.) 31 Pac. 968, 18 L. R. A. 859, 37 Am. St. Rep. 693; *Wood v. Duncan*, 9 Port. 227; *Shackleford v. Ward*, 3 Ala. 37, 36 Am. Dec. 435; *Hardy v. Hunt*, 11 Cal. 343, 70 Am. Dec. 787; *Humphreys v. Magee*, 13 Mo. 435; *Adams*

Express Company v. Reno, 48 Mo. 268. The stakeholder cannot set up the illegality of the contract as a defense to the action to recover the deposit. *Alford v. Burke*, 21 Ga. 46, 68 Am. Dec. 449. See, also, *Vischer v. Yates*, 11 Johns. 23; *Barrett v. Neill*, *Wright (Ohio)* 472; *Tarleton v. Baker*, 18 Vt. 9, 44 Am. Dec. 358.

It is insisted, however, on behalf of defendants, that the plaintiff, by consenting to aid Boatright in what he understood to be a fixed race, by betting Boatright's money as his own, became particeps criminis, or in *pari delicto* with the conspirators, and, therefore, has no standing in court for relief. In the consideration of this aspect of the case it is altogether important to keep in mind the precise status of this case, for it makes the situation of the parties quite *sui generis*. There never was any scheme devised or proposed on the part of Boatright and his confederates to win any money from a third party on a foot race otherwise than by inducing third parties, strangers to the conspiracy, to intrust their money to Boatright. There never was any of Boatright's money or any of his confederates' in fact wagered against any money put up by any opposing racer, other than that of the common fund of the conspirators. All the parties to the confederation understood and knew that all the money put up on behalf of Boatright and those apparently betting against him belonged to the common fund, under the control and in the possession of Boatright. There was no money wagered by Ellis and his abettors against Boatright's money. The money put up by them was never in fact a wager. The very definition of a wager is:

"A contract by which two or more parties agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening of an uncertain event." *Black's Law Dictionary*.

"A wager is an agreement between parties differing as to an uncertain fact or forecast of a future event," etc. *Bishop on Contracts*, par. 530.

There was in this case no uncertain event to constitute a wager as between the Boatright gang. There was nothing uncertain about it. In fact, they were not wagering anything at all. The sole scheme in this case was to obtain and steal the money of the plaintiff. There was no third party in fact to be cheated and swindled by any act or thing done by the plaintiff. How, then, can it be maintained that the plaintiff, whose money both sides to the simulated wager had conspired and agreed to steal, was particeps criminis, or in *pari delicto*, with the defendants in promoting a scheme to defraud some one? There was no one to be defrauded but the plaintiff. There was no innocent third party to be duped and lured into hazarding his money on a fake foot race, to be defrauded by reliance upon the fact that the plaintiff was betting his money with them. There was no conspiracy to defraud anybody but the plaintiff himself. A man cannot swindle and steal from himself. And it would seem to be a solecism in terms, an impossibility in law, to say that a man was participating with others in a scheme to defraud and steal from himself. The sole conspiracy among the "Buckfoot gang" and their coadjutors was the compact to obtain, by deceit and falsehood, the money of the plaintiff, by inducing him to believe that the conspirators were actually wagering the money of the one against the other on a foot race, and to

induce the plaintiff and other strangers to this secret compact to believe that they were in fact wagering their money, which was to be won by a race fixed in the interest of Boatright; and therefore the only compact, as a conspiracy, in which it can be claimed that the plaintiff became particeps criminis, or an aider or abettor, was an agreement to obtain and steal his own money. It seems to me that it would be a reproach to the law if the parties who thus inveigle and deceive a third party, by which they obtain and steal his money, can go unwhipped of justice and keep and enjoy their ill-gotten gains, by taking shelter under maxims of the law that were intended to prevent fraud and the perversion of justice.

The trend of modern jurisprudence is to get away from the technical or literal application of ancient maxims of the law intended to prevent fraud by refusing audience to a party who in his complaint discloses that he himself is tainted with moral turpitude, when its application in the particular case would prove but a cover and shelter for the scoundrel who by falsehood and deceit inveigled the complainant to trust him with his money. In other words, where the ends of public policy will rather be promoted by giving than refusing relief, courts prefer the former. In short, although the complainant may in some degree be in delicto, yet, unless he is also in *pari delicto* with the defendant, it does not, and should not, follow that the doors of the temple of justice should be closed against him. Pomeroy, in his work on Equity (volume 2, § 942), expresses this distinction very aptly and clearly:

"Lastly, when the contract is illegal, so that both parties are to some extent involved in the illegality—in some degree affected with the unlawful taint, but are not in *pari delicto*; that is, both have not, with the same knowledge, willingness, and wrongful intent, engaged in the transaction, or the undertakings of each are not equally blameworthy—a court of equity may, in furtherance of justice and a sound public policy, aid the one who is comparatively the more innocent, and may grant him full affirmative relief, by canceling an executory contract, by setting aside an executed contract, conveyance, or transfer, by recovering back money paid or property delivered, as the circumstances of the case shall require, and sometimes even by sustaining a suit brought to enforce a contract itself, or, if this be impossible, by permitting him to recover the amount justly due by means of an appropriate action not directly based upon the contract. Such an inequality of condition exists, so that relief may be given to the more innocent party, in two distinct classes of cases: (1) It exists where the contract is intrinsically illegal, and is of such a nature that the undertakings and stipulations of each, if considered by themselves alone, would show the parties equally in fault, but there are collateral and incidental circumstances attending the transaction, and affecting the relations of the two parties, which render one of them comparatively free from fault. Such circumstances are imposition, duress, threats, undue influence, taking advantage of necessities or of weakness, and the like, as a means of inducing the party to enter into the agreement, or of procuring him to execute and perform it after it had been voluntarily entered into. (2) The condition also exists where, in the absence of any incidental and collateral circumstances, the contract is illegal, but is intrinsically unequal, is of such a nature that one party is necessarily innocent as compared with the other, and the stipulations, undertakings, and position of one are essentially less illegal and blameworthy than those of the other."

With characteristic discrimination and sense of justice, Judge Napton, in *Gowan's Administrator v. Gowan*, 30 Mo. 472, held that where a debtor deposits property in the hands of another, with a view fraud-

ulently to protect it from his creditors, such depositary is but a bailee, and cannot avail himself of such fraudulent intent to defeat an action brought against him for restitution. After adverting to the general doctrine that courts of equity and law will not afford relief to a party who admits his own fraud or turpitude, he said:

"But the plaintiff here asks no aid of a court of law or equity to set aside anything that has been done, either in the shape of a conveyance or otherwise. He simply asks that the bailment be enforced; that, as he put the property in the defendant's hands subject to his order, he shall now have it again when demanded."

He further said:

"It may be questioned whether the determination of courts to give no assistance in the case of fraudulent conveyances, as between the parties, has been promotive of the ends of justice and is founded upon sound morality. It is seldom that both parties are equally to blame in a transaction tainted with fraud in each, and, if they are, the doctrine seems to encourage a double fraud on one side to punish the single fraud on the other. But we will not be understood as questioning the propriety of the general rule. We merely make the observation to show that it has been carried far enough. It ought not to be extended to cases not properly within its sphere. We might as well be asked to go further still and allow a defendant to defend himself against a just claim by the general allegation that the plaintiff was a dishonest person or had committed some crime."

In *Adams Express Company v. Reno*, 48 Mo. 264, one John Reno had been sent from Davies county, Mo., to the state penitentiary. His relative, Clinton Reno, being advised that for the sum of \$5,000 the judges of the county court and Ballinger, the sheriff of the county from which John Reno had been sent to the penitentiary, could bring influence to bear on the Governor to obtain a pardon for John, raised \$4,000 for this purpose and sent his sister to Jefferson City. Failing to meet Ballinger there, as expected, she was persuaded by the warden of the penitentiary to leave the money with him, to be handed to Ballinger when he appeared there. Ballinger not appearing, however, the warden deposited the money in bank. In an action by attachment by the Adams Express Company against John Reno, this money was garnished. Clinton Reno appeared and interpleaded in this action, claiming the fund. There, as here, it was insisted that, as the money was intended to be used for an illegal, corrupt purpose, the law would not assist Clinton Reno in recovering it. The Supreme Court rejected this contention. The court said:

"Where parties have been guilty of turpitude in entering into illegal agreements, or have performed acts which are stigmatized as against public policy, the courts of the country furnish them no redress. But if propositions have merely been made contemplating such purposes, but nothing has been done to finally accomplish or consummate them, they stand in a very different attitude. The moral stain has not attached, and the guilt has not been carried out. The doctrine applies solely to executed contracts, but I have never seen any case which would warrant its application to contracts which are executory."

The reasoning of the court further on in the opinion is that, although the money was placed by the plaintiff in the warden's hands for a grossly corrupt purpose—of influencing the Governor to grant a pardon—and although the conception of the plaintiff was tainted

with turpitude, yet, as the money was not in fact used to advance the forbidden purpose, and no third person's act was influenced or affected thereby, the doctrine of moral turpitude had no just application, and therefore the warden and his privy, the bank, held the money as mere bailee, and plaintiff's title therein had never passed.

The plaintiff's attitude in the case at bar is stronger. He did not intend to bribe or corrupt anybody. He was induced by the "Buck-foot gang" to place his money in Boatright's hands under the false assurances that it was necessary to be used to make a showing of the stake money, and then to be immediately returned to the plaintiff. It was never intended by Boatright to use it for the purpose which he represented. It was never in fact so used. No count was thereafter made of the so-called stake money. Nobody was misled or wronged by the plaintiff placing the money in Boatright's hands. Boatright held the money as special bailee for the plaintiff on a condition which he himself had falsely concocted, and was never expected or intended to transpire. When he refused on demand to return it to the rightful owner, he was guilty of a conversion and theft. It does not, therefore, lie in the mouth of his confederates in the wrong to talk about turpitude and the doctrine of *contra mores*. Suppose, after Reno had so placed his money, through his sister, with the warden of the penitentiary, he had become suspicious of a plot by the warden to appropriate the money to his own use, and had, *eo instante*, made demand on the warden for its return, and the warden had refused; would the warden, when sued for conversion, be heard to say there was an unexecuted purpose on the part of the plaintiff in placing the money with him to cheat or corrupt somebody, and therefore he had a right to keep his money? The Supreme Court of this state answers no.

In *Poston v. Balch*, 69 Mo. 115, Poston and his wife had a domestic disagreement. The wife instructed her attorney to institute divorce proceedings. But in the meantime the husband and wife had agreed upon a separation and division of the property, which she accepted in lieu of alimony and other claims against his estate. Her attorney, not being aware of this settlement, brought the suit, and inserted in the petition a claim for alimony. The husband, in ignorance of the mistake by which this claim was advanced, became alarmed, when he was visited by the defendant, who pretended to be his friend. He disclosed to the defendant his domestic trouble, and requested him to intercede to have his wife withdraw her claim for alimony. The defendant, on the contrary, urged her to insist upon this claim, which she declined, and declared her purpose to stand by the settlement. Notwithstanding this, the defendant reported to the plaintiff that she would insist upon the demand for alimony; and on his suggestion, in order to defeat her claim, the plaintiff, on a nominal or inconsiderable consideration, transferred all his property to the defendant. On discovering the fraud practiced upon him by the defendant, he brought suit to set aside the transfer and subject certain real estate, obtained by the defendant in exchange for the plaintiff's property, to a lien for the value of it. It was held that the parties were not in *pari delicto*, and the relief was granted. Judge Napton, in the course of his opinion, discussed the application of the doctrine of in *pari delicto*.

to, referring to the discussion of Judge Story, to the effect that courts did not affect to sit in judgment upon cases as custodes morum, enforcing a strict rule of morality. "But they do sit to enforce what has not been unaptly called a 'technical morality.' If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition." He further placed his ruling upon the proposition that both parties were not in *pari delicto*, and then said:

"Shall the defendant, who was principal in this gross fraud, be allowed to avail himself of the maxim, '*In pari delicto potior est conditio defendendis*,' and thus retain the profits of his deception? * * * We base our conclusion to set aside the transfer solely on the ground that there was a breach of confidence in the case, and, although the relations of the parties were not of that character which renders transactions between them on inadequate considerations presumptively void, so as to require satisfactory proof to establish their fairness, etc., yet they were such as required from the party in whom a special trust was reposed, the utmost degree of good faith. It must appear that the contract was fair, just, and equitable, and not procured by undue influence and false representations. Here the transfer was made at the suggestion of the defendant, following a false statement of his interview with plaintiff's wife. The parties were not in *pari delicto*. It is probable that the sole ground upon which the bill was dismissed in the circuit court was the participation of both parties in the intention of defeating the supposed claim of Mrs. Poston for alimony. The defendant was perfectly aware that no such claim had any existence. The plaintiff assumed that the report of the defendant, who was especially intrusted by him, was true, and under this hypothesis accepted the offer of defendant to place his property beyond the reach of this claim."

It is difficult to differentiate that case, in principle, from the case at bar. There was in the mind of plaintiff, when he placed his money in Boatright's hands, it may be conceded, the intention that it might be used to deceive third parties. So Poston put his property in the hands of Balch with the intention in his mind at the time to defeat his wife's claim for alimony. Boatright and his confederates were perfectly aware when they obtained the plaintiff's money that the ground upon which they obtained it had no existence in fact, was entirely fictitious, just as Balch was perfectly aware when he obtained Poston's property that no claim for alimony in fact existed. The plaintiff here assumed when he parted with his money on the statement and representation of Boatright, "who was especially intrusted by him," that such statements were true, and under that assumption was induced to intrust his money to him, just as Poston was induced to intrust his property to Balch.

Again, in *Bell v. Campbell et al.*, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505, the complainant, an aged woman, was induced by her son-in-law and the sureties on his official bond to execute a mortgage on her land to indemnify them on the defalcation by her son-in-law to escape punishment for a crime, when in fact this was a false pretense. It was held that, notwithstanding she executed the mortgage for the purpose of protecting her son-in-law from criminal prosecution, it did not preclude her from relief on the ground that she was in *pari delicto*, "as she cannot be regarded as equally culpable with the defendants." After adverting to the rule that courts will relieve parties against undue advantages "under circumstances which mislead, confuse, or disturb the unjust result of his judgment, and thus

expose him to be the victim of the artful, the importunate, and the cunning," the court said:

"It is urged that, if the deed of trust and notes executed by the plaintiff had been given through fear of Carter's criminal prosecution and in order to prevent the same, then she stands in *pari delicto* with the other parties to the transaction, and therefore could have no relief against the enforcement of those writings obligatory. There are two answers to this contention: First. Granting that plaintiff did enter into the contract with that purpose in view, she will not be debarred from pursuing her remedy, because she cannot in any event be regarded as equally culpable with the adversary parties. When this is the case, a court of equity will interfere and go to the relief of the less guilty party, whose transgression has been brought about by the imposition, undue influence, etc., of the party on whom the burden of the original blame-worthiness principally rests."

This is unquestionably the Missouri doctrine on this question, and it is in accord with current authority. Judge Adams, of the Eastern District of this jurisdiction, in the recent case of *In re E. J. Arnold & Co.*, not yet published, recognized and applied this rule to the instance of the right to recover back money placed with a swindling concern for gambling purposes on horse races, with many citations in support thereof. See, also, *Anderson v. Meredith*, 82 Ky. 564; *Johnson v. Cooper*, 10 Tenn. 523, 24 Am. Dec. 502; *Harrington v. Grant*, 54 Vt. 236; *O'Connor v. Ward*, 60 Miss. 1025; *Rucker v. Wynne*, 39 Tenn. 618; *Webb v. Fulchire*, 40 Am. Dec. 419.

In *Bernard v. Taylor* (Or.) *supra*, this rule was applied to an instance quite germane to the one at bar, as it arose out of a "fixed" or "job" race. It was held that the party thus cozened out of his money could recover.

The case of *Catts v. Phalen et al.*, 2 How. (U. S.) 376, 11 L. Ed. 306, sustains the position taken in the foregoing discussion. Phalen and Morris were running a lottery in violation of law. Catts was employed in drawing the tickets for them. He arranged with one Hill to purchase a certain ticket with money furnished by himself, and he so manipulated the drawing as to make the ticket draw a prize of \$15,000, upon which was paid by Phalen and Morris to Hill, for the benefit of Catts, \$12,500. On suit to recover, the defense interposed the illegality of the transaction. The court, after animadverting upon the deliberately concocted, wicked fraud, said:

"The consequence is that he has not and cannot have any better standing in court than if he had never owned a ticket in the lottery, or it had never been drawn. So far as he is concerned, the law annuls the pretended drawing of the prize he claimed, and in point of law he did not draw the lottery. His fraud avoids not only his acts, but places him in the same position as if there had been no drawing in fact, and he had claimed and received the money of the plaintiffs by means of any other false pretense, and he is estopped from avowing that the lottery was in fact drawn. * * * The contract which the law raises between them is not founded on the drawing of the lottery, but on the obligation to refund the money which has been received by falsehood and fraud, by the assertion of a drawing which never took place."

To the same effect are the cases of *Phalen v. Clark et al.*, 19 Conn. 421, 50 Am. Dec. 253; *Timmerman v. Bidwell*, 62 Mich. 205, 28 N. W. 866; *Smith v. Blachley*, 188 Pa. 550, 41 Atl. 619, 68 Am. St. Rep. 887, 888.

In *Kitchen v. Greenabaum*, 61 Mo. 110, much relied upon by defendants' counsel, Judge Sherwood, in adverting to the foregoing rule, observed that it "must not be understood as applying to those involving moral turpitude, for there no inquiry will be made into the relative guilt of the contending parties, but to those where the offense is merely *malum prohibitum*, and is not in its nature essentially or necessarily immoral, nor violative of any general principle of public policy." This assertion is mere *obiter dictum*. The contract ruled on was prohibited by the Constitution of the state, and therefore in contravention of the declared public policy of the state. In the breadth of the statement it is in direct conflict with the later opinion of Judge Sherwood in the case of *Bell v. Campbell*, *supra*, and it has been directly departed from by the Supreme Court of the state in the following cases: *Sprague v. Rooney*, 104 Mo. 360, 16 S. W. 505; *Roselle v. Farmers' Bank*, 141 Mo. 44, 39 S. W. 274, 64 Am. St. Rep. 501; *Haggerty v. Ice Mfg. & Storage Company*, 143 Mo. 247, 44 S. W. 1114, 40 L. R. A. 151, 65 Am. St. Rep. 647. And in *Green v. Corrigan*, 87 Mo. 359, 370, where it was distinctly asserted that:

"Where both parties are in *delicto*, concurring in an illegal act, it does not always follow that they stand in *pari delicto*; for there may be, and often are, very different degrees in their guilt. The maxim, '*In pari delicto potior*,' etc., is not of universal prevalence. Another exception arises where the parties to the transaction, although concurring in the illegal act, are regarded as not equally guilty, in consequence of fraud, oppression, imposition, or hardship practiced by one party upon the other, thereby attaining an unconscionable advantage."

The case of *Knight v. Linzey*, 80 Mich. 396, 45 N. W. 337, 8 L. R. A. 476, which grew out of what is known as the "Bohemian oats" swindle, is by no means apposite to the case at bar. A radical distinction lies in the palpable fact, as disclosed on page 402, 80 Mich., page 339, 45 N. W., 8 L. R. A. 476, that there was in that case some innocent third party to be defrauded by the scheme in which the claimant entered, whereas, as already demonstrated, there was no innocent third party in fact to be defrauded by the plaintiff's consent to do what he did for Boatright. It was purely a scheme by the Boatright gang, feigning bets among themselves, to steal the plaintiff's money.

The same is true of the case of *Shipley v. Reasoner*, 80 Iowa, 548, 45 N. W. 1077, which also grew out of a contract respecting the sale of Bohemian oats.

In *Abbe et al. v. Marr et al.*, 14 Cal. 210, the petition disclosed that the plaintiffs, after they had been swindled in a horse race, through a combination of the parties thereto, deliberately went into a scheme with the defendants, not only to get even, but to win more money than they had lost in the first fraudulent race. Again losing, they sued to recover back the wager. Without further discussion, that case is clearly distinguishable from the one at bar. There the plaintiffs deliberately entered into a conspiracy to steal the money of a third party. With their own consent they put up their property as a wager, ran the race out, and after it was lost brought suit, and in the petition averred their own turpitude, whereas, here the plaintiff never consented to put up his \$5,000 on the foot race, and demanded it back

before the simulated race was run. His going out to the race track and what he did there were practically under coercion, reasserting to Boatright before the conclusion of the race that it was a swindle, and again demanding the return of his money. It was known to the conspirators that the plaintiff's money was not put in Boatright's hands as a wager; that it was intrusted to him in a matter wholly collateral. As such it was of the nature of a bailment. The law accorded to him his *locus pœnitentiæ*, and, when he demanded back his money prior to the proposed race, the law should respect his withdrawal.

In view of the relation the defendant bank and its officers sustained to the public, conducting a banking institution under a charter from the state, where integrity of conduct of such an institution and its officers is expected to be displayed, when its managing officers lent the use of the bank to such a disreputable combination as the "Buckfoot gang," and induced the plaintiff, its confiding patron, to draw from the bank his money and intrust it to the foul hands of the chief of the "gang," with reason to know that it would, in effect, be stolen by him, and he drew out his money on the indorsement of the bank's officer of Boatright's trustworthiness, the court will best subserve the interest of a sound public policy by holding that the bank and its officers shall make good that assurance. For there is good sense in the sentiment expressed by Lord Thurlow, in *Nevill v. Wilkinson*, 18 Ves. 383, to the effect that, if courts of justice mean to prevent the perpetration of criminal wrongs, it must be, not by allowing a man who got possession to remain in possession, but by putting the parties back to the state in which they were before the delict or crime.

The issues are found for the plaintiff as to the \$5,000 drawn by the plaintiff from the defendant bank, with interest thereon from the 7th day of September, 1901, when the plaintiff made demand of Boatright for the return of the money.

Judgment accordingly.

In re WORTH et al.

(District Court, N. D. Iowa, W. D. July 6, 1904.)

No. 620.

1. BANKRUPTCY—PARTNERSHIP—FIRM OR INDIVIDUAL DEBTS.

Where, a short time before a partnership and its members were adjudged bankrupts, a dissolution was agreed to by which one partner took the property of the firm and assumed its debts, consisting chiefly of notes given to a bank, firm creditors who refused to accept the novation cannot set up the claim that the bank consented to it and became the individual creditor of the purchasing partner, and at the same time repudiate the transaction so far as relates to a transfer of the firm property to such partner which was the consideration for his agreement to assume the debts.

2. SAME—PROVABLE DEBTS—RIGHT OF CREDITORS TO PLEAD USURY.

Under the Iowa statute (Code 1897, § 3041) which makes a usurious contract voidable only to the extent of the usurious interest, as construed by the Supreme Court of the state, the defense of usury can be pleaded only by the borrower, and under such rule, which is controlling upon the federal courts as to Iowa contracts, creditors of a bankrupt cannot set up the defense of usury against the claim of another creditor.

3. SAME—COSTS OF CONTESTING CLAIM.

Where the costs on the contest of a claim grew out of a controversy between creditors, entirely carried on for the purpose of controlling the election of trustee, they will not be allowed from the estate.

In Bankruptcy. On petition of objecting creditors for review of order of referee allowing claim of R. W. Ady, as receiver of the Sheldon State Bank, in the sum of \$9,377.64 against the bankrupt estate of N. F. Worth and Ed. C. Brown, copartners doing business under the name of N. F. Worth.

December 28, 1903, a creditors' petition in bankruptcy was filed against Noah F. Worth and Ed. C. Brown, as copartners doing business at Sheldon, O'Brien county, Iowa, under the firm name of N. F. Worth, and thereunder the copartnership and the individual members thereof were adjudged bankrupt on February 16, 1904. The Sheldon State Bank is a banking corporation, duly organized in April, 1902, under the laws of Iowa, its place of business being at Sheldon, in said O'Brien county. Said bank is the successor of the Sheldon Bank, which was also a corporation organized under the laws of Iowa, located and doing business at said town of Sheldon until April, 1902, when it was re-organized as the Sheldon State Bank, which succeeded to the business and assets of said Sheldon Bank; its officers and managers were the same as those of the Sheldon Bank. Ed. C. Brown, one of the bankrupts, was the president and general manager of the Sheldon Bank, and was cashier and general manager of the Sheldon State Bank from the time of its organization. October 16, 1903, the copartnership of Worth & Brown was dissolved by mutual consent of the parties. Brown retired, and Worth retained the assets and assumed the liabilities of the firm, and continued the business in his own name. November 4, 1903, R. W. Ady, in proper proceedings therefor, was duly appointed as receiver of the Sheldon State Bank by the district court of Iowa in and for O'Brien county, has duly qualified as such, and the assets and property of said Sheldon State Bank have been turned over to him as such receiver. Among the assets or property of said Sheldon State Bank so coming into his custody were three notes, dated July 11, 1903, due January 11, 1904, aggregating \$9,377.64, bearing 8 per cent. interest, and signed "N. F. Worth." November 7, 1903, N. F. Worth made to said receiver a chattel mortgage on all of the stock of merchandise that formerly belonged to the copartnership of Worth & Brown, and also assigned to the receiver the accounts due such copartnership, to secure said three notes. March 29, 1904, said receiver filed the said three notes so signed by said N. F. Worth, with an affidavit or proof thereof, against the bankrupt estate of said N. F. Worth, which proof appears to be against N. F. Worth individually, and not against the copartnership of N. F. Worth; but on March 30th an amended proof of said claim was filed against the copartnership of N. F. Worth, and in such proof it is alleged that it is made to conform the proof of the debt to the testimony taken on March 29, 1904, in said bankruptcy proceedings. In these proofs reference is made to the chattel mortgage and assignment of accounts to secure said debt, and the mortgage is attached to such proofs; but the receiver alleges that he surrenders all rights under said chattel mortgage and assignment, so far as the same may or might be held to be a preference over other creditors of said copartnership, and claims only to share equally and ratably with other creditors of said copartnership estate. To this claim of the receiver, Stearns, Shafer & Co., Hart Schaefer & Marx, and Carter & Holmes, creditors of the bankrupt copartnership, filed objections, those now relied upon being (1) that the receiver is not a creditor of said copartnership of N. F. Worth, that its said claim is against either Ed. C. Brown individually or against Noah F. Worth individually, and that the receiver is not entitled to share in any interest that either of said partners may have in the copartnership assets until the copartnership debts are first paid in full, with costs of administration; (2) that the claim is usurious; that large payments of illegal interest have been made thereon which should be applied in the payment of the principal of said debt, and the bank and its receiver held to have incurred the forfeiture provided by the laws of Iowa against usury. Testimony was taken upon these objections, and

at its conclusion the referee held that the objections were not sustained, and allowed the claim against the copartnership estate of N. F. Worth and Ed. C. Brown in the sum of \$9,377.64, and the objecting creditors have petitioned for a review of such order of the referee.

Hunter & McCallum and Alden, Latham & Young, for objecting creditors.

W. D. Boies, for receiver of Sheldon State Bank.

REED, District Judge (after stating the facts). The testimony relied upon to show that the claim of the receiver of the Sheldon State Bank is the individual debt of Ed. C. Brown, and not that of the copartnership, is voluminous, and it must suffice to say that a careful consideration of the whole thereof leads to the conclusion that the debt originally was that of the copartnership of N. F. Worth and Ed. C. Brown, and does not show that either this bank, or its predecessor, by reason of the conduct of Mr. Brown as president or cashier or general manager of either, is estopped from establishing or proving said claim against the copartnership estate in bankruptcy.

It is further contended by the objecting creditors, that if it shall be held that the debt owing to the Sheldon State Bank was originally that of the copartnership, then by the transaction of October 16, 1903, between Worth and Brown, above referred to, the copartnership was dissolved, and this debt assumed individually by N. F. Worth; that Brown, as cashier or general manager of the bank, at the time of this transaction assented to the arrangement on behalf of and for the bank, accepted the three notes of Worth individually for its claim against the copartnership, and released the latter therefrom; that these notes are the claim of the receiver now in controversy, and are not, therefore, a proper claim against the copartnership estate. The objecting creditors claim that they never accepted Worth individually as their debtor in lieu of the copartnership, and therefore insist that the claim of the receiver should not be allowed against the partnership estate. If it be true that by this transaction Worth individually became the debtor of the bank, he, by the same transaction, became the owner individually of the assets of the copartnership, for these were the consideration of his assumption of the debts of the copartnership, and such assets would be first liable for his individual debt under section 5 (f) of the bankruptcy act. Act July 1, 1898, c. 541, 30 Stat. 547, 548 [U. S. Comp. St. 1901, p. 3424]. This would give the receiver, as an individual creditor of Worth (and other individual creditors, if there are any), preference over the objecting and other copartnership creditors in what was formerly the copartnership assets. This, of course, would be inequitable as to the copartnership creditors not assenting to the transaction; but such creditors must either affirm or disaffirm the transaction of October 16th as a whole. They will not be permitted to affirm it in so far as it makes Worth individually the debtor of the bank, and thus lessen the copartnership liabilities, and disaffirm or repudiate it in so far as it gives him individually the copartnership assets which were the consideration of his assumption individually of the bank debt. So far as the testimony shows, Brown was not a creditor of the copartnership, and no property of the firm was transferred to him or to the bank by

this transaction which would amount to a preference under the bankruptcy law, made within four months prior to the filing of the petition in bankruptcy, which might be avoided by the trustee. Nor does the transaction appear from the testimony to have been intended to hinder, delay, or defraud creditors; nor was such its effect necessarily, for each of the partners remained liable to the partnership creditors (except as they might assent to the release of Brown), and Worth retained all of the assets and remained liable for the firm's debts. In any event, it would be inequitable to charge Worth individually with the firm's debts, and take from him that which was the consideration for his assumption of such debts. As the receiver surrenders all preferences that he might have under the chattel mortgage and assignment of November 7th, it will be more equitable to hold that the relation of the creditors of the copartnership and of the individual members thereof to the partnership assets are not changed by this transaction of October 16th, and that the proceeds of the assets of the firm and its individual members should be distributed as though such transaction had not taken place.

It is urged with much persistency that the claim of the receiver is tainted with usury; that it should be allowed for only such amount of the principal debt as remains after deducting all interest that has been paid thereon, and the forfeiture provided by the Iowa statute for usurious debts enforced. That interest in excess of the legal rate was paid upon this debt to the bank seems certain, but the amount so paid is not definitely shown by the testimony, nor is it entirely clear that it was paid in pursuance of a contract to pay unlawful interest, which is essential to work a forfeiture, by the lender, of the entire interest. *Sexton v. Murdock*, 36 Iowa, 516. Laws against usury are penal in their nature, and must be strictly construed. *Tiffany v. Bank*, 18 Wall. 409, 21 L. Ed. 862; *Dickerman v. Day*, 31 Iowa, 444, 7 Am. Rep. 156. The notes of the receiver, being Iowa contracts, and payable in Iowa, are to be governed by the laws of that state relating to usury. *De Wolff v. Johnson*, 10 Wheat. 367, 6 L. Ed. 343; *Call v. Palmer*, 116 U. S. 98, 6 Sup. Ct. 301, 29 L. Ed. 559; *Missouri Trust Co. v. Krumseig*, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474; *Bigelow v. Burnham*, 83 Iowa, 121, 49 N. W. 104, 32 Am. St. Rep. 294. The Code of Iowa (1897) provides that the legal rate of interest is 6 per cent., but parties may contract in writing for a rate not in excess of 8 per cent. (sections 3038, 3040), and (section 3041) "if it shall be ascertained in any action brought on any contract, that a rate of interest has been contracted for, directly or indirectly, greater than is authorized by this chapter, the same shall work a forfeiture of eight cents on the hundred by the year upon the amount of the principal remaining unpaid upon such contract at the time judgment is rendered thereon, and the court shall enter final judgment in favor of the plaintiff and against the defendant for the principal sum so remaining unpaid, without costs" (and in favor of the state for the use of the school fund for the amount of the forfeiture). Under this section the forfeiture there provided can be effected only in an action upon such contract. It is the settled rule in Iowa that under these sections the plea or defense of usury is personal to the borrower, and cannot be interposed by a stranger to the contract. *Carmichael v.*

Bodfish, 32 Iowa, 418; Green v. Turner, 38 Iowa, 112; Burlington Ass'n v. Heider, 55 Iowa, 424, 5 N. W. 578, 7 N. W. 686; Sullivan Savings Institution v. Copeland, 71 Iowa, 67, 32 N. W. 95; Pardoe v. Iowa Nat. Bank, 106 Iowa, 345, 76 N. W. 800. And a purchaser of premises subject to a mortgage which is usurious cannot interpose the defense of usury to an action to foreclose such mortgage, though he is the only party who will be affected by the judgment and decree of foreclosure. Sullivan Savings Institution v. Copeland, 71 Iowa, 67, 32 N. W. 95. And such is the general rule. Pritchett v. Mitchell, 17 Kan. 355, 22 Am. Rep. 287, and cases cited; Bensley v. Homier, 42 Wis. 631. In Pritchett v. Mitchell, 17 Kan. 355, 22 Am. Rep. 287, the right of a second mortgagee to plead usury in an action to foreclose a prior mortgage was involved. Mr. Justice Brewer, then of the Supreme Court of Kansas, said:

"When the parties to a contract are willing to abide by its terms, why should one not a party thereto be permitted to interfere? If the debts were unsecured, no one would think that the second creditor had the right to interfere. * * * Surely a man ought to have the right to say whether he shall keep his own promise or not. * * * While the law ought to protect the borrower from the clamps of the usurer by permitting him to repudiate all but legal interest, yet, if he feels in honor bound by the peculiar circumstances of his loan to pay a stipulated interest, it would seem as though no stranger to the transaction should be permitted to interfere."

The same rule is announced in *De Wolff v. Johnson*, 10 Wheat. 367, 6 L. Ed. 343. In *Bensley v. Hormier*, 42 Wis. 631, the right of a judgment creditor to plead usury as a defense in an action to foreclose a mortgage prior to his judgment lien was involved. In denying such right Ryan, C. J., at page 635, says:

"It is difficult to perceive why the defense given by the statute to the borrower for his protection against oppression, and which he may waive at his pleasure, should be extended to any one but himself and his representatives. * * * On what good reason may a stranger to a usurious agreement be suffered to do what the party in interest may consider as incompatible with honor and integrity? This question has given rise to a wide range of discussion, and the cases have generally held the defense of usury to be personal to the borrower. * * * We have come to the conclusion, after full consideration of the case, that the number and weight of authorities are against the right of the mere creditor."

And he quotes from Tyler on Usury, c. 21, as follows:

"From the authorities it seems to be decided that the policy of the statute of usury is the protection of the borrower against the oppressive exactions of the lender. It is not essential to the promotion of this policy that other persons than the victim of the usury, or persons standing in legal privity with him, should have the benefit of the statute, and hence the rule that the objection of usury cannot be raised by a mere stranger to the usurious transaction. And it is expressly declared that, if the borrower prefers for any reason to abide by his agreement, he will be permitted to do so. * * * Whenever he has waived the benefit which the statute proffers, no one else can make it available in his place. This excludes mere creditors, as has been held in several cases cited by the author."

In some authorities it is held that, where the usurious contract is made absolutely void by statute, it will not support an action in favor of any one, and that any person who may be interested in or affected by the enforcement of such void contract may show its invalidity for the

purpose of protecting his own interests. Of this class is, *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833. See, also, *Frank v. Morris*, 57 Ill. 138, 11 Am. Rep. 4. Under the Iowa statute, however, the usurious contract is not void, but voidable only to the extent of the interest in excess of the legal rate, and as construed by the Supreme Court of that state, the right to interpose such a defense is the privilege of the borrower only, and if he does not avail himself of the privilege so granted the statute is no longer applicable. *Carmichael v. Bodfish*, 32 Iowa, 418. This construction of the local statute by the highest court of the state is, under the familiar rule, controlling upon the federal courts in such state. The objecting creditors in the present case are in no manner parties or privies to the alleged usurious contract of the Sheldon State Bank, in no manner connected therewith, and cannot therefore be heard to interpose the objection of usury thereto.

It would seem that the legal representatives of the borrower might interpose the objection of usury the same as he might do. Whether or not the trustee in bankruptcy of this estate is such a representative and might interpose such objection for the purpose of preventing the allowance of illegal interest in this claim, need not be determined, for he is not interposing such objection. If he shall be of opinion that the amount of interest paid upon the claim in excess of the legal rate can be definitely established, and that it is for the best interest of the estate to expunge the same from the claim as allowed, he may move before the referee to reconsider the order allowing the claim, for this purpose, and the question may be thus raised and determined.

In the matter of costs, the contest was wholly between creditors of the estate, and, while it is claimed in behalf of the objecting creditors that they were waging it in the interest of the estate, it clearly appears that it was in fact waged for the purpose of controlling the election of the trustee. No reason appears why the estate should bear the cost of such a contest.

The order of the referee allowing the claim will be approved, without prejudice, however, to the right of the trustee to move to reconsider its allowance and expunge therefrom any unlawful interest that may be included therein, if he shall determine to do so, and it is so ordered.

JOHNSON et al. v. LEHIGH VALLEY TRACTION CO.

(Circuit Court, E. D. Pennsylvania. June 14, 1904.)

No. 16.

1. RAILROADS—FORFEITURE OF LEASE—EFFECT OF APPOINTMENT OF RECEIVERS FOR LESSEE.

Receivers appointed for a lessee of railroad property have a reasonable time after their appointment in which to determine whether or not they will assume the lease, and where, in such case, formal action was not taken by the lessor company until after their appointment to declare a forfeiture because of a default in the payment of rent which matured prior to the receivership, and within a few days after the expiration of the time for making such payment as fixed in the lessor's notice it was made by the

receivers, and received and retained by the lessor, the court of which the receivers are officers will not enforce the forfeiture on petition of the lessor.

2. LANDLORD AND TENANT—FORFEITURE OF LEASE—EQUITY JURISDICTION.

Where a tenant is in possession, equity has no jurisdiction to enforce a forfeiture of a lease, the lessor having an adequate remedy by ejectment.

3. SAME—RIGHT TO ENFORCE FORFEITURE.

Forfeitures not being favored by courts, either of law or equity, the requirements of a lease must be strictly followed by the lessor before a forfeiture will be enforced against the lessee.

4. SAME—RAILROAD LEASE.

A lease of railroad property provided that in part payment of the rental the lessee should pay semiannual dividends directly to the stockholders of the lessor company, which was required to declare such dividends in advance of each payment, and to furnish the lessee with a list of the stockholders. This requirement had not been observed, the payments having been made to the lessor company which distributed the same. Default was made in one of such payments and correspondence ensued in which the lessee endeavored to obtain further time, and certain stockholders stated their desire not to be insistent, and at this time receivers were appointed for the lessee. A resolution was then passed by the lessor's stockholders declaring a forfeiture of the lease, and notice was given the lessee and receivers as provided by the lease requiring the payment to be made within 30 days, otherwise the lease to stand annulled. Eleven days after the expiration of such time the payment was made by the receivers, and distributed among the lessor's stockholders, who retained the same. The receivers had also made other payments of interest which applied on the rental. *Held*, that the court would not enforce a forfeiture, and require its receivers to surrender the property, for the reason, among others, that no dividend had been declared and list furnished, which was a substantial condition precedent to forfeiture imposed by the lease that had not been waived by the lessee.

In Equity. On petition against receivers to enforce forfeiture of lease.

Robert H. Hinckley and W. S. Kirkpatrick, for petitioners.

J. W. Bayard and J. G. Johnson, for respondent.

J. B. McPHERSON, District Judge. This was an application made by Clarence A. Wollé and other stockholders of the Bethlehem & Nazareth Passenger Railway Company, whose road had been leased by the Lehigh Valley Traction Company, asking the court to make an order requiring the receivers of the traction company "to show cause why they should not be held to have defaulted in the lease with the Bethlehem & Nazareth Passenger Railway Company in not paying the dividends of two and one-half per cent. on the capital stock of \$150,000 of the said the Bethlehem & Nazareth Passenger Railway Company, and why the lease of said Bethlehem & Nazareth Passenger Railway Company to the said Lehigh Valley Traction Company, dated January 26, 1900, should not be forfeited, and the said Bethlehem & Nazareth Passenger Railway Company be at liberty to enter upon the demised premises as of its first and former estate, according to terms of said lease as set out in section L thereof." Nothing is said in this proposed order about default on the part of the traction company in any other respect, although other

¶ 3. See Landlord and Tenant, vol. 32, Cent. Dig. § 337.

defaults are averred in the petition, and the principal controversy has been waged about the default in the payment of the dividend due in February, 1903. Certainly, if this ground of forfeiture is untenable, no other can be maintained, and it is upon this point, therefore, that stress has been laid by the counsel for the petitioners.

At the argument leave was asked to amend the petition so as to show that the proceeding was being conducted on behalf of the Bethlehem & Nazareth Passenger Railway Company as a corporation, and was not merely a proceeding by certain individual stockholders in their own interest. To this request no objection is made by the receivers, and accordingly the application to amend is granted, so as to substitute the Bethlehem & Nazareth Railway Company, wherever necessary, in the place of the individual stockholders who are named as the petitioners.

Turning to the principal question in dispute under the exceptions, I need only say that I do not find it necessary to discuss again the legal propositions that were presented to the master, and have been once more presented to the court with force and ability. They have been satisfactorily dealt with by the learned master, and, as I agree with the conclusions to which he has come, I adopt his report as the opinion of the court:

I find the following facts, to wit:

1. That the Bethlehem & Nazareth Passenger Railway Co. is a corporation of Pennsylvania duly incorporated under the act of Assembly entitled "An act to provide for the incorporation and government of street railway companies in this commonwealth," approved May 14, 1889 (P. L. 211), and its supplements, by letters patent dated February 6, 1899.

2. That company, January 26, 1900, being the owner of a line of railway, property, and franchises operated from Bethlehem to Nazareth, Pennsylvania, and hereinafter called the "lessor," demised the same to the Lehigh Valley Traction Co., hereinafter called the "lessee," owning and operating similar lines connected therewith, for nine hundred and ninety-nine years, to be used, controlled, and operated as part of its system, the demised property being fully described in said lease.

3. The demised property was bound by a mortgage held by the State Trust Company of New York, to secure the payment of principal and interest at 5 per cent. per annum on one hundred and fifty bonds of \$1,000 each, payable semiannually on the 1st days of May and November in each year.

4. This lease provides, inter alia, as follows:

(1) "Thirteenth.—The 'Lessor' covenants that at all annual, or adjourned or other meetings or elections of the 'Lessor' during the continuance of this lease, for the selection of Directors it will procure the necessary proxies and will cast the necessary votes to elect as Directors of the said 'Lessor' Company at least four persons who shall be the nominees of the 'Lessee'; to the end that the 'Lessee' may at all times have proper representation in the Board of Directors; it also covenants that by legitimate means it will procure at each annual election during the continuance of this lease, the selection of such persons to fill the office of President, Secretary and Treasurer respectively of the 'Lessor' as the 'Lessee' may designate and name; it being understood that the 'Lessee' is to be responsible for the conduct of the said officers and Directors so named by it, and is to and does hereby agree to protect and indemnify the said 'Lessor' against any loss, damage, injury or liability whatever, by reason of anything that the officers and the Directors nominated and suggested by it may do, or perform in their official capacity."

(2) "D.—The 'Lessee' agrees to pay from time to time during the term hereby created all United States, State, County, Municipal and Township taxes, and all public charges of any kind which may be legally imposed or levied

upon the property hereby demised, or on the traffic or business of the same, as well as all taxes assessed and imposed upon the aforesaid bonded indebtedness of One Hundred and Fifty Thousand Dollars (\$150,000), as also all taxes imposed by the State of Pennsylvania upon or against the said corporation, upon its capital stock of One Hundred and Fifty Thousand Dollars (\$150,000)."

(3) "G.—As rentals or compensation for the use of the property hereby demised and leased, the 'Lessee' covenants to pay to the 'Lessor' the following further rental, to wit:—to pay the interest on the bonded indebtedness of the 'Lessor,' namely the interest on the said mortgage bonds aggregating One Hundred and Fifty Thousand Dollars (\$150,000), hereinbefore described, or any bonds issued in refunding or renewal thereof.

"Said payments of interest are to be made by the 'Lessee' paying to the holders thereof as they respectively mature, all the interest coupons attached to the said bonds or to any bonds issued to take up, redeem, or refund the present issue, which said payments to the holders of the said coupons shall be considered as a payment on account of this rental; the coupons so redeemed and paid shall be full satisfaction and discharge of so much of the rental herein covenanted to be paid as is represented thereby."

(4) "H.—The 'Lessee' covenants to pay the 'Lessor' as further or additional rental, a sum equal to a dividend of five per cent. (5%) per annum on the aforesaid capital stock of One Hundred and Fifty Thousand Dollars (\$150,000); said payments shall be made in equal semi-annual installments of two and one-half per cent. (2½%), payable respectively on the first Monday of August and February in each and every year during the continuance of this lease. Said dividends are to be paid as hereinbefore provided, without any deduction or abatement by reason of any taxes assessed upon said shares of stock by the State of Pennsylvania or by reason of any other taxes assessed against the said 'Lessor' by National, State or Municipal authority."

"The said payments may be made directly to the persons holding the shares of stock of the 'Lessor' as shown by the books of the said 'Lessor,' and by lists of stockholders to be furnished to the 'Lessee' by the 'Lessor' at least ten days before the date of the maturity of each of said dividends, and the receipts of the said stockholders for each semi-annual dividend shall be a full, sufficient and legal acquittance and discharge of the amount of rent paid by such dividend."

(5) "I. — The 'Lessor' covenants that from time to time, at least ten days before the time for the payment of the said semi-annual dividends, it will procure proper resolutions to be passed by its Board of Directors, declaring, authorizing and directing said dividends to be paid."

(6) "L. — If the 'Lessee' its successors or assigns shall make default in the payment of the rents herein reserved, or in the performance of any of the covenants herein contained on its behalf, and such default shall continue for a period of thirty (30) days after the time for payment or performance as fixed in this Indenture has arrived, it shall and may be lawful for the 'Lessor' to declare this lease forfeited and at an end, and if within thirty days after notice of such intended forfeiture the 'Lessee' does not make the payments, or perform the covenants as to which it has so defaulted, then this lease shall be ended and determined, and the 'Lessor' shall be at liberty to enter upon the demised premises as of its first and former estate, and to put out and remove the 'Lessee' from the same, but such re-entry shall not be a bar to the recovery of any rent in arrears, or to any action for damages for the breach of any of the covenants of this lease."

5. The lessor thereupon and since has procured the necessary proxies and caused to be cast the necessary votes to elect as its directors four nominees of the lessee out of the nine directors of the lessor, and procured the selection of such persons as president, secretary, and treasurer of the lessor as the lessee has designated; Messrs. Wright, Harris, Hartzell, and Bates being the lessee's four nominees elected as directors, and Hartzell as president and Bates as secretary and treasurer, nominees of the lessee, at the last election held January 12, 1903.

6. Previous to said lease, the meetings of the lessor's directors and stockholders were held at Bethlehem, the place of its principal office, where also

were held its annual meetings of stockholders and directors January 12, 1902, and January 12, 1903. There was no evidence of any other meetings of its directors during that time except one held July 30, 1902.

7. Mr. Bates, who since January, 1903, has been secretary and treasurer of both companies, as his predecessors had been, has had the physical possession of the lessor's stockbook and ledger, but the physical possession of its minute books has remained since the lease with Mr. Keys, its secretary, who then resigned. The executive officers of both companies since the lease have occupied the same office in Allentown. The calls for the lessor's meetings of directors and stockholders have been issued by its officers.

8. Since the lease there has been no declaration of dividends by the lessor, or list of its stockholders furnished to the lessee, the payment of dividends under the lease having been made by the lessee to the lessor.

9. The causes of action, the subject of the present contentions under the petition, are:

I. Delay in the payment of the dividends, each amounting to \$3,750, declarable and payable February 2 and August 3, 1903, under the lease.

II. Delay in payment of the tax on the lessor's capital stock for 1901, amounting to \$750.

I. As to the delay in payment of the said dividends:

January 28, 1903, Mr. Keys, having been in the habit, as a reminder, of calling Mr. Bates' attention to the fact that dividend time was approaching, and that it was necessary to hold the proper meeting for the declaration of a dividend, but not then being an officer of the lessor, wrote to Mr. Bates the following letter:

"The Bethlehem Electric Light Co.,
Bethlehem, Pa.

Bethlehem, Pa., Jan. 28, 1903.

Mr. C. M. Bates, Sec'y. & Treas.,
Lehigh Valley Traction Co.,
Allentown, Pa.

Dear Sir:—

Kindly take notice that the semi-annual dividend on the capital stock of the Bethlehem and Nazareth Passenger Railway Company is due and payable first Monday of February next; also, that the quarterly dividend of 1½% on \$140,000 capital stock of the Bethlehem Electric Light Company is due and payable February 1st.

Do you wish resolutions of the Board of Directors of the Company declaring the same to be recorded as passed; also, do you wish notice advertised in the papers?

Yours very truly,
R. B. Keys."

To which letter no reply was made.

The first Monday of February, 1903, was the date for the payments of the dividends on the lessor's stock under the lease upon the lessor's compliance with its provisions. Within ten days before February 28, 1903, Messrs. Wolle and Thomas, two of the lessor's directors and stockholders, called upon Mr. Wright, president of the lessee, asking for payment of the dividend and the prospect of its payment, to which Mr. Wright replied that they had been considerably embarrassed, but would be able to pay it within a short time. February 28, 1903, Mr. Wright wrote to Mr. Wolle the following letter:

"Lehigh Valley Traction Company,
Allentown, Pa.

Commonwealth Bldg., Allentown, February 28, 1903.

Mr. C. A. Wolle,
Bethlehem & Nazareth Street Railway Co.,
Bethlehem, Pa.

Dear Sir:—

In the matter of the settlement of the rental of \$3,750 due the Bethlehem and Nazareth Company on February 1st, we shall have to ask the indulgence of you and your associates.

I handed you the other day a statement of the gross receipts of the last year of the roads we leased from you and your friends and you will readily

understand from those figures that the contract has not been a profitable one to us. While this, of course, in no way legally or morally relieves us from the obligations of our contract yet it does constitute some reason why you should feel inclined to help us.

The disasters last year by flood and storm affected us to such an extent that there was no increase in the gross receipts of our road over the year before, while the coal strike and the accidents referred to very largely increased the operating expenses. The situation in both directions is improving. We close our February business with 25% greater receipts than any February since the existence of the road, and the coal situation as you know is improving.

In settlement of your rental I send you a note of this Company at three months for \$3,825.00 representing interest from February 1st to the maturity of the note on June 1st. We give you this note with the understanding that it shall not interfere in any way with your rights and remedies under the lease in the event the note should not be paid at maturity.

Yours truly,

R. E. Wright, President."

To this letter Mr. Wolle replied March 6, 1903, in the following letter:

"Bethlehem, Pa., March 6th, 1903.

Robert E. Wright, Esq.,
Pres't. L. V. Traction Co.,
Allentown, Pa.

Dear Sir:—

I beg to acknowledge receipt of your favor of 28th inst., enclosing note dated March 2nd, 1903, at three months for \$3,825.00 as stated, which I received on my return from New York this morning. Of course it will be necessary before taking any action on this to call together those interested which we propose to do at a very early date, and I will then advise you.

Yours very truly,

Clarence A. Wolle."

An informal meeting of holders of a large majority of the stock, but not a regular or duly called stockholders' meeting, was held at Bethlehem, which meeting authorized Messrs. Wolle and Thomas to confer as a committee with Mr. Wright, return the note which had been sent in his letter, and demand a cash settlement, which Messrs. Wolle and Thomas did March 10, 1903, Mr. Wright stating at the interview that they required time, and asked for leniency, to which Messrs. Wolle and Thomas replied that they were not disposed to be harsh.

May 4, 1903, Messrs. Wright, Bates, and Norris were appointed receivers of the lessee by this court.

June 30, 1903, at an informal meeting of the lessor's stockholders, or some of them, held at Bethlehem, a formal request was prepared and sent to its president to call a stockholders' meeting; and July 10, 1903, the lessor's stockholders, at a special meeting duly called, passed the following resolution:

"Whereas, under Indenture made the 26th day of January, 1900, between this Company and the Lehigh Valley Traction Company a lease was duly executed, wherein the Lehigh Valley Traction Company, lessee, agreed among other things to pay as rental or compensation for the use of the property of this Company, certain amounts representing 5% of the bonds of the Company, and a dividend of 5% on the Capital Stock thereof:

And Whereas under the same Indenture, it was provided that if the Lessee shall make default in the payment of the said rental and such default continue for a period of thirty days after time for such payment, it is the right of this Company to declare said lease forfeited and at an end, and if within thirty days after notice of such intended forfeiture the Lessee does not make the payments, or perform the covenants as to which it has so defaulted, then this lease shall be ended and determined.

And Whereas, the payment of the semi-annual dividend of 2½% on the Capital stock due and payable the 1st Monday of February, 1903, was passed and default made therein and still remains unpaid.

Therefore Resolved, that this Company so notify the Lessee that this default was made and still exists, and that unless payment be made within 30 days from this date, the lease shall be and is hereby declared forfeited and at an end and this Company will enter in and take possession of its property again and make claim for such defaulted payments and such other damages as may have been sustained by reason of such lease and forfeiture."

And on July 13, 1903, a notice was served upon Mr. Wright, president of the lessee, and the receivers, to the officers and receivers of the lessee, reciting that resolution, and concluding as follows:

"Now, therefore, you are hereby notified that the said Bethlehem and Nazareth Passenger Railway Company, through its stockholders, has this day by resolution declared said lease forfeited and at an end, and that the said Bethlehem and Nazareth Passenger Railway Company will enter in and take possession of its property again, with the same effect as if the said lease in the foregoing preamble and resolution recited, had never been entered into and made, and will make claim for such defaulted payments and such other damages as it may have sustained by reason of such lease and forfeiture, unless payment be made within thirty days from the service of this notice, of all defaulted rentals and interest, and other damages that may have been sustained by the said Bethlehem and Nazareth Passenger Railway by reason of said default.

July 10, 1903.

Chairman of Meeting of Stockholders.

[Seal.]

B. & N. P. R. Co.

Inc. Feb. 6, 1899.

Secretary of Meeting of Stockholders."

---Which notice was signed by the chairman and secretary pro tem. of that meeting.

August 17, 1903, without further action of the lessor's directors or stockholders as a body, the following notice was served upon the lessee and receivers:

"Bethlehem and Nazareth Passenger Railway Company.

Bethlehem, Pa., August 17, 1903.

Robert E. Wright, Esq., Pres't,

C. M. Bates, Sec'y. & Treas.,

Lehigh Valley Traction Co.

and

Robert E. Wright, Esq.,

C. M. Bates,

G. C. Norris,

Receivers of the Lehigh

Valley Traction Co.

Gentlemen:—

In view of the fact that default has been made by you in the payment of rentals, taxes, &c. under the provisions of the lease between the Bethlehem and Nazareth Passenger Railway Company and the Lehigh Valley Traction Company, and the proper steps having been taken by this Company to declare the said lease forfeited, the proper notice having been served upon you to that effect, as required by the terms of said lease, the time under such notice having expired on the 13th inst., and said forfeiture having become absolute, we hereby demand a surrender and return to the custody of this Company of the said leased railway property and all the aforesaid and otherwise scheduled properties belonging thereto.

It is our desire that such surrender shall be immediate and amicable and without the formality of court proceedings, and in order to avoid the same we request the prompt payment by you of all unpaid dividends due the Bethlehem and Nazareth Passenger Railway Company, and of the accrued rentals due this company from the last paid dividend and interest periods the payment of unpaid taxes of every kind due for the years 1901 and 1902 and accrued for 1903 on this road, the replacement upon the lines of the road of this company of all cars and equipments in good first class condition, the putting into proper condition the roadbed and power house and other property of the company and such other things as are required by the lease between

this company and the Lehigh Valley Traction Company, and we will thereupon take steps to cancel and abrogate the aforesaid lease.

Respectfully,

Chairman of the Meeting of Stockholders of the Bethlehem & Nazareth Railway Co.",

This request was not acceded to.

September 8, 1903, the present petition was filed, and the said order of reference thereon to the master made.

September 17, 1903, Mr. Wright, as president of the lessee, and for the receivers, wrote the following letter to the lessor:

"Receivers of the
Lehigh Valley Traction Company,
Allentown, Pa.

Commonwealth Bldg., Allentown, September 17, 1903.

To the

Bethlehem and Nazareth Street Railway Co.,
Bethlehem, Pa.

Gentlemen:—

We beg to call your attention to the fact that the Lehigh Valley Traction Company, Lessee of your Company has not yet received the list of stockholders of your Company entitled to share in the August dividend, nor have we been advised that your Company has procured the enactment of the proper Resolutions of your Board of Directors, declaring, authorizing and directing the payment of the August dividend. I beg to refer to clause "H" and "I" of the lease between these Companies. As soon as we receive this list of stockholders and as soon as your Company passes the Resolution declaring the dividend and authorizing its payment the same will be paid.

Yours truly, R. E. Wright,
President Lehigh Valley Traction Co. also acting for the Receivers."

Which letter was not replied to.

October 6, 1903, Mr. Keys sent the following letter and inclosed copy of a resolution to Mr. Bates, secretary and treasurer of the lessor:

"Bethlehem, Pa., Oct. 6, 1903.

Mr. C. M. Bates, Sec'y. & Treas.,
Bethlehem & Nazareth Passenger Railway Co.,
Allentown, Pa.

Dear Sir:—

Pursuant to direction of the Board of Directors of the Bethlehem & Nazareth Passenger Railway Company held this day, I send you herewith a minute of the proceedings of the Board and invite your special attention to that portion thereof covered in the resolution directing you not to receive, if offered, from the Lehigh Valley Traction Company any sum purporting to be dividend due the Bethlehem & Nazareth Passenger Railway Company as of the 1st Monday of August last.

Will you kindly acknowledge receipt of this and so oblige,

Yours very truly,

R. B. Keys, Sec'y P. T."

"Bethlehem, Pa., Oct. 6th, 1903.

10.30 A. M.

As per adjournment, the Meeting of the Board of Directors of the Bethlehem & Nazareth Passenger Railway Company was held this date.

Present:— Truman M. Dodson
James Thomas
Geo. H. Wolle

Jos. K. McKee
Clarence A. Wolle

In the absence of the President and Secretary, the Chairman and Secretary P. T. of the meeting of the 3rd inst. were called upon to act.

Mr. James Thomas moved and Mr. Jos. J. McKee seconded the following preamble and resolution:—

Whereas R. E. Wright, President of the Lehigh Valley Traction Company and one of the Receivers of the same wrote a letter to the Bethlehem &

Nazareth Passenger Railway Co., calling attention to the fact that the list of stockholders had not been forwarded nor action taken by the Board of Directors declaring semi-annual dividends due and payable 1st Monday in August last, and

Whereas because of default having been made by the Lehigh Valley Traction Co. in the performance of the covenants enjoined by the lease of the Bethlehem & Nazareth Passenger Railway Co. to the Lehigh Valley Traction Co. and such default having been duly certified to the Lehigh Valley Traction Co. and notice served of forfeiture of the said lease in consequence,

Therefore resolved that the Secretary and Treasurer of this company be and he is hereby notified not to receive such dividend, if offered, from the Lehigh Valley Traction Company.

—Which was unanimously adopted.

Mr. Thomas moved that the Secretary of this meeting be directed to forward a copy of the proceeding to C. M. Bates, Secretary and Treasurer.

Attest:—

R. B. Keys,
Secretary P. T."

The following payments have been made by the lessee, the previous dividends and interest having been paid:

April 30, 1903, it paid the interest on the \$150,000 of mortgage bonds then maturing, amounting to \$3,750, and the receivers October 31, 1903, paid the same for the same interest maturing November 1, 1903, to the Morton Trust Company, trustee under the mortgage.

August 24, 1903, the receivers paid to the lessor \$3,750 (the principal amount of the semiannual dividend under the lease declarable and payable the first Monday of February, 1903), by then giving to Mr. Bates, the lessor's treasurer, and taking his receipt as such therefor (he being then also secretary and treasurer of the lessee and one of the receivers), the receivers' check therefor on their deposit in the Allentown Bank, where they had sufficient funds to meet it, to his order as the lessee's treasurer, and which he indorsed as such to the Second National Bank, and there deposited it to the credit of the lessor in a special account for the payment of dividends which the lessor kept, and which was opened before Mr. Bates became treasurer, and wherein such previous deposits had been made. The Second National Bank indorsed that check to the order of any national or state bank, indorsements guaranteed, and it was stamped "Paid."

August 27, 1903, Mr. Bates caused checks of that date of the lessor's to be drawn, and which he signed as the lessor's treasurer, to the aggregate amount of \$3,750, in favor of its stockholders, and sent those checks out to them, respectively, in payment of the February, 1903, dividend; a list of which checks, giving their number, date, amount, and number of shares held by each stockholder, is found at page 114 of the evidence, and which checks were paid by the Second National Bank, and returned paid to Mr. Bates. Neither the lessor nor any of its stockholders returned said payments of \$3,750 to the lessee, but some of the stockholders deposited their amounts in a trust account, the evidence not disclosing any terms of the trust.

September 29, 1903, the receivers paid to the lessor \$3,750 (the principal amount of the semiannual dividend declarable and payable the first Monday of August, 1903) by then giving to Mr. Bates, the lessor's treasurer, and taking his receipt as such therefor, the receivers' check therefor on the Allentown Bank, where the receivers then had moneys on deposit to meet the said check. Mr. Bates, after receipt of this check, being notified by Mr. Keys of the action of a meeting of the lessor's directors October 6, 1903, as aforesaid, has since therefore kept the said check in his possession without further use of it.

II. As to the delay in payment of the tax on the lessor's capital stock for 1901:

The lessee, considering the tax assessed by the state department upon the lessor's capital stock for 1901, which was settled by the department July 18, 1902, against the several companies composing its system, as entirely too high, contending that it should be assessed not at par, but at 50 per cent. thereof, instead of filing an appeal from the said assessment, presented an application for a rehearing—a not unusual practice—and two hearings thereof were

held as to the several companies, including the lessor, before the board, composed of the State Treasurer, Auditor General, and Secretary of the Commonwealth. No disposition has been made of these hearings. The tax returns were made out for the year 1902, and sworn to, but have been held, by the advice of counsel, pending the action of the department upon the pending application respecting the taxes for 1901. However, in September, 1903, Mr. Wright indorsed the tax bill for 1901 "O. K. Pay after September 18th, 1903, R. E. W.," that being the date of the next monthly meeting of the receivers, and he wishing the payment to be made during the month then beginning. This bill, thus indorsed, he gave to the receivers' treasurer, and a check upon the Allentown Bank therefor, dated November 5, 1903, to the order of the State Treasurer, was drawn and signed by two of the receivers, and was awaiting the signature of the other receiver, when the evidence in the present case touching the same was taken. The receivers then had money on deposit in said bank to their credit to meet the said check, which has since been paid.

There are no other taxes due by the lessee, which are unpaid, to support the forfeiture claim.

Receivers of a corporation, especially one engaged in public service as a common carrier, in such cases as the present, are appointed, pending proceedings for sale and administration of its assets incidental to an injunction restraining the company and its officers from affecting its assets meanwhile, to preserve the performance of the public service and its assets for the equitable benefit of all parties interested, suspending the right of separate creditors by independent separate proceedings to obtain a preference or advantage over others, and a consequent sacrifice and disintegration of its property; to preserve the status quo of all parties in interest, creditors and stockholders, in their relation to the assets.

"A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody, as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property." *Chicago Bank v. Kansas Bank*, 136 U. S. 236, 10 Sup. Ct. 1017, 34 L. Ed. 341, and cases cited.

Receivers are allowed a reasonable time to determine and elect whether they will assume any of the corporation's executory contracts, such as the lease in question, meanwhile exercising the company's rights under it for the purpose of such determination, involving questions of the respective interests of creditors, secured and unsecured, and stockholders, whether the contract can be operated at a profit, or, even if at a loss, temporary or otherwise, whether, upon the whole, for the ultimate benefit of any of the persons interested, and requiring practical tests of its operation. *Sunflower Co. v. Wilson*, 142 U. S. 313, 12 Sup. Ct. 235, 35 L. Ed. 1025; *Quincy Co. v. Humphreys*, 145 U. S. 82-87, 12 Sup. Ct. 787, 36 L. Ed. 632; *U. S. Trust Co. v. Wabash Co.*, 150 U. S. 287-299, 14 Sup. Ct. 86, 37 L. Ed. 1085; *Central Trust Co. v. Wabash Co. (C. C.)* 46 Fed. 26-32; *Park v. N. Y. & C. Co. (C. C.)* 57 Fed. 799; *N. Y. P. & O. Co. v. N. Y., L. E. & W. Co. (C. C.)* 58 Fed. 268; *Farmers' Co. v. N. P. R. R. Co. (C. C.)* 58 Fed. 257; *Ames v. Union Pacific Co. (C. C.)* 60 Fed. 966; *Clyde v. Richmond Co. (C. C.)* 63 Fed. 21; *Mercantile Trust Co. v. St. Louis, etc., Co. (C. C.)* 71 Fed. 601; *Carswell v. Farmers' Loan Co.*, 74 Fed. 88, 20 C. C. A. 282; *Ames v. Union Pacific Co. (C. C.)* 74 Fed. 335; *Empire Co. v. McNulta*, 77 Fed. 700, 23 C. C. A. 415; *Thomas v. Cincinnati Co. (C. C.)* 77 Fed. 667; *Central R. R. Co. v. Farmers' Co. (C. C.)* 79 Fed. 153; *Grand Trunk Ry. Co. v. Central Vt. R. Co. (C. C.)* 81 Fed. 541; *Platt v. P. & R. R. Co.*, 84 Fed. 535, 28 C. C. A. 488; *Id. (C. C.)* 115 Fed. 842.

During the reasonable time reserved to the receivers to determine their election, and, a fortiori, if they elect to accept the lease, they are obliged to perform its obligations on the part of the lessee maturing after their appointment; and, as to those obligations matured before their appointment, their acceptance of the lease is subject to its conditions, requiring their performance to the extent which the lessor would have the right to cancel and forfeit for nonperformance thereof as a practical consequence of its provisions

to that effect. *Parks v. N. Y. & L. E. R. Co.* (C. C.) 57 Fed. 801; *Farmers' L. & T. Co. v. N. P. R. Co.* (C. C.) 58 Fed. 257; *N. Y., etc., R. Co. v. N. Y., L. E., etc., Co.* (C. C.) 58 Fed. 268.

Of course, it was open to the lessor, when advised that such reasonable time for the receivers' action has passed, to apply to the court to direct them to elect whether they would assume the lease, or if advised that the receivers had by any act elected to accept it, to proceed against the receivers for payment of any due rentals.

Neither of these courses were pursued, and the receivers have practically elected to assume the lease. Neither the lessor nor the petitioners, if they could do so, have proceeded by re-entry for breach of said conditions for rental payments, authorizing forfeiture, which re-entry at common law requires a previous demand for the rent due on the exact day, with circumstances of great particularity (2 *McAdam on Landlord & Tenant*, § 188; note 3 to *Bowman v. Foote*, 1 *Am. Law Reg.* (N. S.) 362; *Henderson v. Carbondale Co.*, 140 U. S. 33, 11 *Sup. Ct.* 691, 35 *L. Ed.* 332), and does not defeat the lessee's title in equity, which is only barred by an ejectment (*Jackson v. Elsworth*, 20 *Johns. N. Y.* 190); and which re-entry is essential to complete forfeiture where the lessor is out of possession, such a forfeiture being only at the lessor's option (*Scheaffer v. Scheaffer*, 37 *Pa.* 525; *Wills v. Manufacturers' N. G. Co.*, 130 *Pa.* 222-231, 18 *Atl.* 721, 5 *L. R. A.* 603; *Ray v. Gas Co.*, 138 *Pa.* 577, 578, 20 *Atl.* 1065, 12 *L. R. A.* 290, 21 *Am. St. Rep.* 922; *English v. Yates*, 205 *Pa.* 108, 54 *Atl.* 503). Nor have they proceeded by an action at law in ejectment against the receivers under the act of March 3, 1887, c. 373, § 3, 24 *Stat.* 554 [*U. S. Comp. St.* 1901, p. 582], enrollment whereof was corrected by the act of August 13, 1888, c. 866, 25 *Stat.* 436 [*U. S. Comp. St.* 1901, p. 582], permitting suits against receivers without previous leave of the court appointing them, but providing that such suit shall be subject to the general equity jurisdiction of that court, so far as may be necessary to the ends of justice, or by leave of that court, which would be subject to the same equities.

But the present petition is made by Messrs. Wolle, Thomas, and Keck and Keys, and not by the lessor, although the briefs submitted spoke of it as the petition of that company, Messrs. Wolle and Thomas being two of its nine directors, and of its stockholders, and Messrs. Keck and Keys stockholders only, except that Mr. Keys has acted as secretary pro tem. at some of its meetings; but the petitioners are not otherwise related to the company.

Pursuant to the lease, Mr. Hartzell, its president, and Mr. Bates, its secretary and treasurer, were nominees of the lessee, and Mr. Bates is one of the receivers; but these considerations will not dispense with formal direct action of the corporation lessor to enforce the forfeiture, and the petitioners are the actors in the present proceedings.

Where a tenant is in possession equity has no jurisdiction to enforce a forfeiture, the landlord having adequate remedy in ejectment. *Hoch v. Bass*, 133 *Pa.* 328, 19 *Atl.* 360.

The claim of forfeiture is for delay in payment of the lessor's stockholders' dividends declarable first Monday of February, 1903, and the state taxes upon its capital stock for the year 1901, settled by the department July 18, 1902, since when a rehearing was pending until paid by the receivers.

As to the said dividends declarable February, 1903, the receivers are also entitled to a dismissal of the present petition (1) if the lessor has neglected or disregarded any restriction, limitation, or condition to its right of forfeiture, (2) or waived that right, (3) or if the receivers have any equity to be relieved against it.

(1) Courts of law as well as equity do not favor forfeiture, and requirements for them must be strictly pursued. *Gtn. P. R. Co. v. Fitler*, 60 *Pa.* 130, 100 *Am. Dec.* 546; *Henderson v. Carbondale Co.*, 140 U. S. 33, 11 *Sup. Ct.* 691, 35 *L. Ed.* 332.

The requirement of the lease that the lessor must declare dividends upon the stock at the dividend period mentioned in the lease, to give the lessee the option to pay the shareholders directly, instead of the lessor, was not only a technical requirement necessary to be observed to support a forfeiture, but a very substantial one, inasmuch as the lessee could thereby avoid an imminent forfeiture for nonpayment of rental without a full payment by negotiating

with such stockholders as would be willing to give further time for payment of their respective dividends. The payment of the dividends at any dividend periods directly to the lessor without its declaration of the dividend would be no waiver of that requirement at any other dividend period when the then emergencies might prompt the lessee to require and claim the benefit of that option as thus essential to its then interests.

(2) If the rent in the lessor's dividend declarable February, 1903, was then mature without such declaration, when the receivers were appointed May 4, 1903, there had been no formal demand of its payment by the lessor, and the interviews and correspondence between Messrs. Wolle and Thomas, individual directors and stockholders, and the lessee's president, Mr. Wright, had finally resulted in his request for leniency and delay in payment on the grounds suggested, and their reply that they were not disposed to be harsh. Where the conduct of the landlord has been such as to lead the tenant to suppose that the rights of forfeiture given by the lease would not be strictly pursued, forfeiture will not be enforced without a notice that in future it will be insisted upon. *Hughes v. Metropolitan R. Co.*, 1 L. R. C. P. Div. 120; *Cogley v. Browne*, 15 Phila. 162; *Wanamaker v. McCaully*, 11 W. N. C. 450; *Steiner v. Marks*, 172 Pa. 400, 404, 33 Atl. 695.

The first notice from the lessor to the lessee was July 13, 1903, reciting a resolution of the lessor's stockholders, and stating that the lessor had declared the lease forfeited, and that the lessor would re-enter and claim all defaulted payments and other damages unless payment thereof be made in 30 days, and a notice was given to the receivers on August 17, 1903, from Mr. Wolle, as chairman of the stockholders' meeting, that the forfeiture had become absolute, and demanding immediate surrender of the demised premises, and prompt payment of all accrued rentals, and performance of all things required by the lease, and that "we will thereupon take steps to cancel and abrogate the aforesaid lease." August 24, 1903—a delay of 11 days from the 30 days of said notice—the receivers paid the lessor's treasurer those dividends, and August 27, 1903, he paid them to its respective stockholders, who then accepted them.

Rent carries interest from the time it is due, unless from the conduct of the landlord it may be inferred that he means not to insist upon it, or there are other equitable circumstances making the charge of interest improper. *Obernmyer v. Nichols*, 6 Bin. 159, 6 Am. Dec. 439.

Technically, the rent was not payable until the dividends had been declared and the stockholders had accepted their dividends for 1903 without interest. Its nonpayment under the circumstances would not support a forfeiture. The letter of Mr. Keys of January 28, 1903, to Mr. Bates, reminding him that the semiannual dividend was declarable February, 1903, and his making no reply thereto, was no waiver of the requirement for the declaration of the dividend, so far as it was a requirement necessary for forfeiture. The general rule is that subsequent acceptance of rent accrued before forfeiture will not waive it, while of that accrued after the cause of forfeiture will. As to an acceptance of rent whose nonpayment is claimed as the ground of forfeiture, in *Bacon v. Western, etc., Co.*, 53 Ind. 229, it was said that, to insist upon a forfeiture of a lease for nonpayment of rent which the landlord has received seemed a legal solecism; and in *Becker v. Werner*, 98 Pa. 555, there being other breaches of covenant, Judge Paxson said that rendered it unnecessary to discuss the question how far the forfeiture could have been sustained under the circumstances had the nonpayment of the rent been the only breach of covenant by the lessee, which rent had been paid out of a sale under the landlord's warrant. However, these circumstances rather suggest an equitable ground of relief against forfeiture.

(3) Of course, equity will not relieve against forfeiture merely as an act of mercy simply to save property from forfeiture, and although in Pennsylvania, under leases providing for forfeiture for nonpayment of rent, with the usual ejectment clause providing for judgment in ejectment and issue of a habere facias possessionem, the court will not relieve against a forfeiture for simple nonpayment of rent, yet the rule in equity is to give a tenant equitable relief against forfeiture for breach of a covenant to pay rent, as it is a mere money demand, a matter of computation, and interest upon it can be calculated with

certainly, and the landlord therefore compensated for his inconvenience sustained by the rent being withheld. 2 Taylor on Landlord & Tenant, §§ 495, 496, pages 80 to 82; 2 McAdam on Landlord & Tenant, § 197; Woodfall on Landlord & Tenant (17th Ed.) §§ 365-376. Besides, to sustain a forfeiture for delay in payment of the said rent in the February, 1903, dividends, which have been received by the stockholders, would work the inequity of permitting them to hold as a payment by the receivers the full amount of an unsecured obligation maturing before the receivership, if mature without declaration of dividend, as against other creditors of an insolvent corporation.

In *Newman v. Rutter*, 8 Watts, 55, Judge Rodgers held that, where there was a dispute as to whom and in what proportions rent under a lease was payable, it would be harsh application of the principle as to forfeiture to decide that a tenant's defense to settle that question should work a forfeiture of the estate; and in *Gtn. P. Ry. Co. v. Fitler*, 60 Pa. 124, 132, 100 Am. Dec. 546, Judge Sharswood held that, where an insolvent corporation had forfeited the stock of a shareholder, as that extinguished all his liabilities for assessments, the creditors had an equity to prevent and set aside the forfeiture.

The dividends declarable the first Monday of August, 1903, were not then declared, and September 17th Mr. Wright, for the receivers and lessee, notified the lessor that the dividend had not been declared or the list of stockholders furnished, upon which being done they would pay that rental, which notice was not replied to; and finally, without further awaiting for said action, the receivers, September 29, 1903, paid the lessor's treasurer the amount of said dividends, which the lessor's directors October 6, 1903, directed him not to receive, and he has since held. If no right of forfeiture exists as to the February dividend, of course none exists for the August dividend.

As to the delay in the payment of state taxes upon the lessor's capital stock for 1901, no time was fixed in the lease for that payment, and those taxes were not settled until July 28, 1902, since when a rehearing was pending until they were finally paid by the receivers. The delay in this payment under these circumstances would not support a right to forfeiture.

Upon the whole case I am of opinion, and therefore recommend, that the petition should be dismissed, and the following decree entered thereon:

Decree.

And now, to wit, June 14, 1904, the petition of Clarence A. Wolle et al., for a rule upon the receivers of the Lehigh Valley Traction Company and that company to show cause why they should not surrender to the Bethlehem & Nazareth Passenger Railway Company its railway and property demised to the Lehigh Valley Traction Company under the forfeiture clause of their lease, and the master's report thereon being heard, it is decreed that the said petition be dismissed.

The foregoing decree may be entered.

BUTLER v. BARRET & JORDAN.

(Circuit Court, M. D. Pennsylvania. June 24, 1904.)

1. LIBEL—EVIDENCE IN JUSTIFICATION.

In an action for libel by the publication of an article which unmistakably referred to plaintiff, evidence is not admissible in defense to show that there was a foundation in fact for the statements made, where it is not shown that such facts related in any way to plaintiff.

2. SAME—EVIDENCE IN MITIGATION.

In an action for libel, facts are not admissible in mitigation of damages which were not known to defendant when the publication was made.

¶ 2. Mitigation of damages for libel and slander, see note to *Sun Printing & Publishing Ass'n v. Schenck*, 40 C. C. A. 168.

See *Libel and Slander*, vol. 32, Cent. Dig. § 159.

3. SAME—IDENTITY OF PLAINTIFF WITH PERSON REFERRED TO IN PUBLICATION.

Whether a newspaper article alleged to be libelous was intended to apply to plaintiff, and would be so understood by readers, is a question to be determined by the jury from the statements made in the article itself and their application to plaintiff; and evidence to show that the occurrences on which the article was based related to another person, which fact was unknown at the time to both defendants and the readers of the article, has no relevancy to such issue.

4. INSTRUCTION—EXPRESSING OPINION UPON THE FACTS.

Where the decided weight of evidence on an issue is in favor of one party, it is not improper for the judge in a federal court to express his opinion to that effect in his charge to the jury, leaving it to them, however, to determine the fact.

5. LIBEL—DAMAGES—MENTAL SUFFERING.

Where an article in respect to a woman, found by the jury to relate to plaintiff, was clearly libelous and defamatory, falsely charging that she had committed a crime for which she was sent to prison, and with having become in other respects degraded, the jury may consider the mental suffering resulting to her from the libel in estimating her damages as a matter of general knowledge and experience.

6. SAME—INSTRUCTIONS—PUNITIVE DAMAGES.

Where defendants published a grossly defamatory libel concerning plaintiff, copying the statements made therein from another paper without inquiry as to their truth, and in the face of a retraction, an instruction to the jury that it was within their power to award punitive damages on account of defendants' carelessness, but that in the judgment of the court it was not a case for such damages, was not prejudicial to defendants' rights, especially where the verdict returned was such as to indicate that such damages were not given.

7. SAME—EVIDENCE.

Where defendants in an action for libel sought to justify or extenuate the publication by showing that the article was copied from another paper, evidence was admissible to show that such paper published a full retraction five days before the article was published by defendants.

On Rule for New Trial.

Everett Warren, for the rule.

Henry N. Paul, Jr., opposed.

ARCHBALD, District Judge. This is an action for the publication in the Scranton Truth, of which the defendants in August last were the proprietors, of an article which related to the plaintiff—as it is claimed—and was a libel upon her. Until within a year or two past, under the stage name of "Annie Oakley," she was connected with the "Wild West Show" conducted by W. F. Cody, familiarly known as "Buffalo Bill," and gave exhibitions of her skill with the rifle in almost daily performances all over the United States and in several countries of Europe, and particularly at the World's Fair at Chicago in 1893 and at Buckingham Palace before the present King of England, then Prince of Wales. This explanation will show the application of the article of which complaint is made, which is as follows:

"Annie Oakley in Prison Cell.

"A Chicago dispatch to the Philadelphia Press last week says: 'Annie Oakley, daughter-in-law of "Buffalo Bill," and the most famous woman rifle shot

¶ 5. Mental suffering as an element of damages, see note to Chicago, R. I. & P. Ry. Co. v. Caulfield, 11 C. C. A. 556.

in the world, lies to-day in a cell at the Harlem Street Station, under a Bridewell sentence, for stealing the trousers of a negro in order to get money with which to buy cocaine.'

"This is the woman for whose spectacular marksmanship King Edward himself once led the applause in the courtyard of Buckingham Palace.

"When arrested Saturday on the complaint of Charles Curtis, a negro, she was living at 140 Sherman street. She gave the name of Elizabeth Cody, but it occurred to no one to connect her with Colonel Cody's famous daughter-in-law. To-day, however, when brought before Justice Caverly she admitted her guilt.

"I plead guilty, your honor, but I hope you will have pity upon me,' she begged. 'An uncontrollable appetite for drugs has brought me here. I began the use of it years ago, to steady me under the strain of the life I was leading, and now it has lost me everything. Please give me a chance to pull myself together.'

"The striking beauty of the woman, whom the crowds at the World's Fair admired, is gone. Although she is only twenty-eight years old, she looks almost forty. Hers, in fact, is one of the extreme cases which have come up in the Harrison street police court. She was taken to Bridewell to serve out a sentence of \$25 and costs.

"A good long stay in the Bridewell will do you good,' said the court.

"The prisoner's husband, Samuel Cody, died in England. Their son, Vivien, is now with Colonel Cody at the latter's ranch on the North Platte. The mother left 'Buffalo Bill' two years ago, and has since been drifting around the country with stray shows."

At the trial the defendants offered in evidence the depositions of witnesses taken in Chicago with respect to the origin of the article, which the court excluded. This testimony was brought forward for two avowed purposes: First, to establish that there was a foundation in fact for the article, there having been such an arrest and proceedings as are described in it; and, second, on the question of identity, to show that it had reference to another person than the plaintiff, to wit, to Elizabeth Cody, the woman who was arrested. The depositions, as taken, are full of irrelevant and incompetent matters, which would of itself be sufficient to justify their exclusion, the court not being called upon to separate the good from the bad, and the whole being offered together. But, passing that by, there was no mistake in rejecting them. It is not necessary to dwell at length upon the first purpose. It may be that the testimony elicited by the depositions goes to show a certain measure of truth, or foundation in fact, for the statements contained in the article, so far as concerns the person who was arrested; but certainly none is disclosed, as to the plaintiff in this action, to whom the article is made to apply, not only by her stage name, Annie Oakley, but by allusions to incidents of unmistakable significance in her professional career. As a justification, therefore, it fails utterly. And it is equally unavailing in mitigation of damages. There is no pretense that the original facts on which the Chicago reporter worked up this sensational story were ever communicated to the defendants, and they certainly cannot set up in extenuation of their actions something, however true, of which they had no knowledge. *Hatfield v. Lasher*, 81 N. Y. 246; *Sun Printing Association v. Schenck*, 98 Fed. 925, 40 C. C. A. 163; *Morning Journal Association v. Duke* (C. C. A.) 128 Fed. 657.

Nor were the depositions admissible for the purpose of showing to whom the article was intended to apply. Undoubtedly, it was for

the jury to say whether it referred to the plaintiff; and, unless it did, the action would not lie. But this was to be determined by the allusions contained in the article itself and their application to her (*Clark v. North American Co.*, 203 Pa. 346, 53 Atl. 237), upon which the excluded testimony threw no light. It merely showed the arrest in Chicago of a woman who said that she was Annie Oakley, and who seems to have persuaded the reporter who interviewed her that such was the case; and that what was stated in the article with regard to the debased condition and life of this person was true. But the question is not whether the reporter had any basis of fact to work upon, but whether, in the way the incident was dressed up and sent out to the world, it would be understood by the reading public to apply to the plaintiff identified by her professional career and name; and on this the occurrence which prompted the article in no wise bears. Plainly, the person who is made the subject of it is "Annie Oakley," the famous crack shot, who had traveled with the "Buffalo Bill Show," and was identified for so long with it. Not only is her name put at the head of the article, but allusion is made to the crowds who saw her at the World's Fair, and to the applause which she received when performing before the King at Buckingham Palace—things which were true, and could be true, of no one else. The whole "spice" and interest of the item as a matter of news is because of its dealing with such a celebrity. It is the once admired and applauded performer who is held up to observation and obloquy, contrast being made with her present debased condition; and it is only as she is thus identified with the fallen woman brought up for sentence by the Chicago police and committed to Bridewell that the general public could be expected to have any concern with the matter. It is true that there are some references found in the article which admittedly do not fit the plaintiff, such as the name Elizabeth Cody, given by the woman, her asserted relationship to "Buffalo Bill," and the existence of a son Vivien. But these are of minor importance, and go simply to the question whether the article as a whole would be understood to refer to the plaintiff, of which the defendants had full advantage by way of argument. To allow them to go further, and lay before the jury all that was said and done—relevant and irrelevant—in and about the Chicago police court, which gave rise to the article, of which neither the defendants nor the readers of their paper had the slightest knowledge, would be to obscure the issue, and divert attention from the real inquiry, which the court was right in prohibiting.

Complaint is further made of the way the case was submitted to the jury. It left nothing for them—as it is said—but to return a verdict for the plaintiff for substantial damages, the court injecting its own ideas into the charge, and constraining their judgment. On the undisputed facts there were but two questions to dispose of. The libelous character of the article could not be gainsaid. It held up to public odium the party referred to in it, whoever that was, attributing to her a low and degraded life in marked contrast with her former position. Actual crime was also ascribed to her in the stealing of a pair of trousers from a negro. There being no legal justification for these statements, malice in publishing the article was presumed. The

only things, therefore, for the jury to pass upon were (1) whether the article applied to the plaintiff; and (2) if it did, the damages to which, in their opinion, she was entitled. It is contended that these were not given to the jury in a way that left them open to their own untrammelled judgment. There unquestionably was a decided expression of opinion that the article was intended to apply to the plaintiff, but this expression did not go outside of the evidence, and the court is not called upon to render a colorless charge. It is, on the contrary, its duty to point out where is the weight of the evidence, and a charge which does not do so is as misleading as one which gives undue prominence to either side, where there is a real controversy. The right of a judge in the federal courts to express his opinion on the facts is well established (*Rucker v. Wheeler*, 127 U. S. 85, 8 Sup. Ct. 1142, 32 L. Ed. 102); and it has even been held that, where the evidence is all one way, so that a verdict to the contrary would have to be set aside as against the decided weight of it, the court may direct a verdict either for plaintiff or defendant (*Gentry v. Singleton* [C. C. A.] 128 Fed. 679). In the present instance there was no error in calling the attention of the jury to the strength of the evidence in favor of the plaintiff, which, with due respect to counsel, was all that was really done. That the plaintiff, Annie Butler, was familiarly and widely known by the name of Annie Oakley, and performed with the "Buffalo Bill" show in the way referred to in the article, was virtually conceded, or, if not, was so positively proved as to be practically uncontroverted. With this established, the rest was a mere matter of deduction from the article itself and the allusions contained in it, which pointed unmistakably to the plaintiff and applied in fact to no other. It is true that there are some matters which do not do so, such as the name Elizabeth Cody, the relationship by marriage to "Buffalo Bill," etc. But, as already stated, these are minor and subordinate, and do not divert the mind from the real personage who is the subject of comment. Starting out with the title, "Annie Oakley in Prison Cell," the references under this heading admit of but one conclusion, and that is that the plaintiff, identified by her stage name, profession, and performances, was intended by the article; and the court was justified in so declaring to the jury, leaving it, nevertheless, for them to say—as was done—whether that was really the fact.

But it is said that the court practically required of the jury a verdict for substantial damages, when they ought to have been permitted to give nominal damages only, if they chose. This is not a fair criticism of the charge, nor can it be successfully maintained that any such constraint was put upon them. The different kinds of damages were fully and carefully explained to them, and the accepted rule laid down that they were to give such as, in their judgment, would compensate the plaintiff for the injury, if any, which she had suffered. It was pointed out in this connection that she had shown no special damages, or such as affected her in her profession as a crack shot performer, proof having been given out of her own mouth that a new engagement of the same character, and with the same troupe as before, had been offered her since the libel, which she had been prevented from accepting solely by reason of ill health. Defendants'

third point also was affirmed, by which the jury were instructed that, no actual pecuniary loss having been shown, substantial damages were not to be given, if the evidence in mitigation of damages satisfied them that they ought not to be. It is true that attention was called to the fact that the plaintiff's general reputation was involved, the mention of her by her professional name not doing away with her individual or personal standing in the community. And the jury were also told that they might consider what, if any, mental suffering the article would be likely to cause, having regard to the fact that the plaintiff was a woman, and had a woman's reputation to defend. Complaint is made that she was thus put on a level, in matter of respectability, with the mothers and sisters of the land, of honest life and reputation, when the fact is that she followed a low calling as a mere circus performer. But I recall no evidence that throws the least discredit upon her personally, and, without it, the law, if not ordinary chivalry, accepts her as of equal respectability with any others. It is to be observed that in this and other references care was taken to say to the jury that there was no intention of inflaming their minds, or carrying them beyond that which was their own sober and reasonable judgment. It is urged, however, that nothing could be given for mental anguish without proof that the plaintiff had actually suffered it. But injury to the feelings, as a matter of common experience, is one of the most immediate, as it is one of the keenest, results of such a libelous article, and it may be, therefore, taken into consideration by the jury simply from their general knowledge. 18 Am. & Eng. Enc. Law (2d Ed.) 1883; *Bergmann v. Jones*, 94 N. Y. 51; *Smith v. Sun Printing Association*, 55 Fed. 240, 5 C. C. A. 91.

In view of the verdict, which was only \$900, the question of punitive damages can hardly be regarded as more than academic. But, in any event, I do not see that serious objection could be made to the instructions upon that subject. Even without proof of actual malice, it is doubtful whether the question could have been withdrawn from the jury (*Callahan v. Ingram*, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583; *Hintz v. Graupner*, 138 Ill. 158, 27 N. E. 935; *Hamilton v. Eno*, 81 N. Y. 116; *Bergmann v. Jones*, 94 N. Y. 51; *Blocker v. Schoff*, 83 Iowa, 265, 48 N. W. 1079); and it certainly could not, in view of the evidence which warranted a finding that the publication was carelessly, if not recklessly, made, having been copied from another paper without inquiry, and in the face of a retraction (*Regensperger v. Kiefer* [Pa.] 7 Atl. 724; *Holmes v. Jones*, 121 N. Y. 461, 24 N. E. 701; *Smith v. Sun Printing Association*, 55 Fed. 240, 5 C. C. A. 91). But it is not necessary to dwell upon this, for the defendant certainly had no reason to complain of the way it was treated by the court. "The plaintiff asks me to instruct you further," it is said in the charge, "that in this case you should award punitive damages, to punish the defendants because of carelessness in the publication of this article. I think this a matter for you. If you see in the case (there being confessedly no special enmity on the part of the defendants) anything by reason of the carelessness on their part, in repeating this libel without any attempt to verify it, to award a further sum to meet the aggravation of the case, as something to punish the defendants, I suppose it is in

your power to do so; but it seems to me there is hardly anything of that kind in the case." This was as favorable to the defendants as they could expect. The court could hardly say anything and say less. The jury were distinctly advised that, while it was in their power to give extra damages, it was not, in the judgment of the court, a case in which they ought to do so; and if, as has been argued, the jury were liable to be influenced by the opinion expressed in other matters, why may we not equally conclude that they were also in this? From the size of the verdict—as already intimated—they evidently were. This instruction also does away with the mistake, if any, in refusing the defendants' tenth point. The jury having been told that the case, as it stood, was not one in which they ought to give more than compensatory damages, it did no harm that they were not further instructed not to give any unless certain conditions were found to exist. This would weaken, rather than strengthen, the other, because it left it open for them to do so, if they did. The same is true of the defendants' second point, which was also refused, although this was otherwise objectionable, and could not have been affirmed. By it the court was asked to say as a matter of law that the plaintiff was simply entitled to what would compensate or make her whole if the jury believed that the article was published without express malice, and merely taken from the Philadelphia Press as an item of news, without intent to injure the plaintiff, and believing it to be substantially true. No doubt the circumstances referred to were to be considered by the jury, if the question of giving punitive damages arose; but the court could not say that such damages should not be allowed, notwithstanding them, if the jury, upon the whole case, thought that there was occasion for doing so. The point leaves out of sight that they might have considered the publication to have been so carelessly or recklessly made as would have justified the imposition of "smart money." In the *Morning Journal Association v. Rutherford*, 51 Fed. 513, 2 C. C. A. 354, 16 L. R. A. 803, the defense—the same as here—was that the article had simply been copied from another paper, the *New York Sun*. "On seeing the article in the *Sun*," said the editor in his testimony, "we were not supposed to make any inquiry as to the truth of it, and I did not make any"; as to which it was said by Lacombe, J., speaking for the Court of Appeals of the Second Circuit: "If this does not evidence a reckless indifference to the rights of others, which is equivalent to an intentional violation of them, it is somewhat difficult to conceive what will." And again: "When the publisher of a libel urges as his sole defense that it is the custom of his paper to print such stories as this, whenever they have appeared in the columns of another paper, without inquiry as to their truth, he manifests such complete indifference to another's rights—such reckless unconcern as to the mental anguish he may cause—as will warrant a jury in finding him guilty of wanton negligence." In the present instance, not only was the same thing true, but there was the added circumstance that the original journal had published an intermediate retraction. Complaint is made at the admission of this evidence, but the defendants having endeavored to extenuate, if not justify, the publication by its previous appearance in the columns of

the Philadelphia Press, it was competent on the question of negligence to show, as was permitted to be done, that in the issue of that paper of August 15th—five days before the publication in the Truth—the whole item was retracted. This paper being one of the defendants' recognized exchanges, it was a question for the jury whether, in the exercise of proper care, they ought not to have seen and been warned by the later assertion.

There are other matters which are relied upon, some 18 reasons in all being assigned for a new trial; but I will not stop to consider them. With every desire to rectify any mistake that was made to the detriment of the defendants, I am not persuaded that there was any of which they can justly complain.

The rule for a new trial is discharged

PAUL v. DELAWARE, L. & W. R. CO.

(Circuit Court, E. D. New York. June 24, 1904.)

1. **FEDERAL COURTS—APPEAL—REVERSAL—QUESTION OF FACT—STATUTES—APPLICATION.**

Rev. St. § 1011 [U. S. Comp. St. 1901, p. 715], providing that there shall be no reversal in the Supreme Court or any Circuit Court on a writ of error for any error of fact, is applicable to the Circuit Court of Appeals.

2. **SAME—TRIAL TO COURT—GENERAL FINDING—DISMISSAL OF COMPLAINT—REVIEW.**

Under Rev. St. § 649 [U. S. Comp. St. 1901, p. 525], providing that the finding of the court on the facts, which may be either general or special, shall have the same effect as the verdict of a jury, and section 700 [U. S. Comp. St. 1901, p. 570], declaring that the rulings of the court in the progress of the trial of a cause, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed by the Supreme Court on a writ of error or on appeal, and when the finding is special the review may extend to the sufficiency of the facts found to support the judgment, where a motion to dismiss the complaint was denied at the close of the evidence in an action tried before the court without a jury, the correctness of such ruling was reviewable on exceptions, without a special finding of facts.

3. **SAME—GENERAL VERDICT—REVIEW.**

Where a general verdict is rendered, only such rulings of the court in the progress of the trial can be reviewed as are presented by bill of exceptions or as may arise on the pleadings.

4. **SAME—BILL OF EXCEPTIONS.**

Where a case is tried to the court without a jury, a bill of exceptions cannot be used to bring up the entire testimony for review.

5. **SAME—QUESTIONS OF LAW.**

Where parties to a suit tried to the court without a jury desired a review of the law involved in the case, a special verdict raising the legal propositions must be procured, or propositions of law must be presented and ruled on by the trial judge.

6. **SAME—OBJECTIONS TO EVIDENCE—PROPOSITIONS OF LAW—RULINGS.**

Objections to the admission or exclusion of evidence, or to the court's rulings on propositions of law, in a case tried to the court without a jury, must appear by bill of exceptions in order to be reviewed.

7. **SAME—FINDINGS—CONCLUSIVENESS.**

Under Rev. St. § 1011 [U. S. Comp. St. 1901, p. 715], providing that there shall be no reversal for any error of fact, the sufficiency of the evidence

to support the findings of the court in an action tried without a jury cannot be considered by the appellate court, whether such findings are general or special.

8. SAME—VERDICT—CONCLUSIVENESS.

A general verdict which may include mixed questions of law and fact is conclusive as to both, except so far as they may be saved by some exceptions which the party has taken to the ruling of the court on questions of law.

9. SAME—SPECIAL VERDICT.

Where a special verdict is rendered, the defeated party is entitled to review the question whether the facts thus found required the judgment entered.

10. SAME.

Errors alleged in the findings of the court on a trial without a jury are not subject to revision by the Circuit Court of Appeals, that court being limited in that connection to the question whether there is any evidence on which such findings could be made.

Augustus Van Wyck, for plaintiff.

Walter W. Ross and W. S. McGuire (Henry D. Hotchkiss and Mr. Guthrie, of counsel), for defendant.

THOMAS, District Judge. The trial is before the court without a jury, pursuant to the statute (section 649, Rev. St. U. S. [U. S. Comp. St. 1901, p. 525]); the court has concluded that the plaintiff should recover; the defendant asks the court to make special findings of fact, upon the ground that it cannot otherwise review the questions of law raised on the trial (other than those relating to the admission of evidence). The section provides:

"The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

While section 700 [U. S. Comp. St. 1901, p. 570] provides:

"The rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Section 1011 [U. S. Comp. St. 1901, p. 715] provides:

"There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error, * * * for any error of fact."

This section is applicable to the Circuit Court of Appeals. *Hall v. Houghton, etc., Co.*, 60 Fed. 350, 8 C. C. A. 661.

The trial court is not required to make special findings (*Insurance Co. v. Folsom*, 18 Wall. 249, 21 L. Ed. 827), and in the present case it is sufficient that the parties be placed in the same position as if a general verdict had been found by a jury. The defendant could not have had the jury pass specifically upon the 25 proposed findings of fact now tendered by it, to which the plaintiff suggests abundant addition. These, in many instances, are not requests for ultimate facts within the meaning of the term. *Wilson v. Merchants' Loan & Trust Co.*, 183 U. S. 126, 22 Sup. Ct. 55, 46 L. Ed. 113; *Mercantile Trust Co. v. Wood*, 60 Fed. 348, 8 C. C. A. 685. The defendant could, in

case of a verdict by a jury, have reviewed the rulings as to the admission of evidence. It can do the same at present. In case of a trial by a jury, it could have reviewed the refusal of the court to direct a verdict for the defendant. It should be enabled to review its motion to dismiss the complaint, or for judgment for the defendant, made after the evidence was closed. It urges that it must have the proposed special findings of fact to enable it to raise before the appellate court the ruling of the court upon such motion. It has been held that a judgment upon a nonsuit of an action tried before a jury may be reviewed upon proper exception by the Supreme Court. *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55. In analogy, it would seem that a dismissal of the complaint at any stage of a trial before the court should be similarly reviewable. If so, a refusal to dismiss at the close of the evidence should be reviewable on the part of the defendant. The only difficulty is that when the trial is before a jury the practice requires a motion to direct a verdict, while in the case of a trial before the court the motion takes the form of a motion to dismiss, or to order judgment for the defendant. The distinction is technical, and would most unjustly deprive the defendant of an opportunity to review. The motions are equivalents, except so far as a motion to dismiss is similar in its effect to a motion for nonsuit. Section 700 [U. S. Comp. St. 1901, p. 570] provides in terms for a review of the "rulings of the court in the progress of the trial." The refusal to dismiss, or to order judgment for the defendant, is a ruling in the progress of the trial. The trial is not ended. It is in progress. The refusal of the court is a ruling. The motion is the common one, entitled to be made on the trial of every action in the courts of the state of New York or the federal courts held therein. An examination of the authorities will show that the present defendant may raise the questions of law, upon which it rests its denial of liability, either by motion to dismiss, or by submitting declarations of law and asking findings thereon. It may at this time avail itself of both methods. What may or may not be reviewed, and the manner of raising questions sought to be reviewed, fall under general rules. The first four rules given below were in terms stated in the opinion in *Norris v. Jackson*, 9 Wall. 125, 127, 19 L. Ed. 608. The rules are sustained by other decisions cited under them, and certain general propositions are added with references.

1. If the verdict be a general verdict, only such rulings of the court in the progress of the trial can be reviewed as are presented by bill of exceptions, or as may arise on the pleadings. *Norris v. Jackson*, *supra*; *Insurance Co. v. Folsom*, 18 Wall. 237, 248, 21 L. Ed. 827; *Grayson v. Lynch*, 163 U. S. 472, 16 Sup. Ct. 1064, 41 L. Ed. 230.

Searcy County v. Thompson, 66 Fed. 100, 101, 13 C. C. A. 357, 358. Judge Thayer's logical statement shows what should fall within the term "rulings of the court." The learned judge says:

"Between that conclusion, that rulings upon the admission and rejection of evidence alone may be reviewed, and the conclusion to which I have arrived, that any ruling of the court made during the progress of the trial, and before the finding is filed, is reviewable in the appellate court if it would have been

subject to review had the trial been before a jury, there seems to me to be no secure middle ground. If we depart from both these rules, it will be difficult, and I think impossible, to draw the line by any rule so that the courts and the gentlemen of the bar may know what requests for declarations of law are, and what are not, reviewable in this court. For this reason, and because the statute provides that the general finding of the court shall have the same effect as the verdict of a jury, and that the rulings of the court in the progress of the trial of a cause may be reviewed upon a writ of error, and because I think both the earlier and later decisions of the Supreme Court point to this result, I have been forced to the conclusion that the true test for determining whether or not a ruling of the trial court may be reviewed when a jury has been waived is whether it would have been subject to review if the trial had been by jury. As the statute declares the general finding shall have the same effect as the verdict of a jury, I think it ought not to be given any greater or other effect. *Trust Co. v. Wood*, 8 C. C. A. 658, 60 Fed. 346, 348; *Clement v. Insurance Co.*, supra [7 Blatchf. 51, Fed. Cas. No. 2,882]; *St. Louis v. W. U. Tel. Co.*, supra [148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380]. Tested by this rule, the application of the plaintiff for a declaration of law 'that, upon the whole case, the finding of the court should be for the plaintiff for the amount of the warrants sued on, without deduction of any kind,' presented the question whether or not, if all the evidence adduced by the defendant was admitted to be true, the plaintiff was entitled to a judgment for the amount he claimed. This application had the same effect that a request to the court to instruct the jury peremptorily to find for the plaintiff for the amount of the warrants would have had if the trial had been before a jury. Nor does it appear to me that there is any greater difficulty in reviewing and deciding this question in a case tried before the court than there would have been if the trial had been by jury. There is in this record a bill of exceptions which declares that it contains all the evidence. It is not necessary to pass upon the weight or sufficiency of the evidence to determine this question of law. It is to be decided, like the question which arises upon a request for a peremptory instruction to the jury, on the concession that the evidence for the defendant must prevail on all disputed material issues. Indeed, this application is, both in form and in substance, substantially the same as that which Mr. Justice Brewer declared, in *St. Louis v. W. U. Tel. Co.*, supra, properly presented a question for the consideration of the Supreme Court."

In *Cooper v. Omohundro*, 19 Wall. 65, 22 L. Ed. 47, it was said:

"'Rulings of the court in the progress of the trial' does not include the general finding of the Circuit Court, nor the conclusions * * * embodied in such general finding."

See, also, *Martinton v. Fairbanks*, 112 U. S. 673, 5 Sup. Ct. 321, 28 L. Ed. 862.

2. In such cases a bill of exceptions cannot be used to bring up the whole testimony for review, any more than on a trial by jury. *Norris v. Jackson*, supra; *Insurance Co. v. Folsom*, 18 Wall. 250, 21 L. Ed. 827; *Martinton v. Fairbanks*, 112 U. S. 672, 5 Sup. Ct. 321, 28 L. Ed. 862.

3. If the parties desire a review of the law involved in the case, they must get the court to find a special verdict, which raises the legal propositions. *Norris v. Jackson*, supra (see cases cited next below). Or they must present to the court their propositions or declarations of law, and require the court to rule on them. *Norris v. Jackson*, supra; *Martinton v. Fairbanks*, 112 U. S. 670, 672, 5 Sup. Ct. 321, 28 L. Ed. 862; *St. Louis v. W. U. Tel. Co.*, 148 U. S. 92, 96, 13 Sup. Ct. 485, 487, 37 L. Ed. 380, where Mr. Justice Brewer said:

"It is enough to say that in this case there was, as appears by the bill of exceptions, an application at the close of the trial for a declaration of law that

the plaintiff was entitled to judgment for the sum claimed, which instruction was refused, and exception taken; and this, as was held in *Norris v. Jackson*, 9 Wall. 125 [19 L. Ed. 608], presents a question of law for our consideration."

In *Clement v. Insurance Co.*, 7 Blatchf. 51, Fed. Cas. No. 2,882, Judge Blatchford said:

"The trial is to proceed in all respects as if before a jury, except that there is to be no charge to a jury, and, instead of a verdict by a jury, there is to be a finding by the court on the facts, which finding, if general, is to have the same effect as the general verdict of a jury, and, if special, is to have the same effect as the special verdict of a jury. The rulings of the court in admitting or rejecting evidence are to be made and excepted to as on a trial before a jury. When the evidence is concluded, the respective parties are to propound to the court the propositions of law which they respectively conceive to arise therefrom, as on a trial before a jury, except that a proposition of law, instead of running to the effect that, if the jury find thus and so, the law on such a state of facts is thus and so, will run that, if the court find thus and so, the law on such a state of facts is thus and so. The court must pass on such a proposition of law when it tries an issue of fact, just as it must pass on a proposition of law, when made at a like stage of the trial, on a trial before a jury. * * * And such ruling being, within the fourth section of the act of 1865, a ruling of the court in the cause, in the progress of the trial, and being excepted to at the time, may under that section, when duly presented by a bill of exceptions, be reviewed by the Supreme Court upon a writ of error or upon appeal."

In *Mercantile Trust Co. v. Wood*, 60 Fed. 348, 8 C. C. A. 659, it is said:

"The only question the special finding presents that would not be presented by a general finding is whether or not, in any view, the facts found in it are sufficient to support the judgment. With the single exception of this question, which is presented by the special finding itself, there are only two methods by which questions of law can be so presented to the court that tries the facts that this court can review them by writ of error. These methods are, first, by seasonable objections and exceptions to the rulings of the court upon the admission or rejection of evidence, and, second, by requesting the court, before the trial is ended, to make declarations of law, and excepting to its refusal to do so, and to its declarations of law, if any, that do not accord with the propositions asked, in exactly the same way as instructions to the jury would be requested, and the rulings of the court giving or refusing them would be excepted to, if the trial was before a jury. The finding of the court, whether general or special, performs the office of a verdict of a jury. When it is made and filed, the trial is ended."

To the same effect are *Walker v. Miller*, 59 Fed. 870, 8 C. C. A. 331; *Adkins v. W. & J. Sloane*, 60 Fed. 344, 8 C. C. A. 656; *Searcy County v. Thompson*, 66 Fed. 92, 13 C. C. A. 349; *Barnard v. Randle*, 110 Fed. 906, 49 C. C. A. 177.

There is some judicial statement that a party cannot raise a question of law by tendering requests for instructions and obtaining a ruling. *Consolidated Coal Co. v. Polar Wave Ice Co.*, 106 Fed. 798, 45 C. C. A. 638. The question was specifically left undecided in *Insurance Co. v. Folsom*, 18 Wall. 253, 254, 21 L. Ed. 827, although it was said in that case (page 251, 18 Wall., 21 L. Ed. 827) that defendant's exception to refusal to nonsuit, at end of plaintiff's case was reviewable because it was taken to a ruling in the course of the trial. See, also, *Lehnen v. Dickson*, 148 U. S. 78, 13 Sup. Ct. 481, 37 L. Ed. 373, and the remark in *Dirst v. Morris*, 14 Wall. 484, 490, 20 L. Ed. 722, which Judge Thayer calls obiter dictum (66 Fed. 98, 13 C. C. A. 349),

and which he states was overruled in *St. Louis v. W. U. Tel. Co.*, 148 U. S. 92, 96, 13 Sup. Ct. 485, 37 L. Ed. 380.

4. Objection to the admission or exclusion of evidence, or to such ruling on the propositions of law as the parties may ask, must appear by bill of exceptions. *Norris v. Jackson*, *supra*; *Insurance Co. v. Folsom*, 18 Wall. 249, 21 L. Ed. 827.

5. Whether the finding be general or special, it shall have the same effect as the verdict of a jury; it is conclusive as to the facts found. The sufficiency of the evidence to support the findings cannot be considered by the appellate court. Section 1011, Rev. St. U. S. [U. S. Comp. St. 1901, p. 715]; *Insurance Co. v. Folsom*, 18 Wall. 249, 252, 21 L. Ed. 827; *Dooley v. Pease*, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457; *Stanley v. Supervisors*, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000; *Walker v. Miller*, 59 Fed. 870, 8 C. C. A. 331; *Smiley v. Barker*, 83 Fed. 688, 28 C. C. A. 9; *Hoge v. Magnes*, 85 Fed. 355, 29 C. C. A. 564.

6. A general verdict, which may include mixed questions of law and fact, is conclusive as to both, except so far as they may be saved by some exception which the party has taken to the ruling of the court upon a question of law. *Insurance Co. v. Folsom*, 18 Wall. 248, 21 L. Ed. 827; *Martinton v. Fairbanks*, 112 U. S. 674, 5 Sup. Ct. 321, 28 L. Ed. 862; *Boardman v. Toffey*, 117 U. S. 271, 6 Sup. Ct. 734, 29 L. Ed. 898; *St. Louis v. Rutz*, 138 U. S. 241, 242, 11 Sup. Ct. 337, 34 L. Ed. 941.

7. In the case of a special verdict the question is presented, as it would be if tried by a jury, whether the facts thus found require a judgment for plaintiff or defendant, and, this being matter of law, the ruling of the court on it can be reviewed in this court on that record. *Insurance Co. v. Folsom*, 18 Wall. 253, 21 L. Ed. 827; *Lehnen v. Dickson*, 148 U. S. 73, 13 Sup. Ct. 481, 37 L. Ed. 373; *Stanley v. Supervisors*, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000; *Smiley v. Barker*, 83 Fed. 688, 28 C. C. A. 9; *Mercantile Trust Co. v. Wood*, 60 Fed. 348, 8 C. C. A. 658.

8. Errors alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals or by the Supreme Court, but the court may consider whether there is any evidence upon which such findings could be made. *Dooley v. Pease*, 180 U. S. 131, 132, 21 Sup. Ct. 329, 45 L. Ed. 457; *Hathaway v. National Bank*, 134 U. S. 498, 10 Sup. Ct. 608, 33 L. Ed. 1004; *Runkle v. Burnham*, 153 U. S. 225, 14 Sup. Ct. 837, 38 L. Ed. 694; *Case Manufacturing Co. v. Soxman*, 138 U. S. 431, 438, 11 Sup. Ct. 360, 34 L. Ed. 1019; *Martinton v. Fairbanks*, 112 U. S. 670, 672, 5 Sup. Ct. 321, 322, 28 L. Ed. 862, where Mr. Justice Woods said:

"If the question was whether all the evidence was sufficient in law to warrant a finding for the plaintiff, he should have presented the question by a request for a definite ruling upon that point."

Lehnen v. Dickson, 148 U. S. 71, 72, 13 Sup. Ct. 481, 482, 37 L. Ed. 373, where it is said:

"As said by Mr. Justice Blatchford in *Lancaster v. Collins*, 115 U. S. 222, 225, 6 Sup. Ct. 33, 34 [29 L. Ed. 373]: 'This court cannot review the weight

of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict rendered."

Consolidated Coal Co. v. Polar Wave Ice Co., 106 Fed. 798, 45 C. C. A. 638, where it is said:

"This court" will not "examine the record with a view of ascertaining what the testimony established or did not establish, except in that class of cases where at the conclusion of all the evidence a request is preferred to direct a verdict for the defendant upon the ground that there is no substantial evidence to support a judgment against the defendant."

See, also, Hall v. Houghton, etc., Mercantile Co., 60 Fed. 350, 8 C. C. A. 661.

It seems that the power of the appellate court to review the rulings of this court upon questions of law involved in the motion to dismiss is ample. It is difficult to conceive of its nonexistence. The plaintiff in this case admits that it exists, and, but for some expressions in certain opinions to which attention has been called, no doubt would have arisen. The request for special findings of fact is denied, in reliance upon the repeated utterances of the appellate courts that the rulings of this court upon questions of law may be reviewed in the manner pointed out by them as hereinbefore considered.

CHICAGO-COULTERVILLE COAL CO. v. FIDELITY & CASUALTY CO.
OF NEW YORK.

(Circuit Court, W. D. Missouri, W. D. June 11, 1904.)

No. 2,880.

1. INDEMNITY INSURANCE—DEFENSES—WAIVER.

Plaintiff, after having been sued for injuries to its servant, notified defendant indemnity company, by which plaintiff was insured, thereof, and the latter, after having examined the claim, advised settlement, but denied liability on the ground that the injury was caused by plaintiff's breach of a statutory obligation within an exemption from liability contained in the policy. Defendant, however, agreed that its attorney should defend the suit, but plaintiff employed other attorneys, and, without relying on the opinion of defendant's counsel, settled the claim. *Held*, that defendant was not liable to reimburse plaintiff for the amount of the settlement, on the ground of an express or implied promise.

2. MINES AND MINING—INJURIES TO MINERS—STATUTES—CONTRIBUTORY NEGLIGENCE.

Where a miner was injured by reason of the mine owner's willful failure to maintain an open passageway around the landing place at the bottom of the shaft, as required by 4 Starr & C. Ann. St. 1902, pp. 845, 864, c. 93, §§ 2, 33, declaring that, for any injury occasioned by any willful violation of the act or willful failure to comply with its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby, the contributory negligence of such miner was no defense.

3. SAME—NEW MINES.

Where, long prior to an injury to a miner who was struck by a descending cage in a shaft, the owner of the mine had complied with 4 Starr & C. Ann. St. 1902, p. 845, c. 93, § 2b, requiring a passageway to be constructed 14 feet wide around the bottom of the shaft, but, by reason of a cave-

¶ 2. See Master and Servant, vol. 34, Cent. Dig. §§ 670, 671.

in, the passage had become blocked and obstructed so that a man could get through the passageway only by crawling over the rock and débris, and then by squeezing through a narrow passage, which condition existed for about six weeks before the injury, whereas the passage might have been cleared in two or three days' time, it was no defense to an action for injuries under the statute that the mine was in the early stages of development, as to which the statute ought not to apply.

4. SAME—POLICY—CONSTRUCTION.

An indemnity policy providing that insurer should not be liable for any loss or liability for injuries occasioned by the failure of insured to observe any statute affecting the safety of persons was not repugnant to a preceding general statement of the policy that insurer agreed to indemnify insured against loss from common-law or statutory liability to servants, etc.

5. SAME—WAIVER.

Evidence that the general agent of an indemnity company insuring plaintiff against loss by injuries to employes was informed that plaintiff was engaged in developing a new mine, and that it was not in full operation, but was not advised that the mine was being operated in violation of a statute of the state requiring a safe and commodious passageway around the bottom of the shaft, or that the passage constructed was then obstructed by a cave-in, was insufficient to establish a waiver of a provision in the policy exempting the insurer from liability for injuries caused by a failure of plaintiff to observe the statutory requirements.

H. L. McCune, for plaintiff.

Harkless, Cryslar & Histed, for defendant.

PHILIPS, District Judge. This cause having been submitted for hearing and determination to the court by written stipulation of the parties herein waiving a trial by jury, the cause was submitted on the pleadings and the evidence.

The suit is based on what is known as an "employer's indemnity policy," issued by the defendant company to the plaintiff company, beginning on the 1st day of October, 1902, at noon, and ending on the 1st day of January, 1903, at noon, "against loss from common law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered within the period of this policy by any employé of the assured while on duty at the places and in the occupations mentioned in the schedule hereinafter given, in and during the continuance of the work described in the said schedule." Willard A. Pettigrew, an employé of the assured, received an injury on the 23d day of October, 1902, while acting as cager and driver in the plaintiff's coal mine in Illinois, the mine covered by said policy; and to the March term, 1903, of the circuit court of Randolph county, state of Illinois, he brought suit against the said Chicago-Coulterville Coal Company to recover the sum of \$5,000 as damages for said injuries. The petition in that case alleged, in substance, that the said coal company was operating a certain coal mine in Perry county, Ill., and was then engaged in mining, removing, and shipping coal from said coal mine; that said coal mine had a shaft in which a cage was lowered and raised, and from the bottom of said shaft were driven entries, and the plaintiff (Pettigrew) was then and there in the employ of said defendant in said coal mine as a driver and cager, his duties being to drive a mule in and along the entries in said coal mine, and to haul empty coal cars from the bottom of said shaft to where the men were mining and dig-

ging coal in the mine, and to haul loaded boxes to the bottom of the shaft and place them on the cage to be hoisted to the surface, and to remove the empty boxes from said cage; that there was a main entry driven south from the bottom of said shaft, and also a main entry driven north from the bottom of said shaft, and it became necessary for the plaintiff, in the performance of his said work, to go both into the south and the north entries. The petition then avers that it was then and there the statutory duty of the defendant to have and maintain at the bottom of said shaft, and at the place for caging therein, a safe and commodious passageway cut around said landing place, to serve as a traveling way by which men or animals might pass from one side of the shaft to the other without passing under or on the cage; that at the date aforesaid, and for a long time prior thereto, said defendant willfully failed and omitted to have and maintain a safe and commodious passageway around said landing place to serve as a traveling way by which men or animals might pass from one side of the shaft to the other without passing under or on the cage, but certain planks and timbers were placed on the "sump" in said shaft, and that plaintiff was compelled to pass over said timbers and under the cage in the performance of said work, and the injuries plaintiff received were caused directly and immediately by said willful failure of said defendant to have and maintain such passageway at the bottom of said shaft, as required by statute; that on the date aforesaid, while plaintiff was passing from the south side of said coal mine to the north side thereof on said planks or timbers over said "sump" and under said cage, the said cage came down upon the plaintiff, pinioning him to the said timbers on said "sump," crushing, mangling, and permanently injuring him (describing in detail the character of his injuries and the disabilities resulting therefrom). Notice of this suit was given by the assured to the insurance company, and it undertook through its attorney the defense thereof.

It appears from the correspondence between the insurance company and the assured that, after the said attorney and the agents of the insurance company had investigated the facts of the case, said attorney became impressed with the fact that said coal company had failed to comply with and observe the requirements of the state statute applicable to said mine, and that the action could not be successfully defended, even though the evidence might tend to show that the party injured had been guilty of contributory negligence at the time of the injury; and the opinion was expressed by said attorney that such defense would be unavailing under the statute in question, and suggested to the coal company the advisability of effecting a compromise settlement with Pettigrew. A number of letters passed to and fro between the parties touching this matter, but throughout it was stated on behalf of the insurance company that, if the injury to Pettigrew resulted from the employer's willful violation of the statute of the state in failing to construct and maintain a safe and commodious passageway around the bottom of said shaft for the use of said cager and driver, no liability of the insurer to the assured was admitted under the policy in question; that, if a compromise settlement should be effected between the coal company and Pettigrew, it should be on the understanding that the

coal company did not thereby waive any right it might have under the policy to look to the insurer for indemnity, and, on the other hand, that the insurer did not waive its right of nonliability to indemnify the assured under the terms of the policy. It further appears from this correspondence that the coal company did not wholly rely upon the opinion of the counsel of the insurance company respecting the probable indefensibility of Pettigrew's suit, for in one of its letters to the insurance company it stated that it had "employed good attorneys to look after our [its] interest," and it was after this, and presumably after its own "good attorneys" had looked after its interests, that it settled the claim of Pettigrew at \$2,400, and the further sum of \$18.55 on account of costs. This was done by the assured company after the assistant examiner of the insurance company had stated in his letter that:

"If, as our attorneys seem to think, the plaintiff's recovery in this case is based upon the violation of a statute, we would not be responsible to you for any judgment. Our policy is clear upon its face. We suggest that it would perhaps be better to effect, if possible, a reasonable settlement with the plaintiff's attorney, or with the plaintiff direct, and we agree that you by so doing will not thereby waive any right which you may have against us under your policy. Our differences could be taken up and disposed of either amicably or by suit at some later period. Of course, if the plaintiff's recovery, if any, is not based upon the violation of a statute, and it is otherwise covered under your policy, we would protect you in accordance with the terms of your contract. If you prefer to have our attorney continue the defense, we are willing to have him go ahead, and the expense in connection therewith, that is his fee, will be borne by our company."

It cannot, therefore, be maintained that the amount paid by the plaintiff in compromise of Pettigrew's claim is recoverable from the defendant on the ground of a promise, expressed or implied, by the defendant to reimburse the plaintiff the amount paid in settlement in any event. But looking to the clear intentment of the parties, gathered from their correspondence, and taking what seems to me to be a common-sense view of the situation, the plaintiff would be entitled to recover from the defendant the sum so paid to Pettigrew, unless the matters pleaded in defense are good in fact and law.

The policy contains the following provision, *inter alia*, under the head of "special agreements":

"(b) This policy does not cover loss from liability for injuries * * * occasioned by reason of the failure of the assured to observe any statute affecting the safety of persons."

Pursuant to the mandatory requirement of the Constitution of the state of Illinois, the statute of that state (4 Starr & C. Ann. St. 1902, c. 93, entitled, "Mines and Miners; Coal Mines and Subjects Relating Thereto—Miners"), section 2b, in force at the time of this accident, declared as follows:

"At the bottom of every shaft and at every caging place therein, a safe and commodious passage-way must be cut around said landing place to serve as a traveling way by which men or animals may pass from one side of the shaft to the other without passing under or on the cage."

By section 33 of this statute it is provided that:

"Any wilful neglect, refusal or failure to do the things required to be done by any section, clause or provision of this act, on the part of the person or

persons herein required to do them, or any violation of any of the provisions or requirements hereof, * * * shall be deemed a misdemeanor punishable by a fine not exceeding five hundred dollars, or by imprisonment in the county jail for a period not exceeding six months, or both at the discretion of the court. * * * For any injury to person or property, occasioned by any wilful violations of this act, or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any direct damages sustained thereby."

The weight of the evidence taken in this case shows satisfactorily that the allegations of the petition in the said action of Pettigrew against the coal company herein were substantially true. When the said shaft was sunk by the coal company in the earlier part of its operation of this mine, it had constructed a passageway 14 feet wide around the west side of the shaft, connecting the north and south entries. By reason of a cave-in at this place, the passageway had become blocked and obstructed, so that the mule used by Pettigrew in his work could not pass over it, and a man could get through the passageway only by crawling or clambering over the rock and debris, testified to be from 2 to 5 feet high, and then by squeezing through a narrow passage of about 15 inches in dimensions between a post and the shaft on the northwest corner. This condition of the passageway had existed for about six weeks before Pettigrew's injury, which obstruction could have been cleared away by the operator in two or three days. The coal company knew that this passageway was thus blocked; and that to enable the driver to take his mule from one side to the other a passageway of timbers had been constructed over the "sump" or pit beneath the cage, and that in passing from one side to the other the mule and the employés were passing over this way, necessarily taking them beneath the cage. By constructing this provisional passageway it invited its employés to use it. Pettigrew received his injury by being caught under the west descending cage in attempting to pass over from one side to the other in the performance of his work.

It is the established construction of said statute by the Supreme Court of Illinois that, it having been enacted in compliance with the declared public policy of the state as defined in its fundamental law, the defense of contributory negligence and assumption of risk on the part of the person injured does not lie to an action founded on the willful failure of the mine operator to comply with the requirements of the statute. This question was thoroughly discussed by the highest court of Illinois in *Carterville Coal Company v. Abbott*, 181 Ill. 503, 55 N. E. 131, and followed in *Western Anthracite Coal & Coke Co. v. Beaver*, 192 Ill. 333, 61 N. E. 336. It is true that, to make out a case of liability on the part of the mine owner under this statute, it must be shown that his omission of duty was willful, and that the injury resulted directly therefrom. The term "willful" employed in this statute has been construed by the Supreme Court of Illinois in the case of *Carterville Coal Company v. Abbott*, supra. The court said:

"Where an owner, operator, or manager so constructs or equips his mine that he knowingly operates it without conforming to the provision of this act, he willfully disregards its provisions, and willfully disregards the safety of miners employed therein. Where such owner, operator, or manager willfully disregards a duty enjoined on him by legislation of this character, and places

in danger the life and limbs of those employed therein, he cannot say that, because one enters a mine as a miner with knowledge that the owner has failed to comply with his duty, he is guilty of contributory negligence."

The learned counsel for plaintiff sought in argument to evade the application of this statute to this instance by contending that this was a new mine, in the early stages of development, and that it ought not to be exacted or expected of a mine owner, in his relation of responsibility to his employé, to have the passageway in the prescribed condition during such experimental development. The evidence in this case shows that long prior to this accident, when the shaft was sunk and the levels started therefrom, the plaintiff complied with the statute by making a passageway 14 feet in width, and that in the fore part of September, 1902, the obstruction occurred from the cave-in, and that for six weeks the plaintiff left it in this condition, although it was prosecuting the work of development by hauling tons of coal from the extensions each day for merchandise. It was then engaged in operating a mine. The spirit as well as the letter of the statute made it imperative upon the plaintiff, as soon as it began to extend its lateral levels and to dig, haul, and dump the coal into the elevator crates, to provide this safe and commodious passageway for the cager and his mule. In *Odin Coal Company v. Denam* (Ill.) 57 N. E. 193, 76 Am. St. Rep. 45, the Supreme Court of Illinois, in speaking of this statute, said:

"Where a declaration against a mining company alleged that plaintiff's intestate came to his death by defendant's willful omission to comply with sections 6 and 8, it was proper to refuse to allow officers of defendant to testify that they intended to comply with the statute in good faith, since the word 'willful,' as employed in the declaration, did not involve a charge of wrongful intent, but only that the omissions were conscious acts of the mind, and not from mere inadvertence."

So it is held in *Donk Bros. Coal Co. v. Stroff*, 100 Ill. App. 576:

"The miners' act is a police regulation passed in obedience to a constitutional provision of this state, and a willful failure to obey the provisions of the statute has all the force of wanton and intentional injury, in contemplation of law."

The statute requiring a safe and commodious passageway means just what it says. The requirement is not met, as applied to Pettigrew's case, by showing that he could have gone around from one side to the other of the shaft by climbing over the débris in the passageway and then struggling through a 15-inch hole. The mule—his *vade mecum*—could not be gotten through that way at all. After the crate was dumped at the cage, the only way the mule could pass to the other side was over the improvised passageway under the cage. The mine superintendent must have known this. How did he expect the driver to get his mule over this way without going with him? The evidence does not disclose that the mule was an educated or trained animal who, by word or sign from his driver, would unattended cross over the bridge. The mule is a historic animal of well-known characteristics. He is uncertain, coy, and perverse. It is always safer to lead than to push him. It might, in order to avoid passing over the bridge by the driver, have required two men to work the mule, one to urge him across, and the other to catch him when he had crossed. When Petti-

grew knew that this way was provided by his employer for performing his work with the mule, and was thus caught by a descending cage and injured, his injury was the direct result of the plaintiff's willful failure to comply with said statute.

It is urged by plaintiff's counsel that the provision of the policy quoted from item "b" aforesaid should be held inoperative as in conflict with and repugnant to the preceding general statement of the policy that the Fidelity & Casualty Company "does hereby agree to indemnify Chicago-Coulterville Coal Company against loss from common law or statutory liability," etc. This is immediately followed by the "Special Agreements." Item "a" provides that the company's liability for an accident resulting in injuries to or in the death of one person is limited to \$5,000, and, subject to the same limit for each person, the total liability of any one accident resulting in injuries to or in the death of several persons is limited to \$10,000. Then "b" declares that:

"This policy does not cover loss from liability for injuries as aforesaid to, or caused by, any person unless his wages are included in the estimated wages hereinafter set forth and he is on duty at the time of the accident in an occupation hereinafter described at the place or places mentioned in the schedule. but drivers and drivers' helpers shall not be covered by this insurance unless the number of drivers and helpers and their estimated wages are separately stated in the estimated pay-roll, or they are drivers and helpers of teams for which the assured carries concurrent Teams' Insurance in this company, nor in any case unless the injured employé is on duty at the time of the accident at a place mentioned in the schedule; nor for injuries occasioned by reason of the failure of the assured to observe any statute affecting the safety of persons; nor for injuries occasioned by reason of the failure of the assured to observe any local ordinance of which he has knowledge."

I am unable to perceive that there is any legal incompatibility or repugnancy between the general opening statement and the provisions immediately following under so conspicuous a head. As well say that an accident policy which in its opening paragraph insures A. against injuries from accidental causes could not qualify or limit this general clause by excepting from its operation injuries to A. caused by the discharge of his pistol while engaged in an attempt to murder some person, or while he was engaged in dueling, or hunting in violation of the Sunday law; or that a fire policy which insures A.'s house against loss by fire could not, under the head of "Special Agreement," except from its operation a liability for loss by fire willfully communicated by the assured to his house, or from a fire communicated by known explosives or combustibles. The general clause "against loss from common law or statutory liability" was neither nullified nor emasculated by the exception, as there were left many subjects-matter upon which it could operate. For instance, but for the statute law of the state, in case of death from the accidental injury, giving a right of action to the designated survivors, there would be no liability on the part of the employer. If the injury was the result of the negligence of a fellow servant, there would be no liability of the master but for the fellow-servant statute of the state. As this policy contract was to apply to injuries occurring in a mine in Illinois, it is to be presumed that the parties were aware of and had in mind the penal statute respecting the duties and obligations of a mine owner in the particular in question. And, as there

could be no liability arising from this source except from the willful failure of duty on the part of the assured, it was peculiarly proper for the insurer to except such culpable misfeasance of the assured from the risk assumed.

The final contention on the part of plaintiff is expressed in its reply, which the court permitted it to file after the hearing of the case was begun, which is as follows:

"That if, at the time of said accident, plaintiff had failed to comply with the statutes of Illinois, as alleged in said amended answer, then plaintiff alleges that said violation of the statutes existed at the time of the issuance of the policy sued on, and defendant company had full knowledge and information as to the condition of plaintiff's mine at said time, and issued said policy with such knowledge and information, whereby it waived the provision of said policy referred to in said amended answer."

The policy contains this express provision that:

"No condition or provision of this policy shall be waived or altered by anyone unless by written consent of the president or secretary of the company, nor shall notice to any agent nor shall knowledge possessed by any agent or by any other person be held to effect a waiver or change in this contract or in any part of it."

The only evidence introduced by plaintiff in support of the allegations of the reply was that of Mr. Thomas, the president of the plaintiff company, located at Kansas City, Mo., the substance of which is that he effected this contract of insurance with Mr. Rush, who was the general agent of the defendant company at Kansas City, Mo., and that Mr. Rush was aware of the fact that the plaintiff company was engaged in developing the mine in question as a new mine, and that it was not in full operation, and the like. He did not, as admitted by him on cross-examination, at the time of taking out the policy in question, advise Mr. Rush of the fact that the mine was being operated without the assured having complied with the statutes of the state of Illinois by having a safe and commodious passageway around the shaft, nor that the passageway which it had theretofore constructed had become and was then obstructed by a cave-in, as shown by the evidence in this case. Without, therefore, considering the provision of the contract above quoted respecting a waiver and notice to the agent, it is sufficient to say that, before a waiver can become effective, the party making it must be informed of the essential facts on which such waiver is based. The evidence falls far short of the allegations of the reply.

It results that the issues are found for the defendant.

BROWN v. McDONALD et al.

(Circuit Court, E. D. Pennsylvania. June 23, 1904.)

No. 39.

1. BILL OF DISCOVERY—JURISDICTION—ADEQUATE REMEDY AT LAW.

A federal court of equity will not entertain a bill of discovery, the sole purpose of which is to ascertain the names of alleged owners of stock of a corporation against whom complainant desires to bring actions for the collection of an assessment, where the bill shows that defendants, one of whom is responsible, are also liable for such assessment, since complain-

ant not only has an adequate remedy at law for the collection of the assessment, but, under Rev. St. §§ 858, 724 [U. S. Comp. St. 1901, pp. 659, 583], may call defendants as witnesses in such action and require them to produce books and papers.

In Equity. On demurrer to bill of discovery.

Burr, Brown & Lloyd, for complainant.

A. T. Ashton and John G. Johnson, for respondents.

HOLLAND, District Judge. This bill, as amended, is purely and simply a bill for the discovery, not of evidence to be used in the aid of a suit at law, but for the purpose of ascertaining the persons for whose account certain certificates of stock were purchased, and against whom the plaintiff alleges he intends to bring suit for the recovery of certain installments of assessment legally made upon the said stock. The amended bill sets forth that Arthur K. Brown, surviving receiver of the American Alkali Company, a corporation organized under the laws of the state of New Jersey, was duly authorized to levy an assessment of \$10 per share upon the preferred stock of the said corporation, the first installment of which, amounting to \$2.50 per share, was required to be paid October 21, 1901, and on November 14, 1902, the Circuit Court of the District of New Jersey authorized the receiver to collect this installment from the holders of said stock, as they appeared upon the books of the company on September 16, 1901, and on that date one William J. McDonald, one of the defendants in this case, had registered in his name 1,100 shares of this preferred stock. It is further averred that the said William J. McDonald was on September 16, 1901, and is now, a clerk in the employ of Sparks & Co., also defendants in the bill, who are stockbrokers engaged in the business of buying and selling stock in the city of Philadelphia, and that the said McDonald is not, and never was, the real owner of the 1,100 shares of the preferred stock in the said company, or any of them, but that they were purchased by Sparks & Co. for the account of persons unknown to the plaintiff, and were placed in the name of the said McDonald, at the order and request of Sparks & Co., for the purpose of concealing the names of the real owners thereof; that these undisclosed owners are liable for the assessments on this stock; and that the defendants have been requested to disclose their names, but have refused. The plaintiff alleges he intends to bring suit against these unknown persons, who are the real owners of the stock, to recover the first installment; amounting to \$2,750, as soon as their names are discovered. The original bill averred that Sparks & Co., or customers of theirs, were and are the owners of said stock, and prayed for both discovery and relief against them. An amendment was allowed in accordance with the facts above stated, and discovery alone is now requested.

The bill prays (1) that the defendants be compelled to answer the allegations of this bill and the interrogatories, but not under oath; (2) that they be ordered to disclose and discover the names and addresses of the person or persons for whose account the 1,100 shares were purchased that now stand in the name of the said McDonald; (3) for such other and further relief as the nature of the case may require.

A demurrer was filed by the defendants to the whole of the said

bill for the reasons: (1) That the American Alkali Company would have been estopped from questioning the title or ownership of demurrant to the shares of stock registered in his name, which title and ownership had been approved of by the American Alkali Company, through its officers, by the issuance to demurrant, McDonald, of the various certificates of stock referred to in the bill of complaint, under the corporate seal of the company. The complainant, who acquires no greater rights than the American Alkali Company ever possessed, is in no position to question or inquire into demurrant's right of ownership. (2) As the statutes of this state, and also of the United States, give the complainant the undoubted right to call and examine as a witness either demurrant or Sparks & Co., as codefendants, complainant needs no discovery, and the bill should be dismissed. (3) The complainant is not now, and would not have been prior to the statutes allowing parties defendant to be examined as witnesses, entitled to the discovery prayed for, merely in order to aid him in determining against whom to bring suit. (4) The averments in the bill show that the plaintiff is not in need of discovery, but that he is in the full possession of all the knowledge and information necessary for the purpose of bringing the actions at law referred to by him.

The first cause of demurrer raises the question as to whether the action of the officers of the company in accepting McDonald as the holder, together with the provisions in the charter of the alkali company, does not require the plaintiff to look solely to the person in whose name the stock was registered on the 16th day of September, 1901, for the payment of the installments. The charter provides that:

"Subscribers thereto shall not be liable for any balance of their subscription, excepting upon such shares as shall stand of record on the books of the company in their names at the time when any subsequent assessments or calls are made, but the holders of such shares of record on the books of the company at that time and they only shall be liable for the same."

It is contended that as the company saw fit to accept McDonald as the holder of record of the 1,100 shares of its stock, and inasmuch as its charter limits its right to recover assessments from such holders, there is no obligation upon any one else to pay the same, and that McDonald, by becoming the registered holder, has agreed to pay such assessment. The company, by accepting him as such, has agreed that he alone shall be liable.

The determination of this question is not necessary to a decision in this case. I will state, however, that this same question was raised in the case of *American Alkali Company v. Bean & Company*, 125 Fed. 823, tried in this court in October, 1903, before Dallas, Judge of the Circuit Court, who gave binding instructions for the plaintiff, and subsequently, in an opinion filed at the October sessions, 1903, on a motion for a new trial, held that this provision should be so interpreted as to limit its application to cases of bona fide changes of ownership, and that it was intended that the liability of subscribers should cease upon actual, and not merely nominal, transfers of the shares subscribed for, and that upon such actual transfer the new owner would become exclusively liable. This case was appealed to the Circuit Court of Appeals of this district, and has not yet been decided. 131 Fed. —.

The second, third, and fourth grounds for demurrer will be considered together. They involve the determination of the question as to whether the plaintiffs, upon the facts in this case, can maintain a bill for discovery against the defendants, with no suit at law pending against them, merely in order to ascertain the names and addresses of alleged unknown owners of the stock, against whom they desire to bring suit, when the plaintiffs already know of two parties who are liable for the payment of these installments, and either of which can be called and examined as witnesses, and required to produce books and papers, under the laws of the United States. However, McDonald, for the purposes of this case, is to be considered as a straw man, against whom the plaintiff would be unable to collect the installments after judgment against him, but there is no allegation that Sparks & Co. are not entirely responsible for the payment of any judgment the plaintiffs might secure against them.

The plaintiff is not without a complete and adequate remedy at law. In fact, he would be in no better position if he were possessed of the information he seeks to discover. If he can recover against the unknown owners, he can at once, and with equal convenience, recover against Sparks & Co., whose responsibility is known. Can a court of equity, under these circumstances, be made the instrument by which plaintiff is permitted to fish out an assortment of parties, for the purpose of electing against which particular one he will bring his suit, when he already is confronted with a responsible firm, financially able to respond to any judgment that may be secured against them in an action at law? Even upon the ground of convenience and to avoid a multiplicity of suits, the plaintiff has no case, because Sparks & Co. are responsible, and it may turn out that the undiscovered persons are as irresponsible as McDonald, and, as a consequence, the information be valueless to the plaintiff. A suit at law against Sparks & Co. would enable the plaintiff to recover whatever he claims to be due, and in that proceeding, if any good purpose could be served, he would have a right to call both McDonald and Sparks & Co. as witnesses, and require them to produce books and papers, under Rev. St. § 724 [U. S. Comp. St. 1901, p. 583]; and, in the event of not being satisfied by that suit, the undiscovered owners could be called on to respond, if found to be financially able.

A number of cases are cited in support of the contention of the plaintiff that this bill should be sustained, and it is urged that *Dixon v. Enoch*, L. R. 13 Eq. 400, *Post v. Toledo Railroad Company*, 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86, and *Orr v. Diaper*, 4 Chan. Div. 92, are cases directly in point. The *Dixon Case* was a bill filed against the printer of a newspaper, by a person libeled therein, to obtain the name of the publisher, in order that he might bring suit against him. In this case there was an enactment expressly authorizing a bill of discovery to be filed for the purpose of ascertaining the owners and publishers of newspapers in cases where they libeled a person. So that this bill was sustained by an express act of Parliament. In the *Orr Case* it appears that Orr was the manufacturer of cotton in England, which was shipped to various foreign countries under his trade-mark. Certain other firms in England, un-

known to Orr, used his trade-mark upon cotton which these unknown firms shipped in competition with Orr's cotton. The defendant shipowners carried this cotton, and were in possession of the information as to the names of these firms who were, in violation of law, using the trade-mark of Orr. The shipowners, however, may have been the innocent instruments through which Orr was injured. A bill for discovery was filed against the owners of the ship to compel discovery of the names of these merchants who were shipping in the defendants' vessel the goods bearing the trade-mark of the plaintiff, and the bill, on demurrer, was sustained. Had Orr been unable to discover the wrongdoer, he would have been possessed of a substantial and valuable right, without a remedy. I gather from reading the Post Case, that the defendant was a defunct Ohio corporation, against which creditors had secured a judgment, and whose officers and books of the company were in Boston, Mass.; the stockholders residing in Ohio, who, under the laws of Ohio, were responsible for the debts of the defunct corporation. The corporation itself was unable to respond to the demands of creditors, and a bill was filed in Massachusetts to compel the officers of the corporation to discover the names of the stockholders, in order to enforce the personal liability imposed upon them by the statutes of Ohio, and on demurrer the bill was sustained. These cases are entirely different from the one at bar.

Whether or not a pure bill of discovery, such as the one in the present case, could be maintained prior to the enactment of Rev. St. §§ 869, 724 [U. S. Comp. St. 1901, pp. 665, 583], is a question which will not be considered, as it is evident from a review of the decisions that the general trend of judicial discussion and thought in the federal courts is to the effect that such a bill is no longer necessary, and will be sustained only in exceptional cases.

In *Heath v. Erie Railway Company*, Fed. Cas. No. 6,307 (1872), it was held that:

"A bill of discovery is no longer necessary, in view of the act permitting parties to be witnesses, and that the theory and basis of a bill of discovery in equity, in aid of a defense in another suit, is that the court in which such other suit is pending has no means of compelling a discovery from the plaintiff therein of the facts material to the defense."

In *Markley v. Mutual Insurance Company*, Fed. Cas. No. 9,091 (1877) it was held:

"A bill for discovery in aid of a suit at law cannot be maintained in the absence of allegations that it is material that the discovery should be had, and that the court of law in which the case is pending cannot compel the discovery."

And the case of *Heath v. Erie Railway Company* is cited to sustain that decision.

In *Drexel v. Burney*, 14 Fed. 268, Chief Justice Wallace, of the Circuit Court, Southern District of New York (1882) said:

"Even if formerly the complainant might have been entitled to a discovery, now that the parties can be examined in the same case as other witnesses, at the instance of the adverse party, there is no necessity for such relief."

In *Ex parte Boyd*, 26 L. Ed. 1200 (1882), the Supreme Court was considering the question as to whether a certain provision in the New York Code requiring defendants in proceedings supplementary to execution to make discovery as to property was applicable in execution proceedings in the United States courts, and, in the discussion of this question, Justice Blatchford said:

"It follows, then, that although at one time courts of equity would entertain bills of discovery in aid of executions at law, because courts of law were not armed with adequate powers to execute their own process, yet, the minute their powers were sufficiently enlarged by competent authority to accomplish the same beneficial result, the jurisdiction in equity, if it did not cease, as unwarranted, would at least become inoperative and obsolete. A bill in equity to compel disclosures from a plaintiff or defendant of matters of fact peculiarly within his knowledge, essential to the maintenance of the legal rights of either in a pending suit at law, would scarcely be resorted to, unless under special circumstances, now, when parties are competent witnesses, and can be compelled to answer under oath all relevant interrogatories properly exhibited; nor to compel the production of books, deeds, or other documents important as instruments of evidence, when the court of law in which the suit is pending is authorized by summary proceedings to enforce the same right."

In *United States v. McLaughlin* (C. C.) 24 Fed. 823 (1885) Justice Sawyer says it is very doubtful whether a pure bill of discovery in an equity suit would lie at the present day, and further states that the Supreme Court, in *Ex parte Boyd*, intimates that at this day bills of discovery are not only valueless, but obsolete.

In *Preston v. Smith* (C. C.) 26 Fed. 884 (1888) Justice Brewer, now of the Supreme Court, said:

"It is claimed that the bill must be sustained because a discovery is sought. I do not understand that a bill can be sustained solely for the sake of discovery—at least, that is the general rule. Indeed, bills of discovery are rarely, of late, resorted to. They have fallen into a condition of innocuous desuetude."

In *Rindskopf v. Platto* (C. C.) 29 Fed. 130 (1886):

"A bill of discovery in aid of an execution at law cannot be maintained where full discovery may be compelled by examination of the adverse party as a witness in the suit at law."

In *Patton v. Majors*, 46 Fed. 210 (1891) it was held:

"Since, under the Revised Statutes of United States (section 869), either party may call the other as a witness, and, by subpoena duces tecum, require him to produce books and papers, the complainant cannot give jurisdiction to a court of equity, in a proceeding where his remedy is otherwise perfect at law, by asking for a discovery."

In *Field v. Hastings, etc., Co.* (C. C.) 65 Fed. 279 (1895) it was held:

"Since parties in interest have been made competent to give testimony as witnesses, bills for discovery have become obsolete, save in exceptional cases."

In *Safford v. Ensign Mfg. Co.*, 120 Fed. 480, 56 C. C. A. 630 (1903) it was held:

"A federal court of equity is without jurisdiction of a suit in which discovery and relief are sought, but the only ground for equitable relief appears to be a discovery of evidence to be used in the enforcement of a purely legal demand, both because defendant is entitled to a jury trial on the merits, and

because a bill of discovery is rendered unnecessary by Rev. St. § 724, U. S. Comp. St. 1901, p. 583, under which plaintiffs may compel the production of the required evidence in an action at law."

The primary object of discovery was to obtain admission from a party which could be used as evidence against him, and the general rule was that a discovery could not be had from persons who had no interest in the litigation, and who could be called as witnesses. An exception, however, was made in the cases of corporations, where answer was made, not under oath, but under its corporate seal; and the practice was established of making one or more of its officers co-defendants, and compelling them to make disclosures of such facts within their knowledge as the corporation, if a natural person, could have been compelled to disclose, although their answer could not be used as evidence against the corporation. It is clear, however, that courts do not compel discovery from persons who sustain no other relation to the contemplated litigation or to the subject of suit than that of witnesses, and it is also clear that a bill for discovery cannot be used to enable a plaintiff to fish for information of any cause of action he may have against other persons than the defendants. *Twells v. Costen*, 1 Pars. Eq. Cas. 373; *Post v. Toledo Railroad Company*, 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86. But where a plaintiff has a cause of action against persons who are defined as a class by statute, and the names and residences of these persons are unknown, as in *Post v. Toledo Railroad Company*, *supra*, or where defendants have innocently become the instrument of the injury, which is the ground of a cause of action, and the names and residences of the persons offending are unknown to the plaintiff, and solely within the knowledge of the defendants, as in the case of *Orr v. Diaper*, *supra*, such a state of facts in either case is presented that a court of chancery was moved to compel a discovery.

The jurisdiction of courts of Pennsylvania as to bills of discovery, and the practice adopted and followed, were fully considered by President Judge King, of the court of common pleas of Philadelphia, in 1849, after the jurisdiction of these courts had been extended, empowering them to give such relief in matters of discovery of fact as was then possessed by courts of chancery. The chancery powers of courts in Pennsylvania have not been enlarged since that time, nor is there any decision in any of the courts overruling or modifying the principles established in *Twells v. Costen*, *supra*. This case is on all fours with the one under consideration, and the principles and discussion therein contained are applicable here.

Demurrer sustained and bill dismissed.

MUTUAL LIFE INS. CO. OF NEW YORK v. BLAIR et al.

(Circuit Court, E. D. Missouri, E. D. June 1, 1904.)

No. 4,898.

1. CANCELLATION OF INSTRUMENTS—PLEA IN BAR.

Where insured died after the commencement of a suit in equity to cancel the policy for fraud, but before answer, whereupon an action on the policy was brought, a plea in bar alleging insured's death, and the bringing and pendency of such action at law, was not available to present the objection that the bill was not sustainable for want of equity.

2. SAME—CONFLICTING AVERMENTS.

Where a plea in bar is filed to a bill in equity before answer, and its averments are in conflict with those in the bill, the averments in the bill will control, though the plea is verified.

3. INSURANCE POLICY—CANCELLATION—PENDING SUIT—DEATH OF ASSURED—EFFECT.

Where a court of equity had obtained jurisdiction both of the persons and subject-matter involved in a bill to cancel an insurance policy for fraud prior to insured's death, the fact that insured died before answer, and that an action at law was immediately brought on the policy, in which all the defenses claimed by the insurance company in the equity suit were available, did not deprive the court of equity of jurisdiction to proceed with the suit and determine the controversy.

4. SAME—ADEQUATE REMEDY AT LAW.

A life insurance policy provided that, on insured's death, settlement should be had by the issuance of a new annuity contract, by the terms of which, when settlement was made, the first payment of \$10,000 was payable to insured's widow, who was to receive annual payments thereafter if she should live, for a period of 20 years from the date of the settlement; and, if she died prior to the expiration of that period, her two children should receive the remainder of such payments, and, if either of them should die before the expiration of the period, the other should take the share of the deceased child, and, if both died before the end of the period, the installments remaining unpaid should go to the executor of insured's estate. *Held*, that since the rights of insured's children and the executor of insured's estate could not be determined in an action at law on the policy brought by the widow after insured's death, they having no present right of action, such action did not afford insurer an adequate remedy at law, so as to preclude it from maintaining a suit in equity to cancel the policy for fraud.

5. SAME—SPECIFIC PERFORMANCE.

Where a life insurance policy provided that, on insured's death, settlement should be had by the issuance of an annuity policy to insured's wife, the annuity payable in 20 annual installments, either to the wife during her life or to her children, or to insured's executor in case of the death of the wife and children, such policy was in the nature of an agreement to grant an annuity, and was therefore a proper subject for specific performance.

6. SAME—MULTIPLICITY OF SUITS.

An adequate remedy at law does not exist where a multiplicity of actions are required to obtain complete relief.

In Equity. On plea in bar to the jurisdiction of the court.

On the 8th day of January, 1902, complainant and James L. Blair entered into a contract of insurance upon the life of said James L. Blair. This con-

¶ 6. See Equity, vol. 19, Cent. Dig. § 152.

tract, among others, contains the following stipulations and agreements of parties:

"The Mutual Life Insurance Company of New York in consideration of the application for this policy, which is hereby made a part of this contract, insures the life of James L. Blair of Kirkwood, in the County of St. Louis, state of Missouri, hereinafter known as the insured, in the sum of two hundred thousand dollars, for the benefit of his wife, Apolline M. Blair, the beneficiary. Upon acceptance at the head office of the company in the city of New York of satisfactory proofs of the death of said insured during the continuance of this policy, and on the surrender of this policy at said office, the said insurance will be adjusted in instalments, without interest, by the issuance of an annuity contract in lieu hereof as hereinafter provided."

Under the "provisions, requirements and benefits," set forth in the contract, there is found the following stipulation as to the annuity contract:

"Annuity Contract. Upon the surrender of this policy after acceptance by the company of satisfactory proofs of the death of the insured the company will issue a nonparticipating annuity contract, the single premium for which shall be entered in the company's books as a death claim under this policy. The said annuity contract shall provide as follows:

"(a) If the beneficiary be living at the date of said annuity contract, the company will pay to the beneficiary on such date a first instalment equal to five per cent. of the face amount of this policy, and thereafter on each anniversary of said date an instalment of like amount without interest, until twenty such instalments shall have been paid, and furthermore, the company will continue the payment of such annuity in like instalments throughout the remaining lifetime of said beneficiary.

"Should the beneficiary die during the continuance of said annuity contract and before the completed payment of said twenty annual instalments, the company will pay the remainder thereof, as they become due, to the executors or administrators of the insured.

"(b) If the beneficiary be not living at the date of said annuity contract, the company will pay twenty instalments only, as above described, to the executors or administrators of the insured."

Thereafter, by agreement of the parties, the following modification of the terms of the contract was indorsed upon the policy:

"By mutual consent and upon the request of all the parties to this contract it is understood and agreed that in the event of the death of the beneficiary subsequent to the death of the insured, and prior to the completion of the payment of the twenty annual instalments, the remainder of said instalments shall be paid when due to the insured's children, Percy A. and Francis P. Blair, share and share alike, or the survivor of them. If neither survive, then to insured's executors, administrators or assigns. A. Klamroth, Assistant Secretary."

Thereafter, and on the 5th day of November, 1903, complainant filed its bill of complaint in this court against the assured, his wife, Apolline M. Blair, and his two sons, Percy A. Blair and Francis P. Blair, beneficiaries under the terms and modifications of the contract, for the purpose of obtaining a decree rescinding the contract, and directing its cancellation and return to complainant upon the grounds of fraudulent representations by assured in the procurement of the contract, and concealment of crimes theretofore by him committed, averred to be material to the risk incurred by complainant in the issuance of the contract.

The voluntary appearance of James L. Blair and Apolline M. Blair, his wife, was entered at the December, 1903, rules, and on January 4, 1904, a guardian ad litem was appointed for Percy A. and Francis P. Blair, they being minors. On the 16th day of January, 1904, defendant James L. Blair died testate, and on February 3d thereafter, in pursuance of the stipulation of the parties, an order of revivor was entered, and the executor of the estate of assured, theretofore duly appointed and qualified, entered his appearance. On the 4th day of April, by leave of court, complainant filed its substituted bill of complaint, and defendant Apolline M. Blair withdrew her demurrer filed to the original bill, and all defendants were given until

May rules to plead to the substituted bill of complaint. At the May rules, defendant Apolline M. Blair, widow, and John F. Lee, executor of the estate of James L. Blair, filed their plea in due form, setting forth the death of the assured, and the bringing in the state court by the widow an action at law to recover the sum of \$10,000—the first installment alleged to be due and payable under the terms of the contract—and further alleging therein a compliance with all the terms and conditions of the policy requisite to be performed by the beneficiaries therein, the removal of that action by complainant herein (defendant therein) into this court, and praying an order dismissing the substituted bill of complaint, for that, by reason of the subsequent death of assured and the institution of the action at law, there has accrued and is now available to complainant a plain, adequate, and complete remedy at law by way of defense in such action. This plea was by complainant set down for hearing on the 3d day of this month, and has been fully presented to the court in oral argument and upon briefs filed, and taken and held under advisement until this day.

Henry T. Kent and J. F. Lee, for the plea.

McKeigham & Watts, Frederick H. Bacon, Julien T. Davis, and Edward Lyman Short, opposed.

POLLOCK, District Judge. The office of the plea in this case is to bring before the court the fact of the death of the assured, and the subsequent bringing and pendency of the action at law upon the policy as distinct facts in bar of this suit. *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. Ed. 684; *Hughes v. Blake*, 6 Wheat. 453, 5 L. Ed. 303; *Rhode Island v. Massachusetts*, 14 Pet. 210, 10 L. Ed. 423; *Mitford on Pleading* (4th Ed.) §§ 14, 219, 295; *Story, Equity Pleading*, §§ 649, 652. This plea does not bring before the court for consideration the want of equity in complainant's bill. *Rhode Island v. Massachusetts*, *supra*; *National Bank v. Insurance Company*, 104 U. S. 54, 26 L. Ed. 693; *Farley v. Kittson*, *supra*. In the consideration of this plea, the answer of defendants not having come in, the averments of the bill are treated as confessed. Hence, in case facts stated in the plea, though verified, are in any material respect in conflict with the averments in the bill, in such matter the averments in the bill must control. *Roche v. Morgell*, 2 Sch. & Lef. 721; *Farley v. Kittson*, *supra*.

The questions arising for consideration upon this plea are: (1) Conceding the complainant now has, by reason of the death of James L. Blair and the commencement of the action at law now pending in this court, a plain, adequate, and complete remedy at law by way of defense thereto, as this remedy did not exist at the time of the commencement of this suit, will complainant be compelled to now abandon this suit, wherein jurisdiction over the persons and subject-matter of the controversy has once rightly attached, and resort to its defense in the action at law? If so, (2) is it shown by the facts stated in the plea taken in connection with the averments of the bill admitted because unanswered, that complainant now has a plain, complete, and adequate remedy at law by way of defense in the law action now tendered complainant by the plea as equivalent to, and a substitute for, this suit in equity?

From a consideration of the many adjudicated cases referred to in argument by solicitors for the respective parties, and without undertaking a review thereof, it must, I think, be conceded that this

court had jurisdiction to entertain a bill filed for the purpose of obtaining a decree rescinding the contract in question, and directing its cancellation and delivery to complainant at the time the original bill was filed in this suit; the assured at the time being alive, and no other remedy for wrongs averred to have been done complainant then existent. *Riggs v. Union Life Insurance Company* (C. C. A.) 129 Fed. 207; *Conn. Mutual Life Insurance Company v. Home Insurance Co.*, 17 Blatchf. 138, Fed. Cas. No. 3,107; *New York Life Insurance Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789; *Home Insurance Co. v. Stanchfield*, 1 Dill. 424, Fed. Cas. No. 6,660; 2 *Joyce on Insurance*, § 1678; 2 *Phillips on Insurance*, p. 574.

It is conclusively settled that, had this suit been instituted after the death of assured, this court would not have taken jurisdiction, unless, perhaps, a state of facts peculiar and extraordinary in their nature were set forth in the bill, constituting a defense to the contract, neither available nor presentable in a court of law. *Cable v. U. S. Life Insurance Co.*, 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188; *Riggs v. Union Life Insurance Co.*, supra.

The question presented by this plea, as now considered, is the effect of the death of assured upon this pending suit after the commencement of an action at law upon the policy, wherein all defenses that may be made to the enforcement of the contract are available. The difference in the right of choice of forums and remedy pursued, clearly recognized and firmly established by the adjudicated cases, would appear to be controlled entirely by the date of the death of assured. Nor should this be thought strange when it is contemplated the death of the assured forms the entire subject-matter of the contract between the parties; the happening of such death *eo instante* transforming the contingent contract existing between the insured and insurer into an absolute engagement between the insurer and third parties beneficiary under the terms of such contract. Such being the effect of the death of the assured upon the right of the insured to proceed in equity to obtain a rescission and cancellation of the policy after death, what is the effect of such death during the pendency of a suit brought to cancel the contract, where the beneficiary at once brings an action at law on the policy, wherein complainant may make full defense?

The distinctions between the jurisdiction of courts of law and courts of chancery, as recognized and practiced in the federal courts of this country, are not merely distinctions in name or in form, but are fundamental differences of substance. *Fenn v. Holme*, 21 How. 481, 16 L. Ed. 198; *Thompson v. Railroad Co.*, 6 Wall. 134, 18 L. Ed. 765; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 977, 37 L. Ed. 804; *Mississippi Mills v. Cohn*, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052; *Green v. Mills*, 69 Fed. 857, 16 C. C. A. 516, 30 L. R. A. 90. "Equity is the correction of that wherein the law, by reason of its universality, is deficient." As shown by the history of the growth of chancery jurisdiction in England out of the strife which arose between the judges of the courts of law and the chancellors, there sprung the rule that, where a court of equity once rightfully obtains full jurisdiction over the parties to and subject-matter of a controversy, it will maintain such jurisdiction to the end of the controversy. While a court of equity

will not and cannot in the first instance take jurisdiction of a matter cognizable at law, wherein the procedure at the common law can give a plain, adequate, and complete remedy, because in the trial of such cases the parties, by reason of the organic law, have a right to trial by jury, and the assertion of jurisdiction by a court of chancery in such a case would operate as a denial of such constitutional guaranty, yet, where the character of the relief to which a party shows himself entitled from the history of his controversy, as by him stated, is of such nature that the law cannot grant unto him a plain, adequate, and complete remedy, in such case a court of equity has a free hand, and, having once laid hold of the parties and their controversy, it will be retained in its grasp to a final conclusion of the matter. In *Morley v. White*, L. R. 8 Chancery App. Cases, 734, Lord Justice James said:

"I know of no authority or principle by which it can be established that, when this court has been properly applied to because there was no adequate remedy at law, the defendant can afterwards put in a plea in the nature of *puis darrein continuance*, to the effect that, since he put in his answer to the original bill, he has removed the obstacle which prevented the plaintiff from suing at law. It would be a monstrous result, if, after a plaintiff had rightly commenced proceedings in this court, a defendant could say: 'I have but now removed the legal difficulty. Be good enough to dismiss your bill and sue me at law.'"

See *Mollan v. Torrance*, 9 Wheat. 537, 6 L. Ed. 154; *North Chicago Rolling Mills v. St. Louis Ore & Steel Co.*, 152 U. S. 596, 14 Sup. Ct. 710, 38 L. Ed. 565; *Emsheimer v. New Orleans*, 186 U. S. 33, 22 Sup. Ct. 770, 46 L. Ed. 1043; *German Insurance Co. v. Downman*, 115 Fed. 481, 53 C. C. A. 213; *Security Trust Co. v. Tarpey*, 66 Ill. App. 590.

From the foregoing considerations, I am confident in the opinion that the nature of the relief sought by complainant here is of equitable cognizance, that this court rightly acquired jurisdiction over the parties and the subject-matter of the controversy before the death of the assured, and that such jurisdiction may be retained to the end, notwithstanding the death of the assured. And the pendency of the action at law brought by the widow against complainant, even though it should be conceded, for the purpose of argument, that, in the action at law, complainant, since the death of assured and the bringing of that action, has, by way of defense thereto, a plain, adequate, and complete remedy at law.

But does the right of defense in the action at law brought by the widow against complainant, and now pending on the law side of this court, which right of present defense therein is here tendered by the plea as an equivalent to complainant for its bill filed in this suit, give complainant a plain, adequate, complete, and sufficient remedy at law, when, as will be remembered, the remedy at law which is a bar to equitable relief in the federal courts must exist on the law side of the same court, and be not only plain and adequate, but complete and sufficient? *Cable v. United States Life Ins. Co.*, 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188; *Lewis v. Cocks*, 23 Wall. 466, 23 L. Ed. 70; *Kilbourne v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005; *Gormley v. Clark*, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. Ed. 909; *Allen v. Hanks*, 136 U. S. 300, 10 Sup. Ct. 961, 34 L. Ed. 414; *Tyler v. Savage*, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82; *Walla Walla v.*

Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; *Smith v. American National Bank*, 89 Fed. 832, 32 C. C. A. 368.

Manifestly a solution of this problem must depend upon a consideration of the rights of the parties beneficiary under the terms and conditions of the contract, and the parties to and the nature of the judgment demanded in the pending law action. As has been seen, the contract provides for a settlement between complainant and the beneficiaries in the contract, and the issuance of a new annuity contract. By the terms of the original contract, when settlement is made the first payment of \$10,000 is due and payable, and the new contract agreed to be issued upon settlement of the original contract is to issue, providing, if the widow shall live for a period of 20 years from the date of such settlement and the making of the new contract, she will receive the entire sum in the 20 equal installments; if prior to the expiration of that period she shall die, and her two children shall live the remainder of the period, they will receive, under the terms of the new contract to be issued, \$10,000 per annum, share and share alike. If either shall die before the expiration of that period, the other will take the share of the deceased child to the end of the period, if he shall live. However, if both shall die before the end of that period, the installments remaining unpaid will go to the executor of the estate of the assured. The pending law action—the only action at law, if any, which may be brought upon the contract at this time, if properly brought and maintainable—may determine the right of the widow to receive the installments due under the terms of the annuity contract to be issued upon the settlement so long as she may live, but the judgment in the action will not adjudicate the right of the children, or, in the event of their death before full payment made, the right of the executor of the estate to recover, for the reason that they claim on a separate, subsequent, contingent contract from that on which the plaintiff in the action claims, and are not parties to the record or privies in right. *Allen v. De Groodt*, 98 Mo. 159, 11 S. W. 240, 14 Am. St. Rep. 626. What amount of the entire sum the present plaintiff in the law action may be entitled to receive is dependent upon the date of her decease. The children and the executor have no present right of action. Again, should an action at law to recover damages for the breach of the contract by complainant to issue the annuity contract bargained for be brought, how may the interest of the necessary parties plaintiff thereto be determined and shown, or how may the necessary parties plaintiff therein be determined? If, as contended by solicitors for defendants in support of this plea, the contract in suit is one for the payment of money only, all such complications as suggested could not arise. But such is not the nature of the contract made.

From a consideration of the peculiar terms and conditions of the contract in suit, and the singular relations of the beneficiary and contingent beneficiaries thereto, in the event complainant shall, without just cause or excuse, refuse a compliance with the terms of the contract as written, can the jurisdiction and power of a court of equity to compel performance be doubted? I think not. *May v. Le Claire*, 11 Wall. 217, 20 L. Ed. 50; *Express Co. v. Railroad Co.*, 99 U. S. 191, 25 L. Ed. 319; 2 Story, Eq. Jur. § 728. The agreement in question to issue

the annuity contract, with terms and conditions as stipulated, is in the nature of, and may be likened to, an agreement to insure or grant an annuity. Specific performance of such contracts will be enforced. *Hebert v. Mutual Life Ins. Co.* (C. C.) 12 Fed. 807; *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902; *Carpenter v. Mutual Safety Ins. Co.*, 4 Sandf. Ch. 408; *Wellesley v. Wellesley*, 4 M. & C. 561; 5 Addison on Contracts (8th Ed.) § 2.

If the right of the beneficiaries to enforce compliance with the terms of the contract as it is written be admitted, as a necessary conclusion flowing from such admission their remedy on the contract lies in a court of equity, where such relief may be afforded, and neither complainant nor defendant has a plain, adequate, complete, and sufficient remedy at law in the action brought, or in any action at law on the contract which may be brought, for the granting of relief by way of compelling specific performance of a contract is peculiar to, and afforded alone by, a court of chancery.

Again, there exists no plain, adequate, and complete remedy at law where a multiplicity of actions are required to obtain full relief. *Oelrichs v. Spain*, 15 Wall. 227, 21 L. Ed. 43.

It follows from what has been said that the plea filed in this suit sets forth no sufficient facts in bar of its further prosecution, hence must be disallowed, and is disallowed.

In re HYMES BUGGY & IMPLEMENT CO.

(District Court, W. D. Missouri, S. D. June 27, 1904.)

1. BANKRUPTCY—CUSTODY OF PROPERTY—SURRENDER BY SHERIFF TO RECEIVER.

The surrender by a sheriff to a receiver in bankruptcy of property which he had seized on a writ of replevin, before he has made his return, operates as an abandonment of the seizure, and the goods are not thereafter in the custody of the state court.

2. SAME—SEIZURES AVOIDED BY BANKRUPTCY—REPLEVIN.

Bankr. Act, July 1, 1898, c. 541, § 67f, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], which makes void "all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him in case he is adjudged a bankrupt," covers a seizure of property on a writ of replevin.

In Bankruptcy. On questions certified by referee.

On the 2d day of May, 1904, Parlin & Orendorff Company brought an action of replevin in the circuit court of Greene county, Mo., against the bankrupt, Hymes Buggy & Implement Company, to recover possession of certain personal property, consisting of rakes, grinders, wagons, buggies, etc., alleged to be of the value of \$8,000, covering about 200 items. On receiving the writ of replevin, the sheriff on that day went to the storehouse of the bankrupt and took possession by taking the key and locking up the store. This store contained a large amount of goods of like character, marked with the name of Hymes Buggy & Implement Company, in addition to the goods claimed by the claimant. The sheriff, with the assistance of the claimant's agent on the ground, was unable to identify the goods claimed in the writ, and sent for a bookkeeper or salesman of the petitioner at St. Louis who arrived on the 3d day of May, who, with the servant of the sheriff, undertook to identify

the goods claimed by the petitioner, and to make an inventory of them. This inventory was completed on that day, and handed to the sheriff perhaps on the morning of the 4th of May. On the latter day proceedings in bankruptcy were instituted by other creditors against Hymes Buggy & Implement Company, on which it was adjudged a bankrupt; and one F. M. McDavid was appointed receiver, and forthwith executed bond, and was ordered to take charge of the assets of the bankrupt estate. Thereupon, on the same day, the sheriff surrendered the possession of said goods to the receiver. Other facts will appear in the opinion of the court. Afterwards the said Parlin & Orendorff Company presented its petition to the referee in bankruptcy to have the property claimed to have been seized under the writ of replevin by the sheriff turned over to it on the ground that, the state court having first acquired jurisdiction of the subject-matter, the goods in question were in custodia legis of the state court. On hearing before the referee the petition was denied, and exceptions taken to the action of the referee by petitioner. The questions involved have been certified to the judge of the court for review.

Massey & Schmook, for claimant.

John S. Farrington and W. A. Rathbun, for trustee.

PHILIPS, District Judge (after stating the facts as above). The contention of the petitioning claimant is that the property in question was in custodia legis when the receiver in bankruptcy obtained possession under the seizure made by the sheriff in the action of replevin instituted in the state court; and that, as the state court first obtained jurisdiction of the subject-matter in controversy, it was exclusive of any right of the bankrupt court to proceed to administer the property. If the case were to be made to turn upon the question of fact and law as to whether there was an actual seizure and reduction to possession of this property by the sheriff as against the creditors of the bankrupt represented by the receiver, it would not be free from embarrassment. The referee has found that the property claimed by petitioner was mingled and confused with a large mass of other property in the storehouse of the Hymes Buggy & Implement Company, with no visible earmarks by which it was distinguishable from the mass. The only levy made by the sheriff was constructive, by taking the key to the building and locking it up, and afterwards undertaking to take an inventory. It was in fact conceded by the action of petitioner's counsel and agent that included in this mass of property in the storehouse were goods of a similar character not claimed by the petitioner, and a considerable portion thereof were by said attorney and agent ordered to be released in favor of other claimants. There was no segregation of the property claimed by petitioner, or removal thereof. Neither the sheriff nor petitioner's agent on the ground was able to identify the property claimed, and therefore this agent sent to his house for a book-keeper and salesman, who came out to attempt this work of identification. He and the servant of the sheriff undertook this identification, and to make out an inventory, which inventory was not delivered to the sheriff until perhaps the morning of the 4th of May, the day of the institution of the proceedings in bankruptcy against the Hymes Buggy & Implement Company. This list did not correspond with the items claimed in the writ of replevin, nor accord with the list as presented in the petitioner's claim presented to the referee in bankruptcy. Under the state of proofs in the record before the court, it would be something

of guesswork as to what particular property the court should order turned over to the petitioner if his petition were granted.

But passing this by, it affirmatively appears from the referee's findings, and the evidence amply sustains it, that whatever possession of the goods the sheriff acquired under the writ of replevin was on the 4th day of May, 1904, voluntarily surrendered by him to the receiver in bankruptcy. This constituted an abandonment of his seizure, and entitled the receiver in bankruptcy, as the representative pro hac of the debtor and creditors, to receive and to hold it. It is a well-settled rule of law that a release of the goods levied on or seized under writ by a sheriff is an abandonment thereof, and invalidates the levy. *Western v. Dorr*, 25 Me. 176, 43 Am. Dec. 259; *Dunklee v. Fales*, 5 N. H. 527; *Bagley v. White*, 4 Pick. 395, 16 Am. Dec. 353; *Commonwealth v. Contner*, 18 Pa. 445; *Achland v. Paynter*, 8 Price, 95. As said by Lord Ellenborough in *Rhodes v. Crundale*, 1 Maule & Selwyn, 711: "I am not aware of any case where, upon an abandonment of possession by the sheriff, the goods have still been holden to remain in the custody of the law." Up to the time of this controversy the sheriff had not made his return to the court of his seizure; and if he returns the fact (as he must) his return will show that he did not deliver the goods to the petitioner, but to McDavid, the receiver in bankruptcy; and therefore, as said in *Commonwealth v. Contner*, 18 Pa. 446, "the legal effect of the whole return is that there is at the time of the return no existing levy at all." This is sufficient to repel the petitioner's demand. The court does not, however, wish it understood that it is of opinion that the sheriff, by releasing whatever possession he had of the property, incurred any liability to the petitioner. On the contrary, his action was commendable, in my judgment, under a proper construction of the bankrupt act. I am not unmindful of the view to the contrary, entertained by judges entitled to high respect. But a consideration of the policy, purposes, and scheme of the entire bankrupt act has persuaded my mind that the general rule that the court which first obtains jurisdiction of the subject-matter retains it to the exclusion of all other courts which are later asked to deal with it is limited in many respects by the national bankrupt act. Section 11a is a marked illustration of this fact, which declares that:

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined." Act July 1. 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426].

No matter what the character of the suit, if the claim asserted be such as a discharge in bankruptcy would operate as a release therefrom, the bankrupt court is empowered to stay its prosecution, in furtherance of the policy of the act authorizing the bankrupt court to administer and distribute the insolvent estate. As the action of replevin might well be "founded upon a claim from which a discharge would be a release," it would seem to fall within the power given to the bank-

rupt court to stay such suit pending in the state court to the extent provided in said section 11.

In further demonstration of the purpose of the bankrupt act to place all claims, judgments, liens, and process originating within four months preceding the institution of bankrupt proceedings against insolvents, under the control of the court of bankruptcy, section 67f declares:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as may be necessary to carry the purposes of this section into effect: provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry." Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450].

True it is that the term "all levies" would ordinarily in practice apply to a seizure under execution for the collection of money on a judgment. But looking at the connection and the whole statute, it is difficult to escape the conclusion that Congress employed the term "all levies" in its most comprehensive sense, covering any and all seizures of property of the bankrupt within the four months' period, under legal process, looking to the enforcement of claims against the bankrupt which would be released by his final discharge. Why nullify judgments, attachments, or other liens "against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him," and yet leave the claimant free to seize the property of the insolvent under replevin process? A mortgagee under the provisions of a chattel mortgage covering all the personal property of the insolvent may, on default, be entitled to take possession of the property and sell it to satisfy his claim. If, as he might do, he should bring suit to foreclose, the suit could be stayed, as provided under section 11; and if he obtained judgment of foreclosure within four months, under section 67f, it could not be enforced by levy. Yet it is contended that by resorting to the action of replevin he can, within the four-months period, seize the property of the insolvent under process of a delivery order, and turn it over to the claimant, who can proceed to sell and transfer title, notwithstanding on the day of the seizure proceedings in bankruptcy, in the interest of all creditors, be instituted against the debtor, on which he is adjudged a bankrupt. Another claimant has a vendor's lien on specific personal property held by the bankrupt, which he may bring suit in equity to enforce, and obtain a judgment; yet, if the execution issues thereon within the four-months period to enforce the judgment, it is annulled by the bankrupt act. Why it should have been in the mind of Congress to exclude the process of seizure in the action of replevin, to assert a claim of ownership and right of possession, denied by the bankrupt, and which all the

other creditors may controvert, passes my understanding. There is good reason why the court of bankruptcy, charged with the duty of marshaling and distributing the entire estate of the bankrupt, should be intrusted with the function of hearing and determining the priorities of creditors of the bankrupt, including claimants to the possession of personal property under contracts and liens, as well as any other character of claim. The case at bar affords an apt illustration of the inequality and absurdity of allowing an exemption from the operation of section 67f in favor of a claimant who proceeds by writ of replevin. The evidence in this case shows that almost simultaneously with the institution of the replevin suit the petitioner instituted attachment proceedings against the bankrupt, indicating that it knew of the insolvency, and seized goods in the mass of property in said storehouse, but without segregating them. Becoming aware, doubtless, that the seizure under the writ of attachment would be nullified by the institution of proceedings in bankruptcy, the petitioner, under advice of counsel, let go, and resorted to the writ of replevin, the service of which was hardly complete when the proceedings in bankruptcy were instituted.

This view of the statute finds support in the opinions in the cases of *In re Weinger, Bergman & Company* (D. C.) 126 Fed. 875, and *In re Haynes* (D. C.) 123 Fed. 1001.

It results that the exceptions taken to the referee's action in disallowing the petition of the claimant are overruled.

IN RE BRETT.

(District Court, D. New Jersey. June 27, 1904.)

1. BANKRUPTCY—JURISDICTION.

Jurisdiction of the subject-matter of a bankruptcy proceeding is conferred by law, and jurisdiction of the person in a proceeding in involuntary bankruptcy is acquired by the filing of a petition and the due service of a copy of the petition and of a subpoena.

2. SAME—AMENDMENT.

Though a demurrer to a petition in involuntary bankruptcy proceedings be sustained, the petition will not, as a rule, be dismissed without first giving the petitioners an opportunity to apply for leave to amend.

3. SAME—NEGATING EXCEPTIONS.

The exception in Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], concerning wage earners and farmers, should be negated in a petition in involuntary bankruptcy proceedings; and this may be done either in the express language of negation, or in any other language from which the inference that the alleged bankrupt is a wage earner or a farmer is necessarily excluded.

4. SAME—PROVABLE CLAIM.

An averment, in a petition in involuntary bankruptcy proceedings, that one of the petitioning creditors was the owner of a promissory note, dated January 15, 1904, which was made by the alleged bankrupt payable to the creditor's order in three months after its date at a specified bank, sufficiently sets forth a provable claim.

5. SAME—CONSIDERATION OF CLAIM.

The provision of Bankr. Act July 1, 1898, c. 547, § 57, 30 Stat. 560, 561 [U. S. Comp. St. 1901, p. 3443], requiring the consideration of a claim

against a bankrupt's estate to be set forth and sworn to, relates to the proof of the claim, and not to the averments of the petition.

On Demurrer to Petition in Involuntary Bankruptcy.

Edward F. Merry and Griggs & Harding, for demurrant Paterson Brewing & Malting Company.

Michael Dunn, for petitioning creditors.

LANNING, District Judge. Three creditors have filed a petition against John T. Brett to have him adjudged an involuntary bankrupt. Section 4b of the bankruptcy act provides that:

"Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, * * * owing debts to the amount of one thousand dollars, or over, may be adjudged an involuntary bankrupt." Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423].

Section 59b (30 Stat. 561 [U. S. Comp. St. 1901, p. 3445]) requires that each of the creditors filing a petition must have a provable claim. The Paterson Brewing & Malting Company, another of Brett's creditors, has demurred to the petition, and assigned as causes of demurrer, first, that there is no averment in the petition that Brett is not a wage earner or farmer; second, that it does not appear by the allegations in the petition that the claim of George F. Whitehead, one of the three petitioning creditors, is a "provable" claim; and, third, that no act of bankruptcy has been alleged. The third cause of demurrer was not pressed on the argument, and is understood to have been abandoned.

The demurrant insists that the first two causes of demurrer deal with jurisdictional defects in the petition, and that it is beyond the power of the court to permit an amendment of the petition which shall relate back to the time when the petition was filed. The purport of the argument is that the petition is so defective in form and substance that the court acquired by it no jurisdiction of the subject-matter of the proceedings, or of the person of the alleged bankrupt. But it is not the petition that confers upon the court jurisdiction of the subject-matter. That is done by the law. Jurisdiction of the person is acquired by filing a petition, and serving a copy of it, with a subpoena, upon the alleged bankrupt. The demurrant by its demurrer necessarily admits that the petition has been filed, and the record of the case shows that a copy of the petition and the subpoena have been served on the alleged bankrupt. The court therefore has jurisdiction both of the subject-matter and the person. The petition may be dismissed for grave defects, but, though defective, it may also, under the authority of general order 11 (32 C. C. A. xiv, 89 Fed. vii), be amended, provided the petitioners shall, in their application for leave to amend, state the cause of the error in the petition, and verify the amendment in the same manner as the original petition was required to be verified.

In the Williams Case, Fed. Cas. No. 17,700, it appears that on June 22, 1874, a petition in bankruptcy was filed against Williams and McPheeters, who were partners in business, and that on June 29th they were adjudged bankrupts. After the proceedings in bankruptcy were commenced, one Ellis brought suit in a state court against the bankrupts, and Williams was arrested upon process issued in that suit.

Thereupon he applied to the bankruptcy court for an injunction restraining Ellis from prosecuting his suit. A rule to show cause being allowed, the bankruptcy court, on the return of the rule, stayed the action. The bankrupt law then in force required that the petition should be signed by at least one-fourth of the creditors, the aggregate of whose claims should amount to not less than one-third of the provable debts. The petition was defective, in that it did not conform to these requirements of the law. It was subsequently amended, however, with the consent of the court; and, on a review of the order by the circuit judge, it was held that the court had jurisdiction of the cause notwithstanding the defect in the petition, and that the amendment of the petition related back to the commencement of the bankruptcy proceedings and gave effect to the action of the court. Accordingly the order of the District Court staying Ellis' suit was sustained.

In *Roche v. Fox*, Fed. Cas. No. 11,974, a motion to dismiss a petition in bankruptcy was made for want of jurisdiction, because the petition was not signed and verified by a sufficient number of creditors, and for other reasons that need not now be mentioned. In the opinion on the motion the following language was used:

"It is claimed that the court has not jurisdiction. Jurisdiction of what? The law gives the court jurisdiction of the subject-matter before any petition is filed. And the filing of the petition, the service of process, and the appearance of the alleged bankrupt in the cause are ample to give jurisdiction of the person. What question of jurisdiction remains? In a certain sense, it is true, the court has not jurisdiction. It cannot proceed to furnish the relief prayed for upon a petition which is demurrable in not containing all the necessary allegations. And the true force of the objections, to my mind, does not go to the jurisdiction of the court, but only to the sufficiency of the petition as a pleading. The petition in bankruptcy answers to the declaration or complaint in an action at common law or bill of complaint in equity. Its office is to set forth the cause of action. It was never yet held that a complaint in an action at law or suit in equity should be dismissed for want of jurisdiction in the court when suit has been commenced by service of process, and an attempt made to set out the cause of action, but the complaint is defective in some particulars, in not containing all the essential allegations to make a good case. Such defect would be good ground for demurrer, which, if sustained, leave would be given to amend, which, of course, could not be done if the court had not jurisdiction."

In the *Pilger Case*, 9 Am. Bankr. Rep. 245, 118 Fed. 206, it was held that a petition might be amended to cure the defect arising from a failure to aver that the alleged bankrupt was not a wage earner. The same ruling was made in the *Bellah Case*, 8 Am. Bankr. Rep. 310, 116 Fed. 69, and in *Beach v. Macon Grocery Co.*, 9 Am. Bankr. Rep. 762, 120 Fed. 736, 57 C. C. A. 150.

In view of these authorities, the true rule doubtless is that, if the demurrer in the case now in hand should be sustained, the petition should not be dismissed without first giving the petitioners an opportunity to apply for leave to amend. If such leave should be granted, and the amendment be made, the petition would be considered as valid from the date when it was filed. But, in my judgment, the first cause of demurrer is not well founded. It is true that in pleading upon statutes, where there is an exception in the enacting clause, the plaintiff should negative the exception. 1 Chit. Pl. 223; *Ledbetter v. United States*,

170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162; *In re Taylor*, 4 Am. Bankr. Rep. 515, 102 Fed. 728, 42 C. C. A. 1; *In re Bellah*, supra. In accordance with this rule, the petition must contain allegations which fairly negative the exception of the bankruptcy act concerning wage earners and farmers. The form in which the exception should be negated is immaterial. It may be done in the express language of negation or in affirmative language, which shows that the alleged bankrupt is neither a wage earner, nor a person chiefly engaged in farming or the tillage of the soil. In this case the petitioners have averred in their petition that the alleged bankrupt has his "principal place of business" in the city of Paterson, that he "resided and had his domicile" there, and that he "owned and conducted" a store and saloon there.

It was held in *Beach v. Macon Grocery Co.*, supra, that a petition in involuntary bankruptcy, drafted in the form prescribed by the Supreme Court, as the petition in this case seems to be, and containing averments consistent with the alleged bankrupt being a merchant, and not chiefly engaged in tilling the soil, was "probably sufficient."

In the *Taylor Case*, supra, it was held that a failure to negative the exception concerning wage earners and farmers was a jurisdictional defect. But that remark was made to show that the right to take advantage of such a defect in the petition was not a mere personal privilege of the alleged bankrupt. The court said that the petition "did not allege what the defendant's business or occupation was, and there was no allegation to show that he did not come within the excepted classes, which, under the law, are too important to be wholly ignored." Had there been such an allegation in that case the court doubtless would not have sustained the demurrer there filed.

The bankruptcy act should be so construed as to give full effect to its purposes. One of those purposes is to exclude from the class of preferred creditors any person who has received from an insolvent debtor, within four months before the filing of a petition against him, a preference by means of the transfer of any part of the debtor's property. Although the exception of the statute is not negated in the petition now under consideration, in express words of negation, which is the form usually employed in common-law pleading, the averments concerning the debtor's residence and domicile, his principal place of business, and his owning and conducting a store and saloon, all in the city of Paterson, exclude the idea of his being a "wage-earner" or "a person engaged chiefly in farming," and do sufficiently negative the exception.

The second cause of demurrer is that the petition does not show that George F. Whitehead, one of the petitioning creditors, has a "provable" claim. The averment of the petition is that Whitehead is the owner and holder of a certain promissory note for \$100, dated January 15, 1904, made by the alleged bankrupt, and payable in three months after its date to Whitehead's order at the Paterson National Bank. This is a sufficient averment. There is nothing in the bankruptcy act, or in the general orders or forms prescribed by the Supreme Court under the authority of the act, requiring greater particularity. The provision of section 57 of the act (Act July 1, 1898, c. 541, 30 Stat.

560, 561 [U. S. Comp. St. 1901, p. 3443]) which requires the consideration of the claim to be set forth and sworn to relates to the proof of the claim, and not to the averments of the petition.

The demurrer will be overruled.

NAX v. TRAVELERS' INS. CO.

(Circuit Court, E. D. Pennsylvania. May 28, 1904.)

No. 36.

1. ACCIDENT INSURANCE—CAUSE OF DEATH.

A death resulting from a self-inflicted knife cut made by an insured while trimming a corn, which was followed by blood poisoning, is one from an "accidental, external, and violent" injury, within the meaning of an accident policy.

2. SAME—NOTICE BY BENEFICIARY.

Where an accident policy provides for a weekly indemnity for injury to be paid to the insured, and also for a sum to be paid in case of death to a named beneficiary, no duty to give notice to the insurer rests upon the latter until vested with a right or interest in the policy by the death of the insured.

3. SAME—ACTION FOR DEATH OF INSURED—QUESTIONS FOR JURY.

Plaintiff, who was an aged woman, was beneficiary in an accident policy held by her husband, but had no knowledge of its existence. She assisted in nursing her husband after his injury, and on his death was at once taken to the home of her daughter at a distance, where she remained two months. On her return the policy was found among the papers of the deceased, and notice of the death at once given to the insurer, which made no objection on account of her delay, but required and accepted further proofs as to the cause of death. *Held*, that whether the circumstances excused the delay in giving the notice, or whether such delay was waived by the insurer, were questions for the jury.

At Law. Sur motion for new trial.

A. T. Freedley, for plaintiff.

Frank P. Prichard, for defendant.

BUFFINGTON, District Judge. This is a motion for a new trial. The plaintiff, the death beneficiary under an accident policy held by her husband, brought suit to recover \$5,000 for his death, which she alleged resulted from accident. The jury found in favor of the plaintiff, and a new trial is moved for.

The alleged accident was a self-inflicted knife cut of the insured's toe while he was trimming a corn. Later, blood poisoning ensued, and resulted in his death. Upon the controverted question of the fact whether death resulted from the wound or from diabetes, the finding of the jury was with the plaintiff, and, being so settled, a new trial should be refused, unless the injury was not an "accidental, external, and violent" one within the meaning of the policy, or unless the court should have held that notice was not given by the plaintiff beneficiary as provided by the policy. After full consideration, we are of opinion the court would have erred in taking this case from the

jury. That the injury in question was an accidental, external, and violent injury accords not only with our own views, but with well-considered cases, of which it suffices to cite *Western Commercial Travelers' Ass'n v. Smith*, 85 Fed. 405, 29 C. C. A. 223, 40 L. R. A. 653.

This leaves the question of notice. It will be noted the policy provides for two distinct claims thereunder—one by the insured for weekly indemnity, the other by a named beneficiary in the case of death. As no right or interest in the death benefit vested in the beneficiary until the death of the insured, it would seem that no duty in the way of notice was imposed on her until the death of the insured vested a claim in her against the insurer. Whatever, therefore, may have been the duty of the insured as to notice in order to secure indemnity, it is clear to us the notice the death beneficiary was to give was not a notice of the accident, but of death. *Western, etc., Ass'n v. Smith*, supra. Such being the case, should the court have held that the notice given by Mrs. Nax, the beneficiary, did not answer the requirements of the policy? The deceased died June 22d, and Mrs. Nax gave notice on August 28th following. If these two facts stood alone, not modified or affected by other facts and circumstances, we assume it would be the duty of the court to determine the sufficiency or otherwise of the notice. But we are equally clear that the plaintiff had a right to demand that the jury, and not the court, should pass on the effect of the peculiar modifying facts and circumstances of this case. Among other such facts, we note that Mrs. Nax did not know she was a beneficiary under the policy, or of its existence; she was an aged woman; her husband had a trying and disagreeable illness, which she had helped nurse; her daughter came from Buffalo, and, immediately after the funeral, closed the house and took her mother to her home. She remained there until August. On her return the safe in the house in which her husband's papers were kept was opened, and she then learned of the policy and at once gave notice. It will thus be seen that there was no actual or intentional default on her part. Her husband was a retired business man; nothing is shown that called for immediate action in the settlement of his estate. Under such circumstances, was it the duty of the wife at her peril immediately on his death to institute a search for papers? In the nature of things, had the insurer, when this contract was made, a right to expect that the widow of the beneficiary would under such circumstances make an instant examination of his papers? We must presume that such contracts were made with a view to what would be the reasonable and probable actions of the parties concerned under the conditions existing when the policy matured, and were not intended to require a beneficiary to give instant notice of an unknown right; to deny to her the companionship of her daughter, and change of scene and association, after a trying nursing period, until she had first examined the papers and effects of her husband. In such cases the adjudged decisions and text-books hold the sufficiency of the notice to be for the jury. *People's Ass'n v. Smith*, 126 Pa. 325, 17 Atl. 605, 12 Am. St. Rep. 870; *Kentzler v. American, etc., Ass'n*, 88 Wis. 589, 60 N. W. 1002, 43 Am. St. Rep. 934; *May on Insurance*, § 462; *Cook on Insurance*, § 115;

Niblack on Insurance, § 416. The consensus of these cases is fairly represented by the statement that:

"If the notice be required to be forthwith, or as soon as possible, or immediately, it will meet the requirement, if given with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay, of which the jury are ordinarily the judges."

It will be noted, also, that, when notice was given, the company rested its defense, not on the failure to give notice, but on the ground the injury was not accidental. It agreed to receive fuller proofs. Such proofs were furnished, and it was not until after November 20th, almost three months after Mrs. Nax's notice, that they first raised the question of notice. Moreover, the notice to which they then claimed they were entitled was not of death, to which alone, as against her, they were entitled, but their objection was that there was "a failure on the part of the beneficiary to give immediate written notice of the alleged accident, as required by the contract, which prevented the company from making the necessary investigation at a time when it would have been of some benefit to them." Indeed, there nowhere appears any objection by the defendant company to the omission of the death notice, but only, as we have seen, an insistence, after almost three months' delay, upon an unwarranted demand for notice of the accident. Under such facts no complaint can be made by the defendant that the question of waiver was left to the jury.

On the whole, we are of opinion the motion for a new trial must be refused

In re CALLISON.

(District Court, S. D. Florida. December 24, 1903.)

1. **BANKRUPTCY—INVOLUNTARY PROCEEDINGS—AVERMENT OF OCCUPATION.**

A petition in involuntary bankruptcy should allege the occupation of the alleged bankrupt, showing him to be within the class subject to such proceeding.

2. **SAME—WHO MAY MAINTAIN.**

To entitle a creditor to maintain a petition in involuntary bankruptcy against his debtor, he must have been a creditor at the time the act of bankruptcy alleged was committed.

In Bankruptcy. Petition in involuntary bankruptcy by William J. Brake, administrator of the estate of Gerard H. Brake, deceased. On demurrer to petition.

For opinion of Circuit Court of Appeals affirming the judgment, see 129 Fed. 201.

The petition in this case alleges, in substance, the general jurisdictional facts, but omitting any allegation of the character of the business or occupation of N. A. Callison, the alleged bankrupt, and then further alleges that on the 29th day of May, 1903, the petitioner recovered a judgment at law against defendant for \$6,000 damages, which judgment remains in full force and effect, unsatisfied and unreversed; that defendant is insolvent, and on the 16th day of May, 1903, prior to the recovery of such judgment, he conveyed certain property with the intent to hinder, delay, and defraud his creditors.

Bisbee & Bedell, for petitioner.

E. P. Axtell, C. D. Rinehart, and Jno. E. Hartridge, for respondent.

LOCKE, District Judge. There are two questions presented in the demurrer to this petition:

First, should not the petition negative the exceptions in the statute, so as to bring the party desired to be put into bankruptcy within the class of persons declared to be liable? It is a well-established principle in criminal pleading that all exceptions in the statute must be negated in the allegations of the pleader. *Ledbetter v. United States*, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162. Although, in pleading, it has been held by some courts that, where the validity of the pleading in bankruptcy is permitted to pass until testimony has been taken, it is too late to raise such objection as is done here, in other cases it has been declared that it is a jurisdictional question, and, if raised by the defendant, cannot be ignored; in this respect following the requirements of criminal pleading. This has been distinctly held in *In re Taylor*, 102 Fed. 728, 42 C. C. A. 1, and in *In re Bellah* (D. C.) 116 Fed. 69. This construction seems to be the better form of pleading, regardless of the form given for the petition in involuntary cases. Form 3. It will be noticed that in the form for the petition in voluntary cases (form 1) the occupation of the petitioner must be alleged, and there is no reason why a person can be forced into bankruptcy with any less clear and distinct averment of his character and occupation than can one who desires himself to take advantage of the bankrupt act. I think the fairest construction is to consider the omission in form 3 described rather as a clerical error, than to say that the Supreme Court intended to declare or rule that it was not necessary in involuntary cases to declare the occupation of a person to be such as would make him liable to such proceeding.

The second question presented by the demurrer is that the petition shows that the indebtedness of the petitioning creditor was based upon a judgment recovered subsequent to the act of bankruptcy alleged. A literal application of the language of the act would give to any person having a provable debt the power to put a person into bankruptcy for an offense committed before there were any business relations existing between them, and thereby obtain the power of oppressive action by one party by procuring an indebtedness, when, in reality, he had in no way suffered from the act of the alleged bankrupt. The same form of language in the bankrupt act of England and in the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) has been carefully examined, and the construction put upon it has limited the rights of creditors to such as held debts at the date of the alleged act of bankruptcy. It was so held in *In re Burk*, Fed. Cas. No. 2,156; *In re Muller*, Fed. Cas. No. 9,912; *Beers v. Hanlin* (D. C.) 99 Fed. 695; *In re Brinkmann* (D. C.) 103 Fed. 65. This appears to be not only the conclusion of the courts upon well-considered cases, but a reasonable construction. It is unquestionably based upon the well-established principle that creditors cannot complain of a conveyance by the debtor made prior to the time they became debtors, unless such conveyance was made with the direct purpose of defeating their claim. As held in *Horbach v. Hill*, 112 U. S. 144, 5 Sup. Ct. 81, 28 L. Ed. 670, a creditor of a grantor of real estate, attacking the conveyance

as made to defraud creditors, should show affirmatively that he was a creditor of the grantor when the alleged fraudulent conveyance was made.

I fail to find anything in *West Co. v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, which in any way is opposed to this construction. There was but one question presented in that case, viz., whether, where a general assignment had been made, it was necessary to show the insolvency of the bankrupt, and to this point alone the court seemed to address itself. The question herein pending was in no way presented, nor, in my view, considered.

The fundamental object of the bankrupt act was not to correct abuses of fraudulent conveyances, but to equalize the distribution of assets, and the correction of fraudulent conveyances only comes in incidentally; and I accept the view that no creditor, not such at the time of the commission of an act of bankruptcy, can by himself petition one into bankruptcy.

It is therefore ordered that said demurrer be sustained upon the first, second, and third grounds thereof.

THE WINFIELD S. CAHILL.

THE BERKS.

(District Court, E. D. Pennsylvania. June 6, 1904.)

No. 91.

1. COLLISION—DELAWARE RIVER—VESSEL ON WRONG SIDE OF CHANNEL.

A vessel passing from Philadelphia down the Delaware river on the left or New Jersey side assumes the risk incident to being on the wrong side of the channel, and is required to exercise extra precautions to avoid collision with vessels coming up which are rightfully on that side.

2. SAME—STEAM VESSELS MEETING—INSUFFICIENT LOOKOUT.

A tug with a high-bowed barge on her side, which obscured her star-board light, passing down from Philadelphia on the left-hand side of the channel, and the barge, which carried no side-lights, *held* in fault for a collision with a tug coming up with a tow, on the ground of the want of proper lights, and that they failed to maintain a proper lookout, especially required, since they were on the wrong side of the channel, by reason of which they did not see the approaching tug, nor hear her signals for passing.

In Admiralty. Suit for collision.

Curtis Tilton, for libellant.

Willard M. Harris, for respondents.

HOLLAND, District Judge. Lewis Boyer, as managing owner, files this libel to recover the damage caused the tug John B. Patton as a result of a collision with the barge Berks on the Delaware river on November 28, 1900, about 6 o'clock p. m., nearly opposite Cooper's Point, on the New Jersey side of the channel. The testimony in this case, as usual, is somewhat conflicting, although it plainly appears from that given by disinterested witnesses and the circumstances of

the case that the respondents are responsible for this collision. On the night of November 28, 1900, Harry T. Trout, the master of the tug John B. Patton, had in tow, on her starboard side, the Empire City, a low-deck barge, and was proceeding up the Delaware river on the right-hand side of midchannel, bound to the Gashouse Wharf, at Tioga street, in the port of Philadelphia. Her side lights were properly set, in accordance with the rules, and burning brightly; her towing lights were in their proper places; and the captain himself was in the pilot house on the lookout. Between 5 and 6 o'clock of the same evening the tug Cahill, with the barge Berks in tow, left Pier 16 of Port Richmond, in the city of Philadelphia, and proceeded down the Delaware river, also on the Jersey side of midchannel. The Berks is a very large barge, with a high bow, and was towed this night on the starboard side of the Cahill, without side lights as required by the rules. The Cahill, however, had her green light on the starboard, and red light on her port, side; but these were somewhat obscured from ahead by the high sheer of the Berks bow, and there was no lookout on the Berks, as the captain and the only other employé, the cook, were eating supper at the time of the collision. The captain was in the pilot house in charge of the tug Cahill, and Harb H. Hickman, the mate, was on the bow of the upper deck of the tug Cahill, standing forward of the pilot house, on the lookout. As the Cahill, with the Berks in tow, and the Patton, with the Empire City, approached each other, the captain of the Patton noticed the white towing lights of the Cahill, and gave the signal of one blast of his whistle to denote that the Patton was keeping to the right, and, at the same time ported his helm. Receiving no signal in return from the Cahill, he gave a second signal of one blast, and kept to the right. The captain of the Cahill failed to see the Patton or respond to the signals, but kept on his course. As there were no side lights to be seen on the Berks, and the Cahill's side lights were obscured by the high bow of the Berks, and nothing visible to the captain of the Patton, excepting the towing lights on the Cahill, he was unable to determine which way the Cahill and Berks were going, and at the time he gave the second signal the Patton was so close to the Berks that he was unable to avoid the collision. The stem of the Berks came in contact with the Patton on the port bow, a few feet aft the stem, at an angle of about 45 deg., which shows that the captain of the Patton was endeavoring to pass the object ahead of him on his port side, as the two signals which he had given indicated. If the parties in charge of the Cahill and the Berks had maintained a proper lookout, although they were on the wrong side of the channel, this collision would have been averted. The fact alone that they were on the wrong side of the channel, to wit, the Jersey side, going down the river, should have suggested an extra precaution in their lookout for vessels coming up; and, while there is some evidence in this case that it is a custom to take the short cut at this point where there is a bend in the river, yet it is not sufficient to establish this custom as a right, and those who take this side take the risk in doing so. The claim by the respondents that immediately before the collision the Patton was off to the starboard side of the Berks, and suddenly

sheered around to the Jersey side, so that the barge struck her at right angles, is not supported by the evidence, as it is established that the Empire City parted her towing lines as a result of the impact, and passed up the river on the port side of the Cahill—a circumstance showing clearly that the barge and the tug came together more nearly head-on than at right angles.

These facts lead the court to the conclusion that the fault lay entirely with the Berks and the Cahill, and a decree, therefore, may be entered in favor of the libelants for damage and costs.

H. C. JUDD & ROOT v. NEW YORK & T. S. S. CO.

(Circuit Court, E. D. Pennsylvania. May 31, 1904.)

No. 7.

1. EVIDENCE—RELEVANCY TO ISSUES.

In an action against a carrier to recover for goods lost by fire while stored in a warehouse, through the alleged negligence of defendant in storing them in an unsafe place, evidence is admissible showing the condition of surrounding buildings, or that smoking in the locality had been prohibited by a city ordinance, as bearing on the issue as to such negligence.

2. SAME—ADMISSIONS.

An insurer which by payment of a loss has become subrogated to a right of action of the insured against a third party must recover thereon, if at all, in the right of the insured alone, and its own declarations or admissions are not admissible against such right.

At Law. On motion for new trial.

See 128 Fed. 7.

Francis S. Laws and John F. Lewis, for plaintiff.

N. Dubois Miller, for defendant.

J. B. McPHERSON, District Judge. In my opinion the defendant's reasons for a new trial ought not to prevail. The Aranzas Pass Railway Company's bills of lading were admitted solely as part of the history of the case, and nothing whatever was predicated upon them. The jury was told that by these bills the wool was simply brought to Galveston, where it was delivered to the defendant, who thereupon issued its own bills of lading therefor, and that under these second bills the defense was taken. The testimony concerning the Moody Compress was relevant, I think, because the building was upon the wharf, although it did not directly face the water, and was a warehouse in which cotton was stored. Testimony was offered concerning every other building from one end of the wharf to the other, and why the condition of this warehouse should not be described, although it was not only a warehouse, but also a place where the cotton was compressed into smaller bales, I am unable to see. It formed part of the surroundings of the two warehouses that were burned, and the wharf front could not be fully described without referring to it. The municipal regulations with regard to smoking on the wharf

seemed to me to be admissible as tending to show the hazardous character of the place. If the councils of the city of Galveston thought the condition of things dangerous enough to call upon them to pass an ordinance prohibiting smoking, while it may be true that the ordinance was only an expression of their opinion on the subject, it seems to me to be an expression of opinion that was both competent and relevant.

The rejected evidence with regard to the insurance rates was declared to be incompetent by the Circuit Court of Appeals in the opinion reported in 128 Fed. 7, for several reasons, one of which—its relevancy—was not at all affected by the offer to show that the Insurance Company of North America had paid the plaintiff's claim and was in full control of the present suit. The paragraph of the opinion that begins at the middle of page 13 states the view of the court upon this subject, and is independent of, and additional to, what is stated in the paragraph preceding. Moreover, even if the insurance company had paid the money and was in full control of the case, it would still be true that they must recover, if at all, upon the plaintiff's right and upon that alone: *Mobile Ry. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; *Phoenix Ins. Co. v. Erie Transportation Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 1176, 29 L. Ed. 873; *St. Louis, etc., Ry. Co. v. Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154; *United States v. American Tobacco Co.*, 166 U. S. 468, 17 Sup. Ct. 619, 41 L. Ed. 1081. It is this right to which the insurance company has been subrogated, if the plaintiff's claim has been paid, and, after careful reflection, I do not see that any declaration of the company concerning the safe or the hazardous character of the warehouse could be admissible in any aspect against such right. The foregoing decisions are, I think, conclusive on this point.

The question which is sought to be raised by the twenty-fourth reason for a new trial need not be considered. This reason was not filed within the time prescribed by the rules of court, and under the circumstances I think it would be undesirable to consider the question. Permission to file the reason is accordingly refused.

The motion for a new trial is overruled, and judgment may be entered on the verdict in favor of the plaintiff.

GOKEY v. BOSTON & M. R. CO.

(Circuit Court, D. Vermont. June 8, 1904.)

1. FEDERAL COURTS—PROCESS—SERVICE—RULES—STATE LAWS.

Rev. St. § 918 [U. S. Comp. St. 1901, p. 685], provides that federal courts may make rules directing the return of writs, for the advancement of justice and the prevention of delays, under which a federal court sitting in Vermont adopted a rule providing that all processes shall be returnable to the next term, if there be time for seasonable service thereof, according

¶ 1. State laws as rules of decision in federal courts, see notes to *Griffin v. Overman Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

to the laws of the state. *Held*, that notwithstanding Rev. St. § 914 [U. S. Comp. St. 1901, p. 684], requiring the practice, pleadings, forms, and modes of proceedings in civil causes, other than equity and admiralty causes, to conform to the practice in state courts of record, a writ of attachment issued by such federal court, dated 22 days before, and made returnable at the succeeding term under such rule, was valid, though it did not comply with the state statute requiring state writs to contain a direction for service and return within 21 days after date of the process.

Harland B. Howe, for plaintiff.

George B. Young, for defendant.

WHEELER, District Judge. The statutes of the United States require the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, to conform, as near as may be, to those of like causes at the time in the courts of record of the state. Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]. Those in the state now require writs in such cases as this to contain the direction, "Fail not but service and return make within twenty-one days from date hereof," and require the writs to be served within 21 days from date, and the defendant to enter an appearance within 42 days. Rule 8 of this court, made before the present law of the state in this respect, requires that "all mesne process shall be returnable to the next regular term, if there shall be time for seasonable service thereof according to the laws of this state." The writ in this case is one of attachment, dated 22 days before, and made returnable at this term, and was served by attaching the property of the defendant. Attorneys appeared for the defendant on the first day of the term for the purpose only of filing a motion to dismiss and a plea in abatement, and did file such a motion, founded upon the form of the writ, except where it contained issuable allegations not allowable in such motions, and a plea in abatement on account of the service. The plaintiff has filed a replication to the plea, not yet answered, and a motion to dismiss the defendant's motion, as incompatible with the plea, and these motions have been heard.

Apparently, the defendant's motion to dismiss should not be dismissed, whatever the effect of that and the plea may be upon each other, but should stand for what it amounts to, as it comes up for hearing before the plea. A defect in the writ apparent on its face may be reached in this way. It properly now raises the question whether this is a good writ. This question would be more serious and difficult but for section 918, Rev. St. [U. S. Comp. St. 1901, p. 685], which provides that the several circuit and district courts may, from time to time, "* * * make rules and orders directing the returning of writs and processes * * * as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." In the state courts there are but two terms in a year, having jurisdiction of such cases, and it appears to have been thought best to have writs returnable oftener; but this court has three regular terms in each year, and it has not been considered that to have writs returnable oftener would be advantageous for the advancement of justice or the prevention of delays. Therefore the rule requiring such process to be returnable at the regular terms has been retained

without change. That this course is proper seems to appear not only from the words of the statutes, but from *Shepard v. Adams*, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. Ed. 602, where a summons made returnable according to a rule of the federal court, and not in conformity with a changed state statute, was, after full examination of the subject, upheld.

Upon this view, this writ appears to be regular and good, and the defendant's motion to dismiss must be overruled. The plea in abatement must remain for termination in an issue of fact or of law. Motion to dismiss overruled.

GOKEY v. BOSTON & M. R. CO.

(Circuit Court, D. Vermont. July 9, 1904.)

1. ATTACHMENT—WRITS—SERVICE—CORPORATIONS.

V. S. 21, providing that the word "person" shall include bodies politic and corporate, and section 1109, declaring that, when the goods or chattels of a person are attached in the suit of another, a copy of the attachment and a list of the articles attached, attested by the officer serving the same, shall be delivered to the party whose goods are attached, or to his agent or attorney in possession thereof, authorize the issuance of writs of attachment against the property of corporations.

2. SAME—RAILROADS—LESSEES—PERSONS TO RECEIVE SERVICE—STATUTES—CONSTRUCTION.

V. S. 3948, providing for the appointment by the lessee of a railroad within the state of a person resident therein on whom process may be served, and section 3949, declaring that, on failure to appoint such a person, process may be served by leaving a copy with the station agent or depot master in the employment of the lessee, furnishes an additional mode of service to that provided by section 1109, authorizing attachment by leaving a copy with the party whose goods are attached, and providing, if he is not an inhabitant of the state, such copy shall be left with his known agent or attorney, or, for want thereof, at the place where such goods or chattels are attached, and does not require service of an attachment by leaving a copy with the persons provided by section 3949.

Harland B. Howe, for plaintiff.

Geo. B. Young, for defendant.

WHEELER, District Judge. This cause has now been heard on demurrer to a replication to a plea in abatement for defective service of the writ. The writ issued and was served as an attachment. The Vermont statutes provide:

"Sec. 1109. When the goods or chattels of a person are attached at the suit of another, a copy of the attachment and a list of the articles attached, attested by the officer serving the same, shall be delivered to the party whose goods or chattels are so attached, or left at the house of his then usual abode, as directed in the service of summons, and if such person is not an inhabitant of the state, such copy shall be left with his known agent or attorney, and for want thereof, at the place where such goods or chattels were attached."

"Sec. 21. The word person may extend and be applied to bodies corporate and politic."

¶ 1. See *Corporations*, vol. 12, Cent. Dig. § 2007.

¶ 2. Service of process on foreign corporations, see note to *Eldred v. Palace Car Co.*, 45 C. C. A. 3.

Under these statutes, writs of attachment properly issue against the property of corporations. *Dow v. School Dist.*, 46 Vt. 108.

The marshal's return showing the service made is:

"United States of America, District of Vermont—ss.: At Lyndon, in said district, on this the second day of May, A. D. 1904, I made service of this writ by attaching as the property of the within-named defendant, The Boston & Maine Railroad Company, its locomotive engines numbered 650 and 651, the same being designated to me as the property of the said B. & M. R. R. Co., by H. E. Folsom, one of its accredited agents and a Division Superintendent within said district. On the same day I made further service hereof by leaving a true and attested copy of this writ in the hands of the said H. E. Folsom, agent and Superintendent aforesaid, at his office at Lyndonville, in said district, with my doings thereon indorsed.

"Attest

Horace W. Bailey,

"United States Marshal."

The plea fully denies any other or different service, and alleges that defendant was a nonresident lessee in possession of, and managing and operating, a railroad in this state, and that Folsom was not at the time of the service, and never "has been, a person residing within the state of Vermont, upon whom service of process issued against this defendant may or might be made." The replication alleges that Folsom was at that time "a person residing within the state of Vermont, upon whom service of process issued against this defendant might be legally made, to wit, as agent of this defendant." It is to this that the defendant has demurred.

It is doubtful whether a replication to a plea in abatement is ever necessary, for, in the strictness required of such a plea, whatever might be brought forward by replication that would help the process should be met by the plea, or that would itself be bad. But if a replication to the plea, instead of a demurrer, is filed, if of itself bad, it might be good enough for a bad plea. The statutes of the state (V. S. 3948) provide for the appointment by such a lessee of a person resident in the state upon whom service of process may be made. The known agent of a noninhabitant, with whom the copy of an attachment and a list of the articles attached may be left, may not be a person upon whom, by appointment, service of process generally may be made. Folsom may have been such an agent about this property attached, and not such an appointed person for service of process upon. And leaving a copy in the same custody as that of the goods or chattels attached would be leaving it at the place where they were attached, although the custodian may have no other agency. *Hill v. Warren*, 54 Vt. 78. The division superintendent of the railroad of the defendant, designating the locomotives attached as its property, might well be taken to be the known agent, or the accredited agent, as styled by the marshal, of the defendant, about the custody of those articles, and leaving a copy of the attachment and a list of them with him would be a leaving with the known agent of the defendant within the meaning of that statute, or at the place where they were attached within the same meaning. The statutes provide (V. S. 3949) that, on failure to appoint such a person for receiving service of process, it "may be made by leaving a copy of the process with a station agent or depot master in the employment of" the lessee. The plea alleges

that the defendant had at the time of the service many station agents and depot masters in its employment in this state, to wit, 25, with whom a copy might have been left, and that Folsom was not one of them. But this statute only furnishes an additional mode of service, generally, and does not require service of an attachment to be made upon station agents or depot masters, nor supersede service of such process in the mode otherwise provided.

The plea was bad for not denying Folsom's agency about, or custody of, the property, and the replication bringing that agency forward is good, or good enough for such a plea.

Demurrer overruled, and replication adjudged sufficient.

THE TRANSIT.

THE MONTAUK.

(District Court, E. D. New York. January 2, 1904.)

1. COLLISION—STEAM VESSELS CROSSING IN EAST RIVER—NEGLIGENT NAVIGATION IN NIGHT.

The tug Transit backed out of a slip in East river in the night as the tug Montauk was coming down with two car floats on her port side. The Transit gave her a signal of one whistle, which was assented to, and started to cross ahead, while the Montauk ported and slowed. When the Transit had partly crossed, she saw for the first time a ferryboat east and nearly abreast of the Montauk, and, being unable to cross ahead of such boat, attempted to pass between the two, coming into collision with the Montauk's tow. The tide was flood. The channel was about 1,500 feet wide, and the Montauk and her tows were in about the center of the west side. *Held*, that the Transit was in fault for attempting to cross the Montauk's bows, without knowing that there was no vessel on the other side, when she might have waited; that the Montauk, while properly handled, was chargeable with contributory fault for not being in the center of the channel, as required by the local statute, in which case the Transit, which was intending to go up the river, would have passed on the west side of her.

In Admiralty. Cross-litels for collision.

Wheeler, Cortis & Haight (Mr. Haight and Mr. Smith, of counsel), for McLaren and the Montauk.

James Armstrong (Mr. Brown and Mr. Gove, of counsel), for Philadelphia & Reading Ry. Co., and the Transit.

THOMAS, District Judge. In the early morning, just before the day was breaking, and when only lights could be seen at a distance, the tug Transit, having put her tow in the slip at Stanton street, backed out from the slip between Piers 61 and 62, so that her stern was carried by the strong flood tide up the river, and thereupon she went to port, with the intention of crossing the bow of the Montauk, and turning then upstream to Fourteenth street. She had already seen upriver the Montauk, coming down with two car floats on her port side, and as the Transit was turning, or as she started across stream, she gave the Montauk one whistle, which indicated her desire to cross the Montauk's bow. The Montauk answered with one whistle, port-

ed somewhat, and slowed. Before the Transit could effect her passage across the Montauk's course, she discovered a steamboat going down the river on a course about 25 feet to the port of the Montauk. The master of the Transit saw at once that he could not pass the ferryboat, so he exchanged two whistles with her, attempting to go between the Montauk and Transit, where there was about 25 feet of space, but his port side came in contact with the port corner of the port float of the Montauk, whereby both vessels were injured. Hence the above actions.

The Montauk was 300 or 350 feet in the river, and her own beam and that of her tows would make perhaps 100 feet more. The river at that point is about 1,900 feet wide, and the distance between the piers on each side of the river is about 1,500 feet. It was dark, and the vessels could judge of each other's position only by lights. The Transit was in a safe position to await the Montauk's passage. The pilot of the Transit alone was on actual duty, although two deck hands were about, but not relied upon to help for the purposes of lookout, nor did they. The evidence tends to show that the pilot of the Transit did not look diligently for any other vessel than the Montauk. It is inferable that, had he looked carefully, he would have seen at least the upper lights of the ferryboat, which he did not discover until she was about 200 feet upstream from him, and had nearly passed the Montauk's tow. The pilot of the Transit chose the perilous course of crossing on a strong flood tide ahead of a large and unwieldy tow, seen upstream at a distance of some 600 or 700 feet. Under such circumstances he should have used more than usual care to assure himself that the way was clear outside of the Montauk and her tow. He did not use such care, as is evidenced by his failure to make discovery of any part of the ferryboat until she was only 200 feet away from his projected course across the river. If he could not see over the float, he should not have attempted to cross her bows in ignorance of what might be beyond. He had no right to go forward trusting to the chance that there would be nothing in his way. Considering the conditions, the pilot of the Transit acted with too little circumspection, and his fault contributed to the accident.

The next question is whether the Transit's negligence was the sole cause of the collision. The Montauk is criticised for not stopping, or for not stopping earlier. This is an attempt to demand that the Montauk should, in the darkness, have grasped the result of the Transit's fault, and avoided the consequences, and by some action on her part not required by the Transit's signal. The Transit asked the right to cross the Montauk's bow, and it was accorded. The Hollins was behind the Montauk, and hence out of her view, while the Transit had both the duty and better opportunity of seeing her until she came alongside. It is considered that, when the danger was threatened, the Montauk did all that was demanded of her. She slowed, stopped, and backed, to help ward off the injury arising from the Transit's culpability. The Transit initiated the maneuver and acted. No harm would have arisen from the plan concerted by the two vessels. The cause of the collision was the introduction of a new element, to wit, the presence of the ferryboat. It disconcerted the plans that were

well enough conceived, as between the Transit and Montauk, but the presence or absence of this very element should have been discovered by the Transit before she initiated or attempted the maneuver. The Montauk acted in good faith, and her action is not impugned by the estimates of times and distances upon the trial, showing what it was possible to do.

But did the Montauk's proximity to the New York shore contribute to the accident? The navigable part of the channel is said to be 1,450 feet. The captain of the Montauk stated that he was 300 or 350 feet from the New York shore. Hence the Montauk had about 725 feet on the New York side of the center line of the river. If allowance be made for the beam of the Montauk herself and her floats, the port side of the float was about 270 or 300 feet from the center of the river; that is, the Montauk was navigating about in the center of the New York side of the river, rather than the center of the river, and the Hollins was some 25 feet outside of her. Of course, that was not a compliance with the statute. But it is urged that the position of the Montauk did not contribute to the accident. If the Montauk had been in the position demanded by the statute, the tug would have gone about on the inside of her, and passed under her stern. It is urged that there was room to do this at the time. But the Transit could not determine very accurately whether she had space enough to go about, swinging her whole length up the river. The tide was running strong, and under the circumstances it cannot be said that this was a better alternative than her attempt to cross the Montauk's bow. It would seem that her best choice would have been to remain where she was; but both she and the Montauk agreed otherwise. In the second place, the Montauk, from her position, blanketed the ferryboat, so as to diminish the opportunity of the pilot of the Transit to see her. While it is believed that he could have seen her by the use of much diligence, or, in case of his inability to see, should not have attempted to cross, yet he may have confused her upper lights with those of the Montauk; and in any case, had the Montauk been out of the way, the ferryboat would have been easily seen. In that case the Transit would not have been rash enough to attempt to pass in front of the rapidly moving ferryboat. The fact was that the Montauk's presence aided the necessity of the Transit trying to pass between two vessels within an unlawful distance from the shore. The congestion was such that it could not be done, and the accident happened. The statute was intended to prevent just such happenings.

The conclusion is that the Montauk, by her violation of the statute, contributed to the accident; hence the damages and costs will be divided.

MANCHESTER S. S. CO., Limited, v. I. M. PARR & SON, Limited.

(District Court, E. D. Pennsylvania. June 9, 1904.)

No. 67.

1. SHIPPING—CHARTER PARTY—TIME OF VESSEL'S ARRIVAL FOR LOADING.

Under a provision of a charter party for the carrying of a cargo of grain, to be loaded at Philadelphia, that "in the event of the steamer not being ready for cargo on or before February 28, 1897, rate of freight to be one and one-half penny less," the vessel was in time when she arrived on the forenoon of February 28th, and was ready for cargo, although it was on Sunday, and by the law of the port she could not be loaded on that day, and notice was not given the charterer until the next morning.

In Admiralty. Suit to recover balance of freight.

J. Warren Coulston and Willard M. Harris, for libellant.

J. Rodman Paul and Howard H. Yocum, for respondent.

HOLLAND, District Judge. This libel was filed by the owner of the steamship Manchester on December 2, 1897, for the recovery of four hundred and forty dollars (\$440), a balance due for a cargo of grain shipped from Philadelphia to a port in the United Kingdom of Great Britain in March of that year, under a charter party executed in Philadelphia January 30, 1897, by authorized agents of the parties thereto. The Manchester, then trading, was to proceed to Philadelphia with all convenient speed, and there to load a "full and complete cargo of wheat and/or indian corn and/or rye," and, being so loaded therewith, to proceed direct to Queenstown, Falmouth, or Plymouth for orders, with the further stipulation that, "if ordered to a direct port in the United Kingdom [as was subsequently done] three shillings, one and one-half pence for each and every quarter of four hundred and eighty pounds, English weight, was to be paid as freight, delivered in full of port charges and pilotage on unloading and right delivery of the cargo in cash." The charter party further provides that, "should the steamer not be ready for cargo at her loading port on or before the Twentieth day of March, 1897, the charterers, or their agents, to have the option of canceling this charter party at any time not later than the day of the steamer's readiness," and, "in the event of steamer not being ready for cargo on or before February 28th, 1897, rate of freight to be one and one-half penny less."

It appears from the evidence in this case that the respondents were engaged in shipping wheat from Philadelphia to Europe, and that the price which they were to receive for their shipments was controlled by the month in which it was loaded on the vessels at Philadelphia; if loaded in February one price, and if loaded in March the price was to be somewhat lower. In their negotiations with the libellant's agents at Philadelphia, the respondents stated that the freight per quarter should be one and one-half penny less in case the loading took place in March. The agents of the libellant in Philadelphia cabled the proposition of respondents to the steamship company at London, and the orders came back somewhat altered from the respondents' offer, and

in the exact terms, as appeared in the charter party, which was signed by the parties, to wit:

"That in the event of the steamer not being ready for cargo on or before February 28th, 1897, rate of freight to be one and one-half penny less."

The Manchester arrived in Philadelphia on February 28th, at 10:35 a. m., and was ready for cargo, in accordance with the provisions of the charter party. The respondents, however, claim that as the day of her arrival was Sunday, and the law prevented them loading her upon that day, and having received no notice of her presence until Monday morning, March 1st, they are not bound to pay the rates for a February ship, and set up the claim, which they endeavored to incorporate into the written agreement, that the higher rate was to be paid only in case the Manchester arrived in Philadelphia in time to be loaded during the month of February. The respondents undoubtedly, in their preliminary negotiations, endeavored to arrange for a lower rate in case the ship was not loaded in February, but the libellant rejected this proposition, and made the contract for the higher rate in case the vessel arrived on or before February 28th. If it was intended by both parties that the higher rates should depend on the ship being loaded in February, they could easily have said so, but this they failed to do.

We must assume that the respondents knew that February 28th was Sunday, and knew the law with regard to loading on that day at Philadelphia, and the execution of contracts of that kind. The same question had been before this court in 1892, and Judge Butler held that:

"The tender of a ship to a charterer on the Monday following the Sunday which would be, by the terms of the charter party, the last day for such tender, is in time, in the absence of some controlling custom of the port to the contrary. There is no custom of the port of Philadelphia requiring that, where the last day that a ship could be in readiness falls on Sunday, she should present herself on the previous Saturday." *The Harbinger*, 50 Fed. 941.

The case at bar is controlled by this decision, which was subsequently affirmed by the Circuit Court of Appeals in the case of *Gill & Fisher, Limited, v. Browne*, 53 Fed. 394, 3 C. C. A. 573, in an elaborate opinion by Judge Acheson. In the *Harbinger* Case, as in this, the charterers engaged the vessel for the purpose of shipping grain, and, as stated by Judge Butler on page 942, 50 Fed., "she was chartered for a January shipment," but the vessel arrived on the 31st day of January, the last day mentioned in the charter party, which was Sunday, and was held to be in time to comply with the agreement. The language used in the Case of *The Harbinger* as to the time of the arrival of the steamer, to wit, "Should the steamer not be ready for cargo at her loading port on or before the thirty-first day of January, 1892, the charterers, or their agents, to have the option of canceling this charter party at any time not later than the day of steamer's readiness," is the same as that used in the case at bar with reference to the time of the arrival of the Manchester, the latter being as follows: "In the event of the steamer not being ready for cargo on or before February 28th, 1897, rate of freight to be one and one-half penny less." The efforts of the respondents to alter the terms of the

charter party by setting up the cotemporaneous oral agreement that the ship must arrive in time to be loaded in February in order to recover the higher rate of freight, even if permitted in law, is not sustained by the evidence, as that proposition was rejected by the steamship company when cabled to them by their agents at Philadelphia, and the contract finally made in the terms above quoted; nor is there any evidence to show that "ready for cargo" has a meaning in Philadelphia which respondents endeavored to assign to it, to wit, "ready for cargo on a day in which she could be loaded." The Manchester was bound to be at the port of Philadelphia on or before February 28th, "ready for cargo," and her arrival here on that date at 10:35 a. m., "ready for cargo," was a compliance with her contract. The respondents, therefore, are liable for the higher rate of freight, and a decree will be entered for the libelant for the sum of \$475, which includes interest; said decree for said sum of \$475 to bear interest from this date.

THOMPSON et al. v. WINSLOW.

(District Court, D. Maine. July 5, 1904.)

No. 100.

1. ADMIRALTY—FINDING OF FACT BY COMMISSIONER—COST OF REPAIRS.

The finding of an assessor of the cost of repairs to a vessel made necessary by grounding through the fault of the charterer, based upon an itemized account for such repairs, with uncontradicted testimony that the account was paid, and that the repairs were all necessitated by the grounding, will not be disturbed.

2. SAME—DEMURRAGE—BASIS OF COMPUTATION.

Where there is an agreed rate of demurrage for a class of vessels to which an injured vessel belongs, it may be taken as the basis for computing the damages recoverable for the delay while she was being repaired.

In Admiralty. On exceptions to report of assessor.

Benjamin Thompson, for libelants.

Wm. K. & Albert E. Neal and Seth L. Larrabee, for libelee.

HALE, District Judge. This case has already been before the court. 128 Fed. 73. The libel was brought to recover for a balance of freight on a cargo of coal which the schooner Marjory Brown was carrying at the time of the injury; also to recover for damage to the schooner while being towed from Portland Lower Harbor through the bridge of the Grand Trunk Railway Company, and through Tukey's Bridge into Back Bay, to the respondent's wharf. The schooner is a four-masted vessel, of the burden of 1,061 tons, about 220 feet over all, with a coal-carrying capacity of about 1,900 tons. At the time of the injury, she had a cargo of 1,874 tons of coal, and was drawing about 19½ feet forward and 21 feet aft. The case was heard by this court in November, 1903. In February, 1904, an

† 2. Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.

opinion was filed, holding the respondent liable for the balance of the freight, and for the damage which the schooner had sustained in grounding while being towed. Mr. Fritz H. Jordan, of Portland, Me., was appointed assessor. The assessor has since heard the parties, and, after a careful investigation and consideration of the case, has filed a very complete report awarding:

| | |
|--|------------|
| 1. Freight on 1,874 tons coal at 90c., as per B/L..... | 1,686 60 |
| Less advances as per B/L..... | 131 18 |
| | <hr/> |
| | \$1,555 42 |
| 2. Repairs made at Bath..... | 723 15 |
| 3. 5 days' demurrage, \$112.44..... | 562 20 |
| 4. Permanent damage to vessel..... | 1,000 00 |
| | <hr/> |
| | \$3,840 77 |

—With interest on first item from September 9, 1903, and interest on the remaining items from October 16, 1903, until paid.

To this report the respondent files several exceptions. Two exceptions he now urges, and argues with earnestness and force. They are, first, that the allowance of \$723.15 for repairs is excessive; second, that so much of the report of said assessor is not lawful as allows 6 cents per ton on the coal-carrying capacity of said schooner per day, to wit, \$112.44 per day for 5 days—in all, \$562.20.

The first exception involves purely a question of fact. The libelant offered evidence tending to show that the sole injury to the schooner's bottom was occasioned by her grounding in Back Bay in August, 1903; that she was repaired by the New England Company at Bath; that she was on the ways of that company from Thursday afternoon until Friday of the following week; that while she was on the ways the labor for the entire time was confined to the damage to her bottom.

The libelant produced the original account of the party who made the repairs—that account being for the sum of \$723.15—and proved the payment of this sum. No testimony was offered to contradict the fact of payment, or to attack the correctness of the claim. In *The Armonia*, 81 Fed. 227, 26 C. C. A. 338, it was held:

"It is sufficient *prima facie* proof for libelant to produce bills claimed to have been paid, and witnesses who testified that they had paid them, without further testimony."

In *The Rebecca v. The America*, Fed. Cas. No. 11,619a, the evidence consisted of the master's testimony that the repairs were rendered necessary by reason of the collision, and that these repairs were made at the lowest price, and the testimony of the ship's agent that the bills had been paid. This evidence was held to be sufficient *prima facie* evidence.

In *The Providence*, 98 Fed. 133, 38 C. C. A. 670, Judge Putnam said:

"There was before the commissioner a bill of items showing the cost of the work in detail, but, so far as the record shows, the Van Brunt did not sift out this bill. * * * and, as the Van Brunt omitted her opportunity of sifting out the bills of repairs, there is no principle on which we can safely substitute a lump estimate made by ourselves for the award of the commissioner, who

had full opportunity of examining the bills, and of hearing all the testimony produced."

In the case before us, Mr. Jordan, the assessor, is a man of the best judgment, and of large and valuable experience in maritime matters. Under the decisions cited, and in accordance with the invariable practice in this district, I have no hesitation in deciding that his award upon this question of fact must be sustained.

The other exception presents the question of allowance of an arbitrarily fixed sum of six cents per ton on the coal carrying capacity of the vessel. The assessor finds that:

"The rate claimed is the agreed rate of demurrage for vessels of the class of the *Marjory Brown*. It is a fair compensation for the loss of the vessel's time, and an allowance at such a rate has the authority of precedent."

The respondent insists that the damage by delay must be fixed by the recent earnings of the vessel, as shown by her books. I cannot sustain this contention. The *Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937, cited by the learned counsel for the respondent, is a case where the steam yacht of Mr. Vanderbilt was alleged to have been illegally detained by the collector of customs of the District of New York. That case did not present a case of loss of profits, in a commercial sense. Mr. Justice Brown, of the United States Supreme Court, said:

"In all the cases in which we have allowed demurrage, the vessel has been engaged, or was capable of being engaged, in a profitable commerce, and the amount allowed was determined either by the charter value of such vessel, or by her actual earnings at about the time of the collision."

The case of *The Conqueror* has been discussed in this circuit in *The Providence*, 98 Fed. 133, 38 C. C. A. 670. The court said:

"The fact that there is no means by which to determine the charter value of a vessel injured by a collision, or that the owner has another vessel by which she is at once replaced, does not prevent the allowance of demurrage for the time she is laid up for repairs; and, where she would have been engaged in making regular trips, the damages may be computed on the basis of her average earnings."

In the case of *The America*, Fed. Cas. No. 11,619a, the only evidence of damage by detention was the demurrage clause in the charter party. The respondent producing no evidence, the commissioner reported in favor of the libellant on the ground that he had made out a *prima facie* case. Judge Butler said:

"As respects the loss from detention, I also agree with the commissioner. Of course, the respondent is only liable for such loss on this account as was actually sustained. To show its extent with certainty is impossible. Every available method of ascertainment is open to the objection that to some extent it is speculative. No more can be accomplished at the best than an approximation. Justice nevertheless requires that the injury shall be redressed, and the objection to uncertainty comes with bad grace from one whose wrongful act has rendered an ascertainment of the loss necessary. Had the libellant here entered upon a minute inquiry into all the circumstances, and based a calculation upon the supposed extent of the vessel's net earnings, it is not probable that a safer result could have been reached. The rule adopted by the commissioner has been pronounced by those having the largest experience and the highest intelligence on the subject the safest, under general circumstances, that can be pursued. Why, therefore, should it not be treated as sufficient in

the first instance, leaving to the respondent the fullest opportunity of showing all special circumstances tending to prove that the rate thus indicated is too high in his case? The Hermann, Fed. Cas. No. 6,408, is not in point, though the language of the judge, as reported, is not without interest. Still I do not find anything in the case to shake the conclusion stated."

In cases where there is no way of determining the charter value of the injured vessel, or where there is no agreed rate of demurrage for vessels of her class, it is necessary to resort to evidence showing the average earnings of such vessel. But the Marjory Brown was engaged in commercial business. The method pursued by the assessor in fixing the rate of demurrage for a vessel so engaged was proper, in accordance with the principles of admiralty law, and with the practice in this district.

Report of the assessor confirmed.

In re HOWARD.

(District Court, N. D. California. June 14, 1904.)

No. 2,843.

1. **BANKRUPTCY—POWER OF COURT—DIRECTION OF TRUSTEE.**

A trustee in bankruptcy is an officer of the court, and as such is subject to its direction by order made in summary proceedings in all matters concerning money or property which may have come into his possession by virtue of his office.

2. **SAME—LIABILITY OF TRUSTEE—RESTORATION OF FUND ERRONEOUSLY PAID HIS ATTORNEY.**

A trustee in bankruptcy, who as plaintiff in a suit in another jurisdiction has been required by the final decree of the court to make restitution of a fund which had been paid over to his attorney under a prior decree in the cause, which was reversed, cannot avoid compliance with such decree on the ground that his attorney retained a portion of the fund in payment of his fees and disbursements, and refuses to surrender the same; that being a matter with which the defendant in the suit who has been adjudged the true owner of the fund has no concern, and the receipt of the money by his attorney being in law its receipt by the trustee.

3. **SAME—ENFORCEMENT OF JUDGMENT FOR COSTS—POWER OF COURT.**

A court of bankruptcy cannot, by a summary order, require a trustee to pay a judgment for costs rendered against him in another jurisdiction, where there are no funds of the estate in his hands.

In Bankruptcy. On petition for order against trustee.

W. B. Hardy, for petitioner.

Joseph R. Patton and William A. Coulter, for trustee.

DE HAVEN, District Judge. This is an application for an order directing Charles B. Bills, trustee of the estate of Edward B. Howard, bankrupt, to pay the petitioner the sum of \$6,492.37, with interest thereon from August 29, 1902, at the rate of 3 per cent. per annum, and the further sum of \$681.30 costs awarded against the trustee by the United States Circuit Court for the Eastern District of New York in an action brought by the trustee against the petitioner

under an order made by the referee in bankruptcy. In the action referred to, it was originally adjudged by the Circuit Court that a certain fund amounting to \$6,502.22, with interest at the rate of 3 per cent. per annum from December 7, 1901, then on deposit with the Washington Trust Company, belonged to the estate of Edward B. Howard, bankrupt, and the Washington Trust Company was directed to pay to Bills, or his attorney, Philo P. Safford, said sum upon the presentation of a certified copy of the decree. This decree was subsequently reversed by the Circuit Court of Appeals, with costs taxed in the sum of \$454.68 (127 Fed. 103); and the Circuit Court, in compliance with the mandate of the Circuit Court of Appeals, entered its judgment to the effect that the said fund of \$6,502.22, with interest, was the property of this petitioner, and the Washington Trust Company was directed to pay the same to him. Thereafter the Circuit Court entered a supplemental decree, which, after reciting that it was made to appear that on the 29th day of August, 1902, the Washington Trust Company had paid \$6,492.37 to Philo P. Safford, as attorney for Charles B. Bills, in accordance with the original decree entered in the Circuit Court, directed "that complainant, Charles B. Bills, trustee, forthwith make restitution to defendant, Louis C. Schliep, of the said sum of six thousand four hundred and ninety-two dollars and thirty-seven cents (\$6,492.37), with interest thereon from the 29th day of August, 1902, at the rate of three per cent. per annum, and that said defendant do have execution therefor." The trustee, in his answer filed in this proceeding, admits that his attorney, Safford, in the action referred to, received from the Washington Trust Company the sum of \$6,492.37 under and by virtue of the decree of the Circuit Court, which was subsequently reversed as above stated, and in this connection alleges that Safford, without authority from him, and without his knowledge, approval, or consent, "and with full knowledge that said funds were and had been decreed to be funds belonging to the estate of said Edward B. Howard, a bankrupt, and not to said trustee personally, unlawfully took and appropriated therefrom to his own use the sum of \$1,218.11, claiming the sum of \$1,075 as payment on account of legal services by the said Safford rendered in said action, and the sum of \$143.11 for disbursements by the said Safford in said action, and that the remainder of said sum, to wit, \$5,274.26, so paid to said Safford by the said Washington Trust Company was by said Safford transmitted to said trustee"; that he repudiated the action of Safford in appropriating any portion of the sum so paid by the said Washington Trust Company to him in payment of attorney's fees for services rendered by said Safford to the trustee in said action, "and demanded that said Safford forthwith transmit the said sum retained by him out of said payment, in order that the whole fund so received under said decree might be preserved intact until the final termination of said action, but said Safford then and there refused, and has always refused, to transmit to said trustee the amount so retained by him." The answer further alleges that upon receipt of said sum of \$5,274.26 the trustee caused the same to be deposited in the Bank of San Jose, the proper depository of such

fund, and that the same has ever since remained and now remains on deposit in said bank, without interest; that no interest has been received by the trustee on account of such deposit, nor has any interest accrued thereon; and, further answering, the trustee alleges that there only remains in his hands as trustee of said estate, in addition to said sum of \$5,274.26, the further sum of \$182.14 in money, and that the estate has no other property, and that he "has always been willing, and is now willing, ready, and able, to pay to such person as may be determined by this court the said sum of \$5,274.26."

1. That this court has jurisdiction in this summary proceeding to require the trustee to make restitution of all moneys received by him under the decree of the Circuit Court subsequently reversed by the decree of the Circuit Court of Appeals, I entertain no doubt. The trustee is an officer of the court, and as such is subject to its direction in all matters concerning money or property which may have come into his possession by virtue of his office. It is claimed, however, by the trustee, that he is only responsible for so much of the money as actually came into his hands under such reversed decree; that in the action referred to he was the representative of the estate of the bankrupt, and as such had a right to employ an attorney; that he was not guilty of any negligence in the matter of the employment of such attorney, and cannot, therefore, be made personally responsible for the wrongful act of the attorney in appropriating a part of the moneys received on said judgment in payment of the fee claimed by him. It may be conceded that such would be the rule if the question were presented upon the settlement of the trustee's account in the estate in bankruptcy, but, as between the trustee and this petitioner, a stranger, the trustee cannot be permitted to avoid compliance with the final decree of the United States Circuit Court directing him to make restitution of moneys received by him under the reversed decree by the plea that a portion of such money was unlawfully appropriated by his attorney in the action in which such decree was rendered. The money received by his attorney was, in judgment of law, received by the trustee, and must be restored by him to the petitioner.

2. The judgment of the Circuit Court, in so far as it relates to costs, can only be enforced by execution or by action. It cannot be enforced in this summary proceeding, as it is conceded that there are not now, and never have been, any funds in the hands of the trustee belonging to the petitioner or to the estate of the bankrupt with which to satisfy the same.

The motion that the trustee be directed to pay such costs is denied, without prejudice to the right of the petitioner to enforce judgment for the same by action or execution, as he may be advised. In all other respects the prayer of the petition is granted.

LOWENSTEIN et al. v. HENRY McSHANE MFG. CO.

(District Court, D. Maryland. July 7, 1904.)

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—GOOD FAITH OF PETITIONERS.

Where very few of the large number of creditors of a corporation having a large estate, which is in the hands of state receivers, join in a petition in bankruptcy against it, one of them being a company engaged in buying the assets of insolvents, which was not originally a creditor, but purchased claims against the corporation, in some cases paying par for them, and the good faith of others is open to question, the court is justified in resolving all doubtful questions both of fact and law against the petitioners.

2. SAME—ACTS OF BANKRUPTCY—APPOINTMENT OF RECEIVERS.

A corporation for whose property receivers have been appointed by a state court on a bill filed by creditors alleging insolvency, which it confessed, has committed an act of bankruptcy, under Bankr. Act, § 3a, cl. 4, as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410].

3. SAME—PETITIONERS—ESTOPPEL.

Creditors of a corporation who intervened in a suit against it in a state court and assisted in having receivers appointed, and participated in such proceedings, while large sums were expended and sales of property negotiated by the receivers, are estopped to subsequently file a petition in bankruptcy based on the appointment of the receivers as an act of bankruptcy.

4. SAME—CONTRACT BY PETITIONER TO SELL CLAIM.

Where a creditor contracted to sell his claim, but, as a condition, agreed to first join in a petition in bankruptcy against the debtor, which he did, transferring and receiving payment for the claim immediately afterward, the claim must be considered as having been owned by the purchaser when the petition was filed.

In Bankruptcy. On petition against the Henry McShane Manufacturing Company as an involuntary bankrupt.

Carrington & Carrington, Edward G. Rosenheim, and Wm. Ewin Bonn, for petitioning creditors.

William P. Whyte, Arthur George Brown, J. Hanson Thomas, and Williams, Thomas & Williams, for bankrupt.

MORRIS, District Judge. This petition was filed March 26, 1904, and the act of bankruptcy charged is that, because of insolvency, receivers had been put in charge of the property of the corporation by a decree of the circuit court No. 2 of Baltimore City, dated November 27, 1903. There were three petitioning creditors who joined in the original petition, viz., Lowenstein, whose claim is \$6,335.82; N. Frank & Sons, whose claim is \$1,962.18; and the Electrical Material Company, whose claim is \$578.63.

As to Lowenstein and N. Frank & Sons, it is objected that, by their participation in the receivership proceedings in the state court, they have elected to proceed in that forum, and are estopped from petitioning in bankruptcy. It appears that Lowenstein and N. Frank & Sons on November 28, 1903, intervened in that case on the day after the receiver was appointed, and filed petitions in the circuit court No. 2 praying that court to appoint a co-receiver. These petitions came on

for hearing on March 24, 1904, and a co-receiver was appointed by the court, although not the one urged by the petitioners.

This action, it seems to me, was an election by those two creditors to avail of the proceedings in the state court, and it appears that, during the period between their intervention in that case and their filing the petition in bankruptcy, much was done by the receivers in the state court. The large business of the corporation was carried on, money was, by the orders of court, expended in the repairs of buildings, and leases to quite a number of tenants were effected at very remunerative rents, and sales of property have been negotiated. It seems to me that equitably, after four months' participation, these creditors should be held to be estopped from taking this proceeding, which would be destructive of the acts of the receivers. *Simonson v. Sinsheimer*, 95 Fed. 948, 37 C. C. A. 337.

The Electrical Material Company, which had a claim of \$578.63, joined in the petition in a somewhat peculiar manner. The claim had been filed in the receivership case, but, on the day this petition was filed, one of the counsel for the other petitioners offered to buy the claim at its full face value for the Assets Realization Company, provided the Electrical Material Company would join in the petition and make the required oath. This was done, and the money was immediately paid. The claim was the claim of the Assets Realization Company, a corporation of Illinois, at the time it was filed, because that corporation had made a binding contract to purchase and pay for it, and did immediately pay for it. About two months afterwards the said Assets Realization Company, having bought up 17 other claims, amounting in all to over \$10,000, intervened and joined in the original petition. Henry J. Kennedy also about the same date, having had assigned to him the claim of Ball & Wood, another creditor, for \$368.84, intervened and joined in the petition. Kennedy was the agent of the Assets Realization Company in negotiating for and buying all the claims for the Assets Realization Company, and was regularly and continuously in their employ, engaged in similar work. I think it is apparent that the purchase of the Ball & Wood claim was in the same interest as his other purchases. There is one other creditor who has joined in the petition—the Manhattan Rubber Company, for \$192.

It thus appears that if the claims of Lowenstein and of N. Frank & Sons are discarded as the claims of creditors who are estopped, and the claims bought up by the Assets Realization Company, or in its interest, are treated as the claim of one creditor, there only remain, in fact, two creditors who have validly joined in the petition. The debts of the defendant corporation amount to over \$250,000, and the creditors are very numerous. The assets are very large, and, at a fair valuation, it is strenuously claimed by those representing the corporation that the assets are more than sufficient to pay all its debts. The property consists of large holdings of real estate and a valuable manufacturing plant, and an established business, which has in most years been very profitable. Proof was admitted under objection from the petitioning creditors in support of the allegation that the corporation was in fact solvent at the time that the receivers were appointed. I have not considered that question, as I am of opinion that in the creditors' bill in

the state court praying the appointment of receivers upon the allegation that the corporation was unable to pay its debts, and was in fact insolvent, and the answer of the corporation admitting the facts alleged in the bill, and consenting to the relief prayed, and the action of the court in granting the relief prayed and appointing receivers, who have been ever since in charge, constitutes the condition of affairs intended to be covered by the amendment of 1903, the words of which are, "or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state," etc. Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410].

In dealing with this case the court cannot shut its eyes to the evident character of this proceeding in bankruptcy. A large enterprise, with much property and many creditors, was being administered by a court of competent jurisdiction through its receivers, and had been so administered for four months, lacking one day. Two creditors who were dissatisfied with the results of their intervention in the receivership case turned to the bankrupt court. They were but two out of a great number of creditors. But joining with them comes the Assets Realization Company, a corporation whose business it is to deal in the property of insolvent estates. It is not a creditor of the corporation desiring to protect itself by availing of the provisions of the bankrupt act to secure an equal distribution of its debtor's property, but it bought up the claims—one at 100 per cent., and others at less—for the express purpose of qualifying itself to join in the petition in bankruptcy, and take the administration out of a court where the great bulk of the creditors have shown that they are willing it should remain, and subject it to the added expense of the bankrupt court. It is evident that the Assets Realization Company has not laid out its money in buying claims—one at least at as much as 100 per cent.—without the expectation of deriving some pecuniary advantage greater than that of a mere creditor seeking to bring about a ratable distribution of an insolvent debtor's assets. In such a case the court should be slow to lend its aid, and, I think, should resolve every doubtful question of fact or law against a petitioning creditor who assumes such an attitude toward a valuable estate.

The petition is dismissed for want of the requisite number of creditors entitled to file the petition.

SOWLES v. FIRST NAT. BANK OF PLATTSBURG et al.

(Circuit Court, D. Vermont. June 9, 1904.)

1. NOTES—OBLIGATION OF SURETY—RELEASE.

Plaintiff, who was surety for her father on certain notes payable to defendant bank, agreed to become surety on four new notes, and to pay \$200 in money in consideration of her discharge from further liability. A note on which plaintiff was liable, not then due, was not noticed when this arrangement was made, and on its maturity the bank commenced suit thereon against plaintiff; but plaintiff claimed that the bringing of suit on such note was a fraud, and released her from liability on the other notes. The bank thereupon surrendered the note and gave up all

claim to recover thereon. *Held*, that the surrender of such notes cured the act of the bank in attempting to collect it in so far as it tended to show a violation of the previous agreement.

2. SAME—COLLECTIONS—FEES.

A bank holding a judgment agreed to pay plaintiff one-half of anything she could collect thereon, and after suit brought and attachments levied the bank caused the same to be dismissed, and settled with the judgment debtor for an amount much less than the face of the judgment. In a suit to recover plaintiff's proportion of the amount due on such judgment there was no testimony tending to show that the debtor owned any particular property or credits which would be covered by the attachment liens except the mere opinion of plaintiff's father that the debtor had inherited from his father's estate more than sufficient to pay the judgment. *Held*, that plaintiff was only entitled to recover one-half of the amount for which the claim was settled by the bank.

In Equity.

Edward A. Sowles and Eleazer L. Waterman, for plaintiff.
Fuller C. Smith and C. J. Vert, for defendant bank.

WHEELER, District Judge. The plaintiff is the daughter of the defendants Edward A. Sowles and Margaret B. Sowles. The defendant recovered judgment in a state court against one D. Noyes Burton and the defendant Edward A. Sowles at the September term, 1887, for \$2,949.17 damages and \$48.10 costs, which, as between Sowles and Burton, it belonged to Burton to pay, and of which the bank was informed. In August, 1895, Sowles was at the bank, and this was alluded to, and question made by the bank as to whether the judgment was good, and Sowles informed the bank that he thought it could be collected of Burton. They said he might have one-half of all he could collect. He said that, being the defendant, he could not make such an arrangement, but his daughter could, and he would make it for her, to which the bank assented; and pursuant to the arrangement a suit was immediately brought, returnable to the next term of the same court on the judgment by writ of attachment and trustee process. It was served on the trustees, attaching any credits of Burton in their hands, and by attaching all the real estate in the towns of Swanton, Highgate, St. Albans, and Burlington, and all the hay and straw and grain in the barns and stacks on certain farms in Swanton, Highgate, and St. Albans, and the suit was entered in court, and continued from term to term. The defendant Edward A. Sowles was indebted to the bank on various notes for \$4,684.13, overdue, on which the plaintiff was a surety for \$2,564.13, and for a note not due, on which the plaintiff was a surety for \$377.35. In April, 1897, by arrangement between Edward A. Sowles and the bank, the plaintiff became surety on four new notes of \$800, due, respectively, in 6, 12, 18, and 24 months, and paid the bank \$200 in money, and the plaintiff was thereupon discharged from further liability. The note of \$377.35, not due, was not noticed when the arrangement was made, and when it became due it was not paid, and the bank commenced suit upon it against the plaintiff. She claimed that this was a fraud upon her, and denied her liability, and made defense to the suit. The bank learned of the suit against the defendant Sowles and D. Noyes Burton, discharged the counsel who brought the suit pursuant to the claim mentioned, and caused it to be

discontinued on payment by Burton to the bank of \$300. The plaintiff claims that one-half of what might have been collected against Burton under the arrangement would nearly or quite extinguish the notes, and has brought this suit to prevent collecting so much of these notes as that one-half would pay; that the attempt to enforce the note of \$377.35 was such a fraud as to release her from paying the four notes of \$800 each. The bank has since surrendered that note and all claim to recover upon it, and on the whole it is considered that there was not such fraudulent attempt to collect it as would vitiate the transaction. If the transaction was set aside, she would be left liable on the old notes, which amounted to within \$258.77 of the new notes, and which, by the prior arrangement, she would have to pay. The giving up of the note not due seems to cure all the difficulty growing out of the attempt to collect it.

The question remains as to the right of the plaintiff to one-half of what was collected of D. Noyes Burton, or that might have been collected in the suit brought on the judgment. That such an arrangement was made is testified to by the defendant Edward A. Sowles, and he is corroborated by the testimony of the attorney who brought the suit, and by its being at first repudiated by the bank. That claim being established, the plaintiff seems entitled at least to one-half of the \$300 actually received by the bank, with interest from the time when it was received, which was April 1, 1899.

There is no evidence as to what might have been collected if the plaintiff had been permitted to prosecute the suit on the judgment against Burton, except the testimony of Edward A. Sowles, which, in conclusion, is as follows:

"Q. What evidence had you upon which you based the statement to Mr. Baker that D. Noyes Burton had property, or would have property, with which to secure and collect payment of the judgment as above stated? A. It is based upon the declarations of his father, while living, to me, as to the condition of his property, and also the property of which I had knowledge of, willed to D. Noyes Burton under the terms of O. A. Burton's will, which by law would come to D. Noyes Burton by way of use of property belonging to the Burton estate, and what might remain of the residue of the estate after paying debts: I might say the income and profits of the Burton estate, which by the will came to him. Q. What has been the result as to the property, in whatever form it may have come to D. Noyes Burton, by which the judgment could have been collected—whether or not enough has come to him from his father's estate so that judgment could have been collected? A. From hearsay, and from knowledge of the situation of the property of O. A. Burton's estate which will come to D. Noyes Burton after satisfying all the debts of the estate, that judgment could now be fully satisfied, and leave a large amount of property to the estate besides."

The attachment doubtless created a lien upon any real estate that Burton might have in the towns named, or in the personal property mentioned, or any funds belonging to him in the hands of the trustees; but these general attachments would not hold any particular property unless Burton owned it. This testimony of Sowles does not show that he did own any particular property or credits which would be covered by such liens. What he states is merely his opinion, which is not evidence of any actual fact as to ownership by Burton. Without more, there is nothing for a basis of any finding that Burton actually owned

any property, or that anything could be collected of him on the judgment, if the suit had been prosecuted to judgment. Therefore the plaintiff has failed to prove, with any degree of certainty, that the bank could have collected any more than it did. The recovery of the plaintiff must therefore be limited to the one-half of the \$300, with interest.

The plaintiff claims that her father, and through him she, should be subrogated to the rights of the bank against Burton, which might be true if either had paid the debt of the defendant and Burton to the bank; but, as neither has, the liability of the bank is not in any way enlarged by that consideration.

Decree for plaintiff for \$150 and interest from April 1, 1899, to be set off against the notes, with costs.

McNULTY et al. v. WIESEN et al.

(District Court, E. D. Pennsylvania. July 8, 1904.)

No. 2.

1. PLEADING—SCANDAL.

Scandal in a pleading consists of an unnecessary allegation bearing cruelly on the moral character of an individual, or stating matter contrary to good manners, or unbecoming the dignity of the court to hear.

2. SAME—BANKRUPTCY—CONVEYANCES—VACATION—PLEAS.

In an action by a bankrupt's trustee to set aside a transfer of certain book accounts less than four months before the assignor was adjudicated a bankrupt, a plea alleging that the purchase was made by defendants without any intent or thought on their part to hinder, delay, or defraud the bankrupt's creditors, or any of them, was neither scandalous nor impertinent; since under Bankr. Act, July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], the burden was on defendants to show that they were purchasers in good faith for a present, fair consideration.

3. SAME—AVERMENT OF CONSIDERATION.

Where a bill by a trustee in bankruptcy to set aside a conveyance of book accounts by the bankrupt alleged that the accounts were assigned without a present, fair consideration, and that no money was paid for the transfer, an answer, which was responsive to the bill and alleged that defendants paid a present, fair, and adequate consideration in cash, was sufficient, without setting forth in detail all the circumstances connected with the facts alleged in the answer.

In Equity. Exceptions to answer dismissed.

Davison & Seymour, for complainants.

Julius C. Levi, for respondents.

HOLLAND, District Judge. The complainants filed a bill in equity alleging that Wiesen Bros., the bankrupts, on the 15th day of September, 1903, without a present, fair consideration, assigned book accounts to the respondents amounting to \$16,861.81, within four months next preceding the 6th day of October, 1903 (upon which date

¶ 1. See Pleading, vol. 39, Cent. Dig. § 46.

an involuntary petition in bankruptcy was filed against them), with intent to delay, hinder, and defraud their creditors. One of the bankrupts, Elias Wiesen, admitted he knew the firm to be insolvent between the 15th and 20th days of September, 1903, and a writing was filed on the 5th day of October, 1903, by the individuals of the firm, admitting their insolvency. The bill prays that the respondents be compelled to make an accounting of all sums of money collected by them as proceeds of accounts assigned or transferred to them by the said Wiesen Bros.

The respondents, in their answer, admit the assignment to them of the amount stated in the bill, for which they say \$12,100 was paid, but deny that the assignment of these accounts was made with intent to delay, hinder, and defraud the creditors of the said Wiesen Bros., but, on the contrary, claim that the purchase of the book accounts was made for a present, fair consideration, without any intent or thought on the part of the respondents to delay, hinder, and defraud the creditors of the said firm of Wiesen Bros., or any of them, and allege that they are holders of the book accounts so assigned for a good and valuable consideration, without notice of any defect of title. They further allege that the \$12,100 was a present, fair, and adequate consideration paid in cash.

The trustee excepts to that part of the answer in paragraph 5 wherein it is stated that "the purchase of the said book accounts was made by the respondents from the firm of Wiesen Bros. without any intent or thought on the part of the said respondents to delay, hinder, and defraud the creditors of the said firm of Wiesen Bros., or any of them, as scandalous and impertinent"; and to that part of respondents' answer in paragraph 6 wherein it is set forth that the sum of \$12,100 in cash is a full, fair, present, and adequate consideration for the purchase of the said book accounts as insufficient, for the reason that upon its face it is untrue; and that the answer fails to state the amount was actually paid in cash.

Scandal in a pleading consists of any unnecessary allegation bearing cruelly on the moral character of an individual, or stating anything contrary to good manners, or anything unbecoming the dignity of the court to hear. It is plain there is nothing contained in this answer that comes within this definition. Nor is the averment in the answer that the assignment was made to the respondents without any intent on their part to hinder, delay, or defraud the creditors of the bankrupt impertinent, for the reason that under section 67e of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], they are required to show that they are purchasers of these accounts in good faith, and for a present, fair consideration. There is no doubt that, if the respondents purchased these accounts from the bankrupts with intent and purpose on their part to hinder, delay, and defraud the bankrupts' creditors, the transfer would be set aside as fraudulent, even if they had paid a full consideration for them in cash; and it is entirely pertinent for them to deny this intent, although it is not clear that the transfer is valid, even though this intent did not exist. This, however, can be determined upon final hearing. We are only now concerned with the pleadings, and the answer in this particular is entirely pertinent.

The exceptions to the sufficiency of the answer as to the consideration cannot be sustained, for the reason that they are responsive to the allegations in the bill. They allege they paid a present, fair, and adequate consideration in cash, which is a direct denial of the charge in the bill that the accounts were assigned without a present, fair consideration, and that no money was paid for the transfer. It does not follow that because the face value of these accounts is \$16,661.81, their actual value is the same. The answer fixes their value at \$12,100. All that is required in an answer to a bill in equity is to fairly meet all allegations of the bill. It need not set forth in detail all the circumstances connected with the facts alleged in the answer, as was required under the rules applicable to bills of discovery where interrogatories were filed to which answers were required of all facts within the knowledge of the respondents pertinent to the matters at issue. A party thus called upon to answer was in fact called upon to give testimony, and an answer which might be entirely sufficient as a pleading might be held insufficient when viewed in the light of being a response to the interrogatories contained in a bill. In the answer the respondents are only required to deny the allegations charged, and, if there is further information required from the respondents, they can be called as witnesses before a commissioner appointed to take testimony. *Field et al. v. Hastings & Co. et al.* (C. C.) 65 Fed. 279.

Exceptions dismissed.

JAMES v. SUPREME COUNCIL OF THE ROYAL ARCANUM.

(Circuit Court, E. D. Missouri, E. D. June 15, 1904.)

No. 4,974.

1. INSURANCE—MUTUAL BENEFIT SOCIETIES—BENEFICIARIES—POWERS.

Where the laws of the state in which a mutual benefit society was incorporated, and the constitution and laws of such society, gave it express power not only to provide for the widows, orphans, and other relatives of deceased members, but authorized it to make provision for "any persons dependent upon deceased members," the association had power to issue a benefit certificate, payable to a certain person named, who was married to assured, and who in good faith lived with him as his wife and was dependent upon him for support, though she was not the legal wife of assured by reason of his having a former wife from whom he had not been divorced.

2. SAME—POLICY—CONSTRUCTION.

Where a mutual benefit association was empowered to make provision for widows and any person dependent on deceased members, and the policy was issued to deceased, payable to "Ella J. Palmer (wife)," the term "wife" was merely *descriptio personæ*, and her dependency on insured was not controlled by the legality of the marital relation existing between herself and assured.

Harmon J. Bliss, for plaintiff.

F. H. Bacon, for defendant.

ADAMS, District Judge. This is an action to recover the amount due on a benefit certificate issued by the defendant on January 29, 1891, to one Alfred Palmer, a member of Compton Hill Council, No.

555, of the Royal Arcanum. The certificate named "Ella J. Palmer (wife)" as the beneficiary. The member died January 19, 1902. In due course, after proofs of death were made, defendant in good faith and without notice of any adverse claim paid the beneficiary, Ella J. Palmer, the amount called for by the certificate. Afterwards the plaintiff, Elizabeth James, instituted this suit, alleging that she was the lawful wife of Alfred Palmer in his lifetime, and now is his lawful widow, and that by reason of the laws governing the defendant order she is entitled to the amount called for by the certificate, notwithstanding the designation of Ella J. Palmer as the beneficiary in the certificate as issued.

The facts disclosed by the proof are substantially as follows: Alfred Palmer, the member, married Elizabeth, the plaintiff in this action, in England in 1866, and continued to live with her as her husband until 1873, when he deserted her and came to the United States. Some time prior to 1880 Palmer took up his abode in St. Louis, and resided here continuously until he died in 1902. In 1885 he formally married a wife in St. Louis. She died about two years thereafter, leaving one child as a result of the union. In 1890 he formally married Ella J. Palmer, the beneficiary designated in the certificate of membership sued on. Ella J. had no reason to believe, and did not believe, he had a wife living in England. She knew of his former marriage in St. Louis, of the birth of a child, and of the death of the supposed wife, and believed she had a lawful right to marry him. From 1890 to the date of Palmer's death in 1902 Ella J. continuously and notoriously lived with him as his wife, kept his house, cared for and reared his infant child, aided him in his daily work as a printer, and in every way was held out by him and recognized by the world as his lawful wife. She, at least, was innocent. She materially aided him in conducting his business and home, and was in the same sense as all lawful wives are dependent upon him for subsistence, care, and protection. After marrying Ella J. an old certificate of membership in defendant order, which had designated his infant child as beneficiary, was in accordance with the laws of the order duly surrendered, and a new one was issued to him, payable to "Ella J. Palmer (wife)." This certificate is the one now sued on by the English widow.

There can be no doubt that the defendant and Palmer, the parties to the contract evidenced by the certificate of membership, intended that Ella J., the reputed wife, should be the beneficiary of the fund provided for by the certificate. But plaintiff's attorney calls attention to a provision in the general laws of defendant order in effect as follows: That if at the death of a member any designation of a beneficiary in the certificate shall fail for illegality, the benefit shall be payable, first, to the lawful widow, if there be such, who shall take the entire benefit. The contention is that the designation of Ella J. Palmer failed for illegality, because she was not in law the lawful wife or widow of a member, and therefore that the right of the plaintiff, who is the lawful widow, springs into existence. This contention raises a question touching the power of the defendant corporation to issue the certificate as made. An examination of the laws of Massachusetts, under which the defendant is incorporated, and the constitution and laws of the de-

defendant corporation, adopted for its government, discloses that the defendant is given express power, not only to make provision for widows, orphans, and other relatives of deceased members, but also to make provision for "any persons dependent upon deceased members." These laws provide that, when a benefit is payable to a member's wife, child, parents, brothers, or sisters, an indisputable presumption of dependency shall prevail; but when made payable to an affianced wife, or to any person who is dependent upon the member for maintenance, written proof of the relation of dependency shall be furnished. These and other like provisions of the laws controlling the defendant satisfactorily show that the defendant has the power to insure the life of its member for the benefit of any person who occupies a relation of dependency to the member. In order, therefore, for the plaintiff to successfully maintain her contention that the designation of Ella J. Palmer as beneficiary failed for illegality, she must make it appear that Ella J. was not dependent upon the deceased member for maintenance. This the facts, in my opinion, do not establish. On the contrary, it is, as already stated, abundantly shown that Ella J. was at all times dependent upon him for maintenance and support.

I am unable to adopt the views of plaintiff's attorneys that the question of dependency must be determined solely by the legality of the marital relation. The argument is that, because Ella J. was mentioned in the certificate as wife, her rights to the benefit must be that of wife, and not that of a person dependent upon the member for support. This, in my opinion, is not the true construction of the contract. The defendant agreed to pay the benefit to Ella J. Palmer, and parenthetically the word "wife" follows her name in the certificate. The contract is to pay the benefit to Ella J. Palmer, and for a more accurate designation, or, rather, as descriptio personæ, the word "wife" is added. This, in my opinion, means nothing more than that the person named, Ella J. Palmer, is that particular person who is now occupying the relation of wife to the member. If, therefore, the individual named and thus identified by name, and otherwise identified by reference to her de facto relation, is capable of taking the fund, she ought to be allowed to do so, even though she is in the legal technical sense inaccurately referred to as "wife." Being in fact a dependent upon the member, she falls within the category of insurable persons, within the true meaning of the laws governing the defendant corporation, and within the true intent and meaning of the contract as made between the parties. This conclusion executes the obvious intent and purpose of the contracting parties, and in my opinion works substantial justice. The conclusion reached is abundantly supported by the following authorities: *Story v. Williamsburgh Masonic Mutual Benefit Association*, 95 N. Y. 474; *Supreme Tent of Knights of Maccabees v. McAllister* (Mich.) 92 N. W. 770; *Senge v. Senge*, 106 Ill. App. 140; *Supreme Lodge Ancient Order of United Workmen v. Hutchinson*, 6 Ind. App. 399, 33 N. E. 1124.

A judgment will be entered in favor of the defendant.

OLSON v. BUFFALO HUMP MIN. CO.

(Circuit Court, D. Washington, E. D. May 28, 1904.)

No. 1,032.

1. TRANSITORY ACTIONS—JURISDICTION.

An action for personal injuries to a servant is transitory, and may be prosecuted in any jurisdiction in which judicial process may be lawfully served on the defendant.

2. CORPORATIONS—DOMICILE.

A corporation organized under the laws of a particular state has its legal home and domicile within such state.

3. SAME—FOREIGN CORPORATIONS—ACTIONS—SERVICE OF PROCESS—AGENTS.

Pierce's Code Wash. § 7216, prescribing the conditions under which a foreign corporation may do business within the state, requires it to have a resident agent authorized to accept service of process in any action or suit pertaining to the property, business, or transactions of such corporation within the state of Washington in which such corporation may be a party. The statute also requires the corporation to keep continually some resident agent empowered as aforesaid, and declares that service of process on him shall constitute service on the corporation. *Held*, that such statute only authorizes service on the agent of a foreign corporation in actions arising within the state, and does not justify such service in a transitory action by a servant for personal injuries occurring in another state.

At Law.

Action at law, commenced in the superior court of the state of Washington for Spokane county by a citizen of the state of Idaho against a New York corporation to recover damages for a personal injury suffered by the plaintiff while at work in a mine operated by the defendant in the state of Idaho. Heard on motion to quash the service of summons, on the ground that the defendant is not amenable to judicial process in the state of Washington at the suit of a nonresident. Motion granted.

Robertson, Miller & Rosenhaupt, for plaintiff.

W. J. Thayer, for defendant.

HANFORD, District Judge. The defendant, having removed this cause from the state court in which it was commenced to this court, now insists upon its motion filed in the state court to quash the service of summons. The case presents squarely the question whether a foreign corporation can be brought into court in this state by service upon a statutory agent of compulsory process, at the suit of a nonresident, to defend its rights in a transitory action based entirely upon transactions in another state.

An action of the class to which this case belongs may be prosecuted in any jurisdiction in which judicial process can be lawfully served upon the defendant. It is settled law that a corporation created by and organized under the laws of a particular state has its legal home and domicile within the state whose laws give it legal existence. *Shaw v. Quincy Mining Company*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768. It can act elsewhere only through an authorized repre-

¶ 3. Service of process on foreign corporations, see note to *Eldred v. American Palace Car Co.*, 45 C. C. A. 3.

sentative, and the only way in which a court in any state can acquire jurisdiction to enforce a personal liability of a foreign corporation is by service of its jurisdictional process upon an authorized agent or representative of such foreign corporation. By the foregoing observations the inquiry necessary in the consideration of the motion in this case is narrowed to the simple question whether the person upon whom the summons was served was at the time of the service an authorized representative of the defendant. It appears that he was a statutory agent of the defendant, and had only the limited authority which the laws of this state require foreign corporations to confer upon an agent residing within the state as a condition prerequisite to the right of such corporation to transact business within this state. -By that fact this case must be distinguished from *Smith v. Empire State-Idaho Mining & Development Company*, 127 Fed. 462, in which this court sustained the validity of service upon the secretary of a foreign corporation having its principal office within this state, the service having been made upon the secretary pursuant to an express statutory provision authorizing service of a summons in a civil action to be made upon such officer. In the case now under consideration, as Mr. Goodspeed, upon whom the summons was served, was not one of the principal officers of the corporation, and had no other authority than that of statutory agent, it becomes necessary to look to the statute in order to ascertain the scope and limitations of his authority as an agent and representative of the defendant. The statute which prescribes the conditions under which a foreign corporation may do business in this state requires it to have a resident agent authorized "to accept service of process in any action or suit pertaining to the property, business or transactions of such corporation within this state in which such corporation may be a party." *Pierce's Code Wash.* § 7216; 1 *Balinger's Ann. Codes & St. Wash.* § 4293; 1 *Hill's Code*, § 1526. The laws of this state do not assume arbitrarily to compel all foreign corporations doing business within the state to submit for adjudication in its courts any and all controversies which may be litigated, nor exact that the resident agent shall be clothed with general authority to bind such corporation by acceptance of service of process in any and all actions and suits in which such corporation may be a party. The requirements of the law were fulfilled by the appointment of an agent residing within this state, with authority to receive process against the defendant in any action or suit pertaining to its property, business, or transactions within this state. The law is plain and unambiguous in this respect, and judicial construction of the law for the purpose of enlarging the authority of an agent is not warranted.

The section of the statute above cited contains another clause, which reads as follows:

"And such corporation shall have and keep continually some resident agent, empowered as aforesaid during all the time such corporation shall conduct or carry on any business within this state, and service of any process, pleading, notice or other paper, shall be taken and held as due service on such corporation."

In behalf of the plaintiff it is contended that a proper construction of this statute requires foreign corporations to have an agent upon

whom process may be served, in addition to an agent authorized to accept service. The words "empowered as aforesaid" refer back to the clause containing the specification of powers required to be conferred, and do not indicate any purpose to require additional or more extended powers. The manifest purpose of the clause last quoted was to bind a foreign corporation by service of writs, pleadings, and notices in litigated cases upon a statutory agent, and to avoid any question as to his discretionary power to refuse acceptance of service. The apparent obscurity of its meaning can be easily removed by connecting the two clauses together, and slightly changing the phraseology of the latter clause so that the reading will be as follows:

"Such corporations shall also constitute and appoint an agent who shall reside at the place in the state where the principal business of the corporation is to be carried on, to be designated as hereinafter required. Such appointment shall be in writing, signed by the president or chief officer of such corporation, and shall be attested by its corporate seal, * * * and shall authorize such agent to accept service of process in any action or suit pertaining to the property, business, or transactions of such corporation within this state in which such corporation shall be a party. * * * And such corporation shall have and keep continually [a] resident agent, empowered as aforesaid during all the time such corporation shall conduct or carry on any business within this state, and service [upon him] of any process, pleading, notice or other paper, shall be taken and held as due service on such corporation [notwithstanding his refusal on any ground to accept service voluntarily]. * * *"

In this reading substituted and additional words are inclosed in brackets. According to what I deem to be the only true construction of the statute, foreign corporations are not obliged to confer authority upon their agents within this state to represent them in litigation which does not pertain to either property situated within this state, or business conducted or carried on in this state, or transactions within this state; and that an agent of a foreign corporation having only the authority which the statute requires foreign corporations to confer is not a representative through whom a foreign corporation can be coerced to submit for adjudication any other controversy, and that the cause of action alleged in the plaintiff's complaint in this case cannot be litigated within this state so long as the defendant declines to waive its legal objections to the jurisdiction of the courts.

For this reason the motion to quash the service must be granted.

THE TRANSFER NO. 11.

(District Court, E. D. New York. January 4, 1904.)

1. COLLISION—STATIONARY TUG AND DRIFTING SCHOONER—FAILURE OF TUG TO MOVE.

A transfer tug, with a car float on each side, which was lying with her engines still off Ward's Island, to permit a schooner coming through Hell Gate to pass, *held* in fault for a collision between such schooner and one of the floats, where, although she was rightfully on that side of the channel, and stopped in due time, the schooner was becalmed and helpless, owing to the dying out of the wind, and drifted for a considerable time before striking the float, giving the tug, which saw her condition, time to have moved out of her way.

In Admiralty. Suit for collision.

Alexander & Ash, for libelants.

Henry W. Taft and Mr. Greenough, for claimants.

THOMAS, District Judge. At 6 p. m. on June 3d the schooner Mary Buckley, loaded, was passing through Hell Gate, and came in collision with Transfer No. 11, with car floats on each side, at a place about 125 feet off a point between Negro Point and the dock on Ward's Island, where the float was lying, with her engines still, to allow the schooner to pass. When the schooner reached Hogs Back the wind died out, and with a heading towards Hogs Back, and at a distance of about 125 feet therefrom, she began to drift and did drift through the Gate, and could not be controlled. The captain of the schooner states that the Transfer came along the southerly side of the channel, and thence went on a diagonal course across the river to the place where the accident happened. The master of the schooner contends that the Transfer could have gotten out of the schooner's way either by backing or going further to starboard, or that it could have kept to the southerly side of the channel, and thereby passed under the schooner's stern. The tide was strong flood, running four or five knots an hour, and the Transfer kept on the northerly side of the river all the way from Sunk-en Meadows, to avail herself of the slack water which exists between the wharf easterly of Negro Point and such Point, and to avoid the strong flood tide, whose course is across the channel southerly shortly after leaving Negro Point.

The witnesses for the Transfer state that on such a tide it would be impossible or impracticable for the Transfer, by taking the southerly side of the channel, to take her tow through the Gate, or to the point above Pott's Cove, where the helper was waiting to assist. It is concluded that the Transfer in approaching Negro Point had for some time been on the northerly side of the channel, and that, with due reference to safe navigation, she had a right to pursue that course. Therefore it is concluded that in the first instance the Transfer was where she had a right to be.

The next and final question is whether she did what requisite prudence required when she saw the helpless condition of the schooner. The master of the Transfer saw that the schooner was becalmed at a distance determined to be some 125 feet off Hogs Back, and that she would be carried past the place of the accident at about the same distance from the shore, with a tendency, however, on the part of the tide to carry her southerly, and out of the way of the floats. Did due care require that the master of the Transfer should measure her distance from Hogs Back, her probable distance from Ward's Island when she came up to him, and did such care require him to go back earlier than he did? Although it has been found that the Transfer had the right to keep up next to Ward's Island, yet her pilot saw the schooner coming, and had plenty of time to go back with the tide, and get out of the schooner's way, for he must have seen that, if he stayed where he was, she would not clear him. If he could not reasonably make that calculation when the schooner was off Ward's Island, yet the schooner did

not suddenly come upon him, but for some time helplessly drifted towards him. Although he had done well in the beginning, he could then have gone back towards the dock until the schooner shortly reached a point where the drift of the tide, leaving the receding shore of Ward's Island, would take her out of the way towards the southerly side of the channel. But he answers this by saying that the schooner was not drifting upon his float, but that he was so far to starboard that she would have cleared if a sudden gust of wind had not sent her towards Ward's Island when she was opposite the float. It is concluded that he was mistaken in this; at least he is not supported in it by the preponderance of evidence. In any case, he should have taken pains to guard against such movement of an ungovernable ship. The fact is that he calculated upon too small a margin for the schooner passing, and did not early enough awaken to the fact that she was coming too close to him, or would come upon him before he went back, as he might easily have done upon the flood tide. Had he gone back, the schooner must certainly have been carried to the southward, and have cleared him. Upon this ground alone the libelants should have a decree.

MEMORANDUM DECISIONS.

BRIDGEWATER ROLLER MILLS CO. v. RECEIVERS OF BALTIMORE BUILDING & LOAN ASS'N. (Circuit Court of Appeals, Fourth Circuit. May 16, 1904.) No. 535. Appeal from the Circuit Court of the United States for the Western District of Virginia. Winfield Liggett and Roller & Martz, for appellant. T. N. Haas, for appellees. Appeal dismissed, under rule 20 (90 Fed. clxii, 31 C. C. A. clxii), on stipulation of attorneys. See 124 Fed. 718.

CHAMPAGNE LUMBER CO. v. NYBACK. (Circuit Court of Appeals, Seventh Circuit. January 30, 1904.) No. 1,025. In Error to the Circuit Court of the United States for the Western District of Wisconsin. Edward Smart, for plaintiff in error. D. B. Nash, J. J. Petek, and Adolph Moses, for defendant in error. No opinion. Judgment (130 Fed. 784) affirmed.

CITY OF NEW YORK v. SHORTLAND BROS. CO. (Circuit Court of Appeals, Second Circuit. March 4, 1904.) No. 171. Appeal from the District Court of the United States for the Southern District of New York. E. Crosby Kindleberger, for appellant. James Forrester, for appellees. Before WAL-LACE, LACOMBE, and TOWNSEND, Circuit Judges. No opinion. Decree (129 Fed. 973) affirmed, with costs.

GALE v. SOUTHERN BUILDING & LOAN ASS'N. (Circuit Court of Appeals, Fourth Circuit. May 2, 1904.) No. 477. Appeal from the Circuit Court

of the United States for the Western District of Virginia. Scott & Staples and Cocke & Glasgow, for appellant. John H. Wright, for appellee. Dismissed, on stipulation of attorneys, under rule 20 (90 Fed. clxii, 31 C. C. A. clxii). See 117 Fed. 732.

HANKS DENTAL ASS'N v. INTERNATIONAL TOOTH CROWN CO. (Circuit Court of Appeals, Second Circuit. June 1, 1904.) No. 83. In Error to the Circuit Court of the United States for the Southern District of New York. For opinion below, see 111 Fed. 916. Philip B. Adams and Charles K. Offield, for plaintiff in error. Walter D. Edmonds, for defendant in error. Before WALLACE and COXE, Circuit Judges.

PER CURIAM. On the 16th of May, 1904, the Supreme Court of the United States rendered a decision in which the following question, certified by us, was answered in the negative: "Was the order of the Circuit Court directing the president of the Hanks Dental Association, the defendant in that court, to appear before a master or commissioner appointed pursuant to the provisions of section 870 et seq. of the Code of Civil Procedure of the State of New York valid and authorized under the act of March 9, 1892?" As the only evidence tending to establish infringement was found in the deposition thus taken without authority of law, it follows that the judgment must be reversed, with costs, and a new trial directed.

SHORTLAND BROS. CO. v. CITY OF NEW YORK. (Circuit Court of Appeals, Second Circuit. March 9, 1904.) No. 170. Appeal from the District Court of the United States for the Southern District of New York. E. Crosby Kindleberger, for appellant. James Forrester, for appellees. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges. No opinion. Decree (129 Fed. 973) affirmed, with interest and costs.

LEERBURGER v. UNITED STATES. (Circuit Court, S. D. New York. June 1, 1904.) No. 3,344. Appeal from a Decision of the Board of United States General Appraisers. William B. Coughtry, for importer. Henry A. Wise, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The merchandise in question consists of certain piece dyed silk and cotton goods, which were returned for duty as manufactures of cotton and silk, cotton chief value, and assessment made at the rate of 8 cents per square yard and 30 per cent. ad valorem, under the provisions of paragraph 311 of the act of 1897. Act July 24, 1897, c. 11, § 1, Schedule I, 30 Stat. 178 [U. S. Comp. St. 1901, p. 1659]. The importer protested, claiming the same to be dutiable at the rate of 50 per cent. ad valorem, as a manufacture of silk not specially provided for, under the provisions of paragraph 391 of said act. Schedule L, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]. The board of appraisers overruled the protest. Upon appeal to this court the importer has introduced three expert witnesses, who testify that silk is the chief value of the merchandise in question. The government has introduced no evidence to contradict this testimony. The decision of the Board of General Appraisers is reversed.

STANTON v. COFFIN. (Circuit Court, S. D. New York. July 12, 1904.) On Motion to Confirm Master's Report. Thos. P. Wickes and Jno. C. Day, for receiver. Stern & Rushmore, for Manhattan Co.

LACOMBE, Circuit Judge. The only exception filed is by the Manhattan Company to so much of the report as finds that such company has not a special lien on the proceeds of litigation between the receiver and the Municipal

Investment Company. There is no dispute as to the facts, and, indeed, it seems unnecessary to add anything to the brief discussion of the law which is found in the master's report. It is manifest that the claim against the Municipal Investment Company was "a mere personal right of action against third persons for a tort, having no relation whatever to the debt itself." The exceptants concede that there is no authority directly in point, and in the absence of any controlling authority the court should not, because the case is a hard one, push the doctrine contended for beyond its legitimate bounds. The exceptions are overruled, and the report confirmed.

In re KAHN. (District Court, E. D. Pennsylvania. August 1, 1904.) No. 1,375. In Bankruptcy. Dismissing exceptions to referee's report against discharge of bankrupt. Robert J. Byron, for bankrupt. George W. Carr, for objecting creditor.

HOLLAND, District Judge. Jacob Kahn filed his petition for discharge on July 31, 1902, and a rule was granted, returnable August 21, 1902, on all parties objecting to show cause, if any they had, why the prayer of the petitioner should not be granted. Certain creditors entered their appearance in due time, and on August 30th filed specifications of objection to the discharge of the bankrupt, the sufficiency of which were questioned by the bankrupt, referred to a referee, and subsequently, on March 10, 1903, amended by special leave of court, to which the bankrupt again filed objections. Upon a hearing the District Judge on March 10th dismissed the eighth and ninth specifications, and referred the other seven specifications, as amended, to the referee to ascertain and report the facts, together with the testimony and his findings thereon. Whereupon a great mass of testimony was taken, and a report to this court by the referee was made on March 22, 1904, recommending that the third, sixth, seventh, and second part of the second specifications be dismissed, and that the first, fourth, fifth, and first part of the second specifications be sustained, and that the bankrupt's discharge be refused. Exceptions to the report of the referee were duly filed, considered, and dismissed by him on March 28, 1904. The report of the referee, together with the exceptions, is now before the court, and after a full hearing and consideration of the referee's findings of fact and conclusions of law the court is convinced that he is right, and his report is approved, for the reasons therein given. Exceptions dismissed, and report of referee confirmed.

END OF CASES IN VOL. 130.